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# STANDARD ENCYCLOPÆDIA *of* PROCEDURE

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# INTRODUCTION

Including a General Outline of the Forms of Remedial Justice

By JAMES DeWITT ANDREWS

of the New York Bar

Author of a "*Commentary on the Jurisprudence, Constitution and Laws of the United States*;" Editor of "*Illinois Supreme Court Rules of Practice*;" "*Andrews' Stephen's Pleading*," etc.

**Sec. 1. The function of a comprehensive encyclopædia of procedure** is to express in detail every step which may or must be taken in the course of the administration of remedial justice. This requires something more than a statement of specific rules. It involves the exposition of the whole system of general and fundamental principles upon which the specific rules and details of practice depend, and the application of which to specific controversies or transactions is illustrated by cases.

**The Distinction Between Principles and Rules and the Difference Between Fundamental Rules and Specific Rules.** — The difference between fundamental principles and general rules, may be thus stated:

*Principles* are existing standards of moral or social policy which exist irrespective of any expression.<sup>1</sup> *Rules*, on the other hand, partake of the nature of prescribed laws expressed by public promulgation or by such habitual usage as constitutes evidence of the general

1. Every law is presumed to have been enacted with reference to certain immutable principles of justice which lie at the foundation of every system of jurisprudence. *Levering v. Levering*, 64 Md. 399, 2 Atl. 1. See also *Amos*, *Science of Law*, p. 72.

The centuries of experience in social affairs have given rise to definite expression by jurists of the main body of general principles in all departments of society. In *Millett v. People*, 117 Ill. 294, 7 N. E. 631, 57 Am. Rep. 869, the supreme court of Illinois refers to an example where Judge Cooley quotes Locke as follows: "Mr. Locke has said of those who make the laws: 'They are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor,—for the favorite at court and the countryman at plough.'"

And this may justly be said to have become a maxim in the law by which may be tested the authority and binding force of legislative enactments." In *Wally's Heirs v. Kennedy*, 2 Yerg. (Tenn.) 554, 24 Am. Dec. 511, the court said: "The rights of every individual must stand or fall by the same rule or law, that governs every other member of the body politic, or land, under similar circumstances; and every partial, or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies, would be governed by one law, the mass of the community, and those who made the law, by another; whereas a like general law affecting the whole community equally could not have been passed."

sanction of the community. *Principles* partake of the nature of logical or moral policies, and are inherent, requiring only recognition and acceptance. *Rules* are conventional; they exist by agreement expressed by habitual usage or by public legislation.

Minute detail is important, but it is not the only important thing. There can be no adequate comprehension of even the smallest detail without a fairly accurate comprehension of the whole of which that detail is a part.

The courts are constantly admonishing lawyers that their cases must illustrate the application of principles.<sup>2</sup> It is common to encounter in a judicial opinion the statement that "Counsel rely confidently upon the decision of this court rendered at the last term, wherein it is said," etc., followed by an explanation of the distinction in principle between the case at bar and the case relied upon.<sup>3</sup> A thorough comprehension of what is meant by a case in point, would obviate long discourses seeking to explain to counsel how the case at bar differs in elemental principles from the cases cited in the defeated party's brief. At least one-half of the labor of the bench, and more than one-half of the volume of reported opinions, is taken up in efforts by the courts to explain

2. "A case was brought before that court (Exchequer), upon which it was proposed to overrule, not the *dicta*, the impressions, the fancies of the learned frequenters of Westminster Hall, but decided cases, running through a period of near 50 years, appearing in numerous reports, and laid down by all the text-writers. I believe Mr. Justice Bayley, on a particular examination of those cases, thought them clearly founded in error; they were traced to a *dictum* uttered by Lord Mansfield in his first judicial year, which *dictum* was held by Mr. Justice Bayley to be untenable; and my noble and learned friend pronounced the unanimous judgment of his Court, denying the authority of these cases, and overruling them all. I speak of the case of *Hutton v. Balme*, (2 Younge and J. 101; 2 Cr. and J. 19; 2 Tyrr. 17; and on Error, 1 Cr. and Mee. 262; 2 Tyrr. 620; 3 Moo. and S. 1; 9 Bing. 471). . . . And I am tempted to take this opportunity of observing, that a large portion of that legal opinion which has passed current for law, falls within the description of 'law taken for granted.' If a statistical table of legal propositions should be drawn out, and the first column headed 'Law by Statute,' and the second 'Law by Decision,' a third column, under the heading of 'Law taken for granted,'

would comprise as much matter as both the others combined. But when, in pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and restatement of a doctrine,—the mere repetition of the *cantilena* of lawyers, cannot make it law, unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle." Lord Denman in *O'Connell v. Queen*, 11 Cl. & Fin. 155, 369, 8 Eng. Reprint 1061.

3. "We think this case is distinguishable from the case of *Birge v. City of Centralia*, 218 Ill. 503, upon which appellant places reliance. In this case, as in that, no words appear on the particular piece of ground as it is shown on the plat, indicating that it was intended as a street. Still here there is, as we have attempted to indicate above, something upon the face of the plat to show that this strip was intended for a street, while in the *Birge case* there was nothing on the plat to indicate that the land there in question was so intended. What has just been said in reference to the case last cited is applicable also to the case of *Poole v. City of Lake Forest*, 238 Ill. 305." *The People v. Chicago & N. W. R. Co.*, 239 Ill. 42, 55, 87 N. E. 946.



the justice of decisions and their conformity to the principles and rules of law<sup>4</sup> recognized in the jurisdiction where the case is pending.<sup>5</sup>

An appreciation of these facts has impelled the publishers of THE STANDARD ENCYCLOPEDIA OF PROCEDURE to pay greater attention to the principles, and to present the body of rules and principles in a homogeneous system wherein any one may discover the integral body of fundamental rules which exist and are given operation in all jurisdictions throughout the United States.

It will be seen that there is a settled body of rules practically uniform throughout the United States, which the minute deviations and the differences in practice do not essentially vary, and that in fact there is greater deviation in names and in modes of expression, that is, *in mere form*, than there is substantial difference in the manner of taking the various necessary steps in the course of the presentation and trial of cases.

**Sec. 2. The Meaning of Remedial Justice.**—Modern jurisprudence and modern civilization are virtually coexistent. Both began when definite and clearly expressed ideas in reference to remedial justice were worked out.<sup>6</sup>

Justice was defined in the Roman law as “the constant and perpetual wish to render to every one his due”—“*justitia est constans*

4. “Certain expressions of learned judges, used *arguendo* . . . are relied upon by counsel as establishing a principle that controls this case. Principles are not established by what was said, but by what was decided, and what was said is not evidence of what was decided, unless it relates *directly to the question presented for decision*. ‘General expressions’, as the great Federal jurist once said, ‘are to be taken in connection with the cases in which those expressions are used.’ *Cohens v. Virginia*, 6 Wheat. 264, 5 L. ed. 257.” *People v. Tax Comrs.*, 174 N. Y. 417, 447.

5. *Halberstadt v. New York Life Ins. Co.*, 194 N. Y. 1, 86 N. E. 801, where Judge Hiscock said:

“The case last cited (*Paul v. Fargo*, 84 App. Div. 9, 82 N. Y. Supp. 369), was concerned with an alleged malicious prosecution by means of civil process and what was there said must be interpreted with reference to that fact, and thus interpreted it is not applicable here. Of the other cases, only two, *Heyward v. Cuthbert* and *Cooper v. Armour*, considered the question here involved with sufficient thoroughness to require brief comment. An examination will show that the decision in each

of them rested in whole or part on a principle not, as I believe, adopted in this state. In the former it was said that ‘The foundation of this sort of action is the wrong done to the plaintiff by the direct detention or imprisonment of his person.’ As I think we shall see hereafter, that is not a correct statement of the law in this state. In the other case it was stated, ‘The only injury sustained by the person accused, when he is not taken into custody, and no process has been issued against him, is to his reputation; and for such an injury the action of libel or slander is the appropriate remedy, and would seem to be the only remedy,’ I think that this doctrine, which if correct would provide an adequate remedy outside of an action for malicious prosecution for an injured party in a case where no warrant had been executed, also is opposed to the weight of authority both in this state and elsewhere hereafter to be referred to.”

6. In *Holden v. Hardy*, 169 U. S. 366, 388, 18 Sup. Ct. 383, 42 L. ed. 780, Mr. Justice Brown says: “Due process of law . . . is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given

*et perpetua voluntas jus suum cuique tribuendi.*" Out of this idea grew the maxim of our law *ubi jus ibi remedium*. Freely translated, this means that the right is not perfect unless the means of its protection are also perfect.<sup>8</sup>

The justice which is to be applied in the courts is not abstract justice, but justice according to law, a practical justice, which, while bot-tomed on morality and ethics, is nevertheless defined by rules which can be appreciated and expressed. As was said by the supreme court of Massachusetts in a very recent case: "Courts are constantly dealing with the various relations of the business world. Legal principles are applied to these transactions, but such principles 'have almost always been the fundamental ethical rules of right and wrong.'"<sup>9</sup>

**Sec. 3.** The legal conception of an injury is based upon a consid-eration of what in the eye of the law is a wrong or an infringement of a right, and much of it surrounds the consideration of what is called in the law a tort.<sup>10</sup>

In an early Ohio case, the court says: "It has been well said that the liability to make reparation for injury rests not upon the consid-eration of any reciprocal obligation, but upon an original moral duty

us that fundamental maxim of distrib-utive justice,—*suum cuique tribuere.*"

7. Inst. 1, 1, 1, Sandars Just. 67, § 1.

8. *Ashby v. White*, Lord Raymond 938; 1 Smith's Lead. Cas. (5th ed.) 473; *Taylor v. Horde*, 1 Burr. 60, 2 Smith's Lead. Cas. 324. See also *Ewell v. Daggs*, 108 U. S. 143, 149, 2 Sup. Ct. 408, 27 L. ed. 682.

The great chief justice in *Marbury v. Madison*, 1 Cranch (U. S.) 137, 163, 2 L. ed. 60, said: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." In another case Chief Justice Taney quoted the language used in *Green v. Biddle* and added: "And no one, we presume, would say that there is any substantial difference between a retrospective law declar-ing a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or incumbered it with conditions that rendered it useless or impracticable to pursue it. Blackstone, in his Commentaries on the Laws of England, vol. 55, after having treated of the declaratory and directory parts of the law, defines the remedial in the following words: 'The remedial part of the law is so necessary a conse-quence of the former two, that laws

must be very vague and imperfect without it. For, in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights when wrongfully withheld or invaded. This is what we mean properly when we speak of the protection of the law.'

. . . We have quoted the entire paragraph, because it shows, in a few plain words, and illustrates by a familiar example, the connection of the remedy with the right. It is the part of the municipal law which pro-protects the right, and the obligation by which it enforces and maintains it." *Bronson v. Kinzie*, 1 How. 311, 317, 11 L. ed. 143. Here is very clearly recog-nized the reciprocal relation between the people and the government which was expressed in the ancient com-mon law. "Protection draws with it subjection: subjection draws with it the right of protection." *Calvin's Case*, 7 Co. a, 77 Eng. Reprint 377; *Broom's Max.* (8th Ed.) 78.

9. *Old Dominion Copper Co. v. Bige-low*, 203 Mass. 159, 194, 89 N. E. 193.

10. Campbell in his *Science of Law*, p. 107, says: "The subject of torts does not appear in Blackstone's classi-fication except as a species of private wrongs." He fails to see that the tort only appears in nature as a species of private wrong recognized by an action being given—an action *ex delicto*.

enjoined upon every person so to conduct himself or exercise his own rights as not to injure another."<sup>11</sup> It is upon this principle that the courts are working out the limits of the doctrines which are treated under the names "malicious interference" and "fair trade," and have arrived at the rule that whenever a man in the conduct of his own business does acts or omits to do acts interfering with a right and causing approximate and appreciable damage to another, he must show some reasonable legal justification, or respond in damages.<sup>12</sup>

**Sec. 4. A Fixed and Definite Procedure Essential to Law.**—The culmination of modern civilization, judicially speaking, is expressed in the phrase "due process of law." Through it is worked out the triumph of modern politics which in America is expressed as a *government of law*, wherein absolutism and arbitrariness are excluded, and power made subservient to rule and order.<sup>13</sup>

A definite, orderly procedure is essential to judicial action and is required by the idea of due process of law. It is the province of this science which we call jurisprudence to give simplicity to the multitude of principles, doctrines and rules which must needs exist in a complex society with its thousands of varied intellectual and commercial activities. The practical task is merely to distinguish between things which are essentially different, and to group things which are essentially and elementally alike. If there is to be law there must be order. If there is to be a law of procedure there must be established forms adapted to the various and varied incidents of life which experience shows have given rise, and will continually give rise, to controversies.

It is a principle of our Constitution which pervades the whole body of our jurisprudence, that individual discretion is curbed and checked and made to conform to general principles and fixed rules. Broom expresses the idea as follows: "Be it remembered that there is no court in England which is entrusted with the power of administering justice without restraint. The proceedings in all courts must take a

11. *Kerwhacker v. Cleveland etc., R. Co.*, 3 Ohio St. 172, 62 Am. Dec. 246.

12. Illustration.—*David v. New England R. Pub. Co.*, 203 Mass. 470, 473, 89 N. E. 565. The defendant published a list of express companies available to the public in and about Boston, omitting plaintiff's name from the list; the plaintiff conducted a general express business. Plaintiff did not claim that he had a right to compel the defendant to do anything for him or refrain from doing anything, but sought to enjoin the defendant from publishing what purported to be a full list of all express companies without including his name. The court in rendering decision, says: "While it (the list) does not say in express words that the list is complete, it conveys that

meaning. Its list is false and misleading, to the plaintiff's injury. . . .

The public is misled. . . . But the gist of the plaintiff's action is the wrong done him by intentionally turning away from him those who otherwise would do business with him. He is entitled to a remedy for this wrong."

13. See *Clemons v. Chicago etc. R. Co.*, 137 Wis. 387, 400, 119 N. W. 102, where Mr. Justice Marshall said: "Rules of law cannot be changed by the court and adapted to the exigencies of particular cases however distressing they may be. With indifference to results, except as seriousness thereof may stimulate greater care, established principles must be applied as the infallible test of what is right and what is wrong in the legal aspect."



defined course and be administered according to a certain uniform system of law."<sup>14</sup>

The importance of formality and fixed forms has been somewhat overlooked by those reformers who have been seeking to abolish all forms and to establish a law of procedure without order. The language of Bleckley, some time chief justice of Georgia, a state which, by the way, was the first to codify its law, has peculiar cogency. "Those who are impatient with the forms of law ought to reflect that it is through form that all organization is reached. Matter without form is chaos; power without form is anarchy. The state, were it to disregard forms, would not be a government but a mob. Its action would not be administration, but violence."<sup>15</sup> The same thought was emphasized by Mr. Justice Coleridge, afterwards Lord Coleridge, when he said: "Experience has shown that the liberty of the subject with which we are entrusted is involved in the accuracy in point of form of legal proceedings. For that reason accuracy is required, and in that view of it it is no paradox to say that form becomes substance."<sup>16</sup>

**Sec. 5. The Doctrine Stare Decisis.** — The law of the land grows with the development of institutions and business in all the varied lines of social and business activity. In crude and simple communities little organization is required, and perhaps greater good for the mass may result from greater power in the individual. But in larger communities in order that there may be some equality of treatment, and that all may understand that the same rule will be applied to like conditions, irrespective of the power or position of individuals, settled rules are required. When these limit the power of magistrates and govern their mode of proceeding, there is law.

The doctrine *stare decisis* naturally results from the principle that the rule as applied between two sets of parties by the judicial tribunal will be applied between other parties under like conditions. This doctrine, then, in its defensible form, becomes not only a useful but an absolutely necessary doctrine. Its meaning in plain terms is that, where once the courts have duly considered and declared the rule which shall be applied to a given state of facts, that rule will thereafter be applied under like circumstances in the same jurisdiction.<sup>17</sup> The ap-

14. Broom's Max. (8th Ed.) 84; Master v. Miller, 4 Term 320, 344, 100 Eng. Reprint 1042. See Holden v. Hardy, 169 U. S. 366, 389, 18 Sup. Ct. 383, 42 L. ed. 780; Hovey v. Elliott, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. ed. 215; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. ed. 569.

15. See Railroad Commission v. Palmer Hdw. Co., 124 Ga. 633, 53 S. E. 193, where Mr. Justice Lumpkin, after quoting the above language, says: "Decisions . . . are sometimes spoken of as resting on a technicality,

and there is a disposition on the part of some to treat with great indifference, if not actual disdain, everything which they refer to as 'technical.' But this spirit may be carried to an extreme. . . . Laws must be administered according to law, and justice must be determined with proper system and method."

16. Howard v. Gosset, 10 Ad. & El. 359, 382, 59 E. C. L. 358.

17. See cases *infra*. It is important to observe in practice when briefing that conflict of principle and policy which still exists in this country, *e. g.*:

plication of the doctrine depends upon indistinguishable elemental facts involved in the controversy submitted to the courts, unchanged social or business policies, like principles, and unchanged or like conditions.<sup>18</sup> Where all of these exist the binding force of precedent is recognized, unless it can be shown clearly that the precedent as originally established and as followed violates a settled principle of law, in which case the courts will not hesitate to overrule their decisions.<sup>19</sup>

Precedents change with the progress of society, and policy changes also, although more gradually. It is in law as it is in the growth of inanimate things that nature's live growths drive out the dead matter, or as Lord Coke says: "Laws are born, live and die." It is this principle, spoken of as the flexibility of the common law, which accounts for the change in precedents and gives rise to what we have come to term leading cases and ruling cases. A clear illustration of this principle is found in the development of the doctrine of restraint of trade as shown in the cases cited in the note from its early formula that covenants in restraint of trade must be limited in point of space and time<sup>20</sup> to the settled rule of the present day, that a covenant even if it be unlimited both in time and space is good, provided it does no

Conflict between states. *Halberstadt v. New York Life Ins. Co.*, 194 N. Y. 1, 86 N. E. 801.

Conflict between states and national courts. *People ex rel. C. P. etc. R. Co. v. Wilcox*, 194 N. Y. 383, 386, 87 N. E. 517.

18. U. S.—*United States v. Evans*, 195 U. S. 361, 25 Sup. Ct. 46, 49 L. ed. 236; *Cohens v. Virginia*, 6 Wheat. 264, 5 L. ed. 257. Ill.—*Mayer v. Erhardt*, 88 Ill. 452. N. Y.—*People ex rel. Milling Co. v. Barker*, 147 N. Y. 31, 38, 41 N. E. 435, 29 L. R. A. 393; *Henry v. Salina Bank*, 5 Hill 523.

In *People v. Barker, supra*, Peckham, J., says: "Very possibly language was used in that case in the course of the opinion which might be capable of a construction broader than was called for by the facts appearing in that record. If so, it would be but another illustration of the truth and importance of the principle which makes it necessary to construe the language used in judicial opinions strictly with reference to the facts which exist in the case which is decided. It was stated in that case that the court was of opinion that the act did not contemplate the deduction of debts from the sum invested in this state by non-residents. As then applied, the language was appropriate, although it might well have been more definite and precise."

In *United States v. Evans, supra*, Mr. Justice Brown writes: "I accept this case as practically overruling the former ones, and as recognizing the principle adopted by the English Admiralty Court Jurisdiction Act of 1861 (Sec. 7), extending the jurisdiction of the admiralty court to 'any claim for damages by any ship.' This has been held in many cases to include damage done to a structure affixed to the land. The distinction between damage done to fixed and to floating structures is a somewhat artificial one, and, in my view, founded upon no sound principle; and the fact that Congress, under the Constitution, cannot extend our admiralty jurisdiction, affords an argument for a broad interpretation commensurate with the needs of modern commerce."

19. As in *O'Connell v. Queen*, 11 Cl. & Fin. 155, 369, 8 Eng. Reprint 1061.

20. The course of this evolution is shown in the following cases: U. S.—*United States v. Addyston Pipe Co.* (C. C. A.) 85 Fed. 271, 46 L. R. A. 122; *National Enam. & Stamp Co. v. Haberman*, 120 Fed. 415. Ia.—*Swigert v. Tilden*, 121 Iowa 650, 97 N. W. 82, 100 Am. St. Rep. 374, 63 L. R. A. 608. Mass.—*Anchor Elec. Co. v. Hawkes*, 171 Mass. 101, 50 N. E. 509, 68 Am. St. Rep. 403, 41 L. R. A. 189. Mich.—*Beal v. Chase*, 31 Mich. 490. N. H.—*Bancroft*

violence to the principle upon which the rule rests.<sup>21</sup> This flexibility and capacity for growth and adaptation to changing conditions is the peculiar boast and excellence of the common law, and is the reason urged by publicists against laying down the law of the land in the form of a fixed and unchangeable code.<sup>22</sup>

Precedent and principle are not allowed to go counter to each other. Precedents are applied strictly as determining nothing outside of the specific case and cases having identity of elements, whereas principles dominate all precedents and are applied to a great variety of conditions. Precedents are specific, principles are general.

Cases in point to be of authoritative influence on another court must be in point in principle and also in the elemental facts upon which the decision rests. For this reason the changes in policies, modes of business, and habits of the people not only permit but sometimes require the change of precedents.

**Sec. 6. The Judiciary — Tribunals and Causes.** — Among the improvements in the art or science of government none were regarded by our ancestors as of greater importance than the separation of the powers of government according to the functions which they were to perform. "It is well known," said the supreme court of New Hampshire in an early case, "that in the distinct and separate existence of the judicial power consists one main preservative of the public liberty; that indeed there is no liberty if the power of judging be not separated from the legislative and executive powers."<sup>23</sup>

Having created tribunals the next step is to mark out the boundaries of jurisdiction of each of the various courts. The courts will not entertain matters which are not judicial in their nature, and cannot extend their jurisdiction,<sup>24</sup> nor decide questions which properly belong to other departments.<sup>25</sup> On the other hand powers strictly judicial cannot be exercised by any other department of the government.<sup>26</sup>

**Sec. 7. Subjects of judicial cognizance** must then be distinguished from those other subjects of governmental power which rightfully belong to the legislative and the executive departments. The general words in the constitutional grant of power to the judiciary are that

*v. Union Embossing Co.*, 72 N. H. 402, 57 Atl. 97, 64 L. R. A. 298. **N. Y.** — *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464. **Eng.** — *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Reprint 347; *Horne v. Graves* (1835), 7 Bing. 735, 20 E. C. L. 310.

21. *Marshall Engine Co. v. New Marshall Engine Co.*, 203 Mass. 410, 89 N. E. 548.

22. See *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. ed. 780.

23. *Merrill v. Sherburne*, 1 N. H. 199, 8 Am. Dec. 52, 57.

24. *Interstate Commerce Com. v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. ed. 1047; *Hayburn's Case*, 2 Dall. (U. S.) 409, 1 L. ed. 436.

25. *Luther v. Borden*, 7 How. (U. S.) 1, 12 L. ed. 581.

26. *Merrill v. Sherburne*, 1 N. H. 199, 8 Am. Dec. 52, 57; *Interstate Commerce Com. v. Brimson*, *supra*.

The difficulty of establishing infallible criteria or fixed and definite lines of demarcation between these powers is frequently illustrated. See *People ex rel. C. P. etc. R. Co. v. Willecox*, 194 N. Y. 383, 386, 87 N. E. 517.



"the judicial power shall extend to all *cases* in law and equity, and to *controversies*," etc.<sup>27</sup>

Judge Story described a case as a suit in law or equity instituted according to the regular course of judicial proceedings.<sup>28</sup> The term "proceedings" embraces matters not having the appearance of adversary actions where parties are ranged on either side, as for instance, condemnation and administration proceedings, which although not formally arranged by formal pleadings are, nevertheless, in substance controversies between parties. When the court is asked to compel the performance of duties or obligations a cause *for action by the court arises*, and it is not always necessary that the matter presented be described in the shape of established forms of action.<sup>29</sup>

**Sec. 8. Forms of Action.**—In order to give some sort of order and regulation to judicial business it became necessary to invent and prescribe orderly rules for the conduct of judicial business.<sup>30</sup> Forms of action are simply the formulæ governing the statement of causes

27. Mr. Justice Harlan commenting on this clause says: "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case." *Interstate Commerce Com. v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. ed. 1047.

Mr. Justice Field says that the term "cases" and "controversies" embrace the claims or contentions of litigants brought before the court for litigation by regular *proceedings* established for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs. *Smith v. Adams*, 130 U. S. 167, 9 Sup. Ct. 566, 32 L. ed. 895.

28. See Story on the Const., § 1646.

29. The case of *Fong Yue Ting v. United States*, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. ed. 905, was a proceeding under an act of Congress authorizing the arrest of an alien by any customs official, collector of revenue, or United States marshal, and the taking him before a United States judge to determine his right to remain, or the power of deportation. The court said: "When, in the form prescribed by law, the executive officer, acting in behalf of the United States, brings the Chinese

laborer before the judge, in order that he may be heard, and the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power; for here are all the elements of a civil case—a complainant, a defendant and a judge—*actor, reus et judex*, 3 Bl. Com. 25. *Osborn v. Bank of United States*, 9 Wheat. 738, 819. No formal complaint or pleadings are required, and the want of them does not affect the authority of the judge, or the validity of the statute." *Interstate Commerce Com. v. Brimson*, 154 U. S. 447, 488, 14 Sup. Ct. 1125, 38 L. ed. 1047.

30. The first business of the United States supreme court on assembling at the February term, 1790, was to prescribe rules. The first rule designated the seal of the court; the second fixed the qualification of attorneys; the third prescribed the oath; the fourth, that "unless and until it shall be otherwise provided by law all process of this court shall be in the name of the President of the United States." At the August term, 1792, the attorney-general having moved for information relative to the system of practice, the chief justice stated that the court considers the practice of the courts of King's Bench and Chancery in England as affording outlines for the practice of this court, and that they will from time to time make such alterations as circumstances render necessary. *Hayburn's Case*, 2 Dall (U. S.) 409, 1 L. ed. 436.

of action, and these forms differ from each other in certain typical elements capable of being grouped and classified according to their different natures. For example, the simple act of intruding upon the land of another differs so widely from the act of speaking evilly of one's neighbor that no one, however obtuse, could fail to see the difference. So throughout all that system of procedure built up by our English ancestors the distinction between the character of actions was marked out under the designation "forms of action," and for each species some particular formula of statement was worked out. Such a statement originally was called a writ, and the writ was followed by a declaration. This whole matter was summed up by Stephen when he said: "These writs differ from each other in their tenor according to the nature of the plaintiff's complaint, and are conceived in fixed and certain forms."<sup>31</sup>

**The Effect of the Codes.** — *Sampson v. Schaeffer* (3 Cal. 196), arose soon after the adoption of the California Code of Civil Procedure, which was almost a literal transcript of the New York Civil Code. In that case Stephen J. Field, later a justice of the supreme court of the United States, a brother of David Dudley Field, the author of the New York code, said in his argument: "It is absurd to say, because the Practice Act abolishes the distinctions in the forms of actions, that it is therefore immaterial what the substantial allegations are. As much legal precision is necessary under our system, in setting forth the cause of action, as under any other. A contract sued upon must be sued as a contract, a trespass as a trespass."<sup>32</sup> The modern practical lawyer whose activities are exercised under any of the systems of procedure will recognize at once that the whole category of actions

31. *Andrews' Stephen's Pleading*, 108.

32. The action was one for rent and occupation, but the facts showed a tortious and adverse holding. The court adverted to the rule that use and occupation will not lie when the possession has been adverse and tortious, for such excludes the idea of a contract, the basis of a claim for use and occupation. "But it is said 'that the statutes of California have abolished the distinctions existing at common law,' and that technicalities and mere forms are to be disregarded by our Courts; 'that substantial rights are regarded, and not the shadows of a case.' It is indeed true that distinctions in mere forms of pleading are abolished, but the common error is to mistake substance for form. It is because substantial rights are regarded that this Court will suffer none to recover upon a mere 'shadow of a case,' nor permit a plaintiff on one

day to attempt to oust a defendant upon the ground that he is a trespasser, and on the next to recover for rent upon an implied contract, on the ground that he is occupying with his permission; 'for that,' to use the language of the Court of King's Bench, in *Birch v. Wright*, 'would be blowing both hot and cold at the same time,' . . . it is a gross error into which many have fallen, to suppose that because the Practice Act abolishes the distinctions in the forms of action, it is immaterial what the substantial allegations of pleadings are, or that all the distinctions which the law makes in the causes of action are swept away. While the mere forms of pleadings are simplified, the body of the law is preserved with all those general principles, those wise distinctions, those strict principles and unerring rules, those sound and logical conclusions, which constitute its justice and justifies its glory as a sci-

which may be pursued in his jurisdiction are nothing more nor less than recognized forms of action, differing in principle not one whit from the forms of action under the common law system, and that the legislative declaration that forms of action are abolished does not in one whit modify the clear distinction between the causes of action which at all times since the establishment of modern procedure have been recognized in English and American law.<sup>33</sup>

**Sec. 9. Legal and Equitable Actions.**—A constitutional provision in most of the states in effect requiring trial by jury according to the course of the common law, renders it imperative that the distinction between legal and equitable remedies and legal and equitable remedial procedure be kept clear and distinct.

The attempt wholly to separate equity from law which gave rise to the separate court of chancery grew out of conditions peculiar to the English law and therefore has been sometimes spoken of as accidental. But that can scarcely be deemed accidental which results from a deliberate struggle on the part of the monarch to retain a prerogative against the clamor of the people that all branches of justice should be administered in regularly established courts. The distinction between what we now call legal and equitable rights and remedies exists in the nature of things and is not affected by the change in the names of courts or the obliteration by legislative declaration of the distinction between forms of action.<sup>34</sup>

ence." *Sampson v. Schaeffer*, 3 Cal. 196. See also *Goulet v. Asseler*, 22 N. Y. 225; *Supervisors v. Seabury*, 11 Abb. N. C. (N. Y.) 377; *Ashe v. Gray*, 88 N. C. 190.

33. The many different forms set out in the books on code pleading are not the same in substance. There is much truth in the remark made by Mr. Justice Grier: "This attempt to abolish all species, and establish a single genus, is found to be beyond the power of legislative omnipotence." *McFaul v. Ramsey*, 20 How. (U. S.) 523. See *Fritz v. Hathaway*, 135 Pa. 274, 280, 19 Atl. 1011. See also *Goulet v. Asseler*, 22 N. Y. 225; *Andrews' American Law*, p. 1195. In *Miller v. Van Tassel*, 24 Cal. 459, Rhodes, J., says: "The forms alone of the several actions have been abolished by the statute; the substantial allegations of the complaint, in a given case, must be the same under our Practice Act as are required at common law."

34. **California Code.**—"The legislature, in providing that 'there shall be but one form of civil action,' cannot be supposed to have intended, at one fell stroke, to abolish all distinc-

tion between law and equity, as to actions. Such a construction would lead to infinite perplexities and endless difficulties. The innovation extends only to the form of action and the pleadings, while the technicalities of pleading have been dispensed with; and the plaintiff need only state his cause of action in ordinary and concise language, whether it be in assumpsit, trespass, or ejectment, without regard to the ancient forms; still the distinction between those actions has not been abolished, but remains the same. So cases legal and equitable have not been consolidated; and though there is no difference between the form of a bill in Chancery, and a common law declaration, under our system, where all relief is sought in the same way from the same tribunal, the distinction between law and equity is as naked and broad as ever. To entitle the plaintiff to the equitable interposition of the Court, he must show a proper case for the interference of a Court of Chancery, and one in which he has no adequate or complete relief at law." *DeWitt v. Hays*, 2 Cal. 463, 56 Am. Dec. 352.



*Equity* was regarded as a part of the law of England from the earliest time.<sup>35</sup> The chancellor was the incumbent of an office which had existed from ancient times and was intimately associated with the judicial establishment provided by the Crown, as well under the Saxon Dynasty as after the Conquest.<sup>36</sup> In very early times the chancellor was a ministerial officer, the duty of issuing and inventing writs not being considered a jurisdiction, but a duty.<sup>37</sup> In the course of time the court of chancery was established with equitable jurisdiction and with settled forms of procedure for the administration of equity, which, like forms of action at law, have become due process of law.<sup>38</sup>

Whenever the fact as well as the right was involved, the ancient idea was that the matter should be determined by a jury of the peers of the parties involved.<sup>39</sup> Where the matter was a question of right or title between the Crown itself and some subject, the proceeding was by petition for redress and was heard by the chancellor, who, in such cases, issued no writ of jurisdiction to the suitor.<sup>40</sup>

The only line of demarcation between law and equity now established is that ordinary causes of action involving legal titles and personal and property rights in relation to which the parties have from time immemorial been allowed a trial by jury, are still termed legal.<sup>41</sup> A cause of action in equity may be based on a legal right, and in fact

35. See *Martin v. Marshall*, Hobart 63, 80 Eng. Reprint 211; Rob. History of the Court of Chancery, Vol. 1, p. 470.

In the case of *The Mines*, Plowden (Eng.) 320, it is said that equity is a part of the jurisdiction of the court of exchequer.

36. Seldon says that the earliest historical evidence of the office is about the year 920. See 1 Woodesen's Lect., 1612; Sullivan's Law Lect., 415; 1 Reeve's Hist., 264; 1 Spence's Eq. Jur., 100.

37. Sullivan's Law Lect., 417.

38. See *San Mateo County v. Southern P. R. Co.*, 13 Fed. 722; *Keith v. Henkleman*, 173 Ill. 137, 50 N. E. 692; *Andrews' American Law*, 1178.

39. Sullivan's Law Lect. 417.

40. *Chisholm v. Georgia*, 2 Dall. (U. S.) 419, 1 L. ed. 440.

41. "All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a money judgment for breach of a simple contract, or as damages for injury to person or property, are legal actions, and can be brought in the Federal courts only on their law side. Demands of this kind do not lose their character as claims cognizable in the courts of the United

States only on their law side, because in some state courts, by virtue of state legislation, equitable relief in aid of the demand at law may be sought in the same action. Such blending of remedies is not permissible in the courts of the United States." *Scott v. Neely*, 140 U. S. 106, 110, 11 Sup. Ct. 712, 35 L. ed. 358.

Where the claim is based upon what is called a legal right it must also be so simple and so single in its nature that it may be tried by a jury, and that the courts of law according to their procedure may administer adequate and complete relief. Equitable actions as they are called are not confined to cases where no remedy at all could have been had under the common law rules, but it is sufficient to warrant the interposition of equity that adequate and complete relief cannot be given. See *Williamson v. Berry*, 8 How. (U. S.) 495, 536, 12 L. ed. 1170.

Peculiar circumstances, such as the multiplicity of claims, may give jurisdiction to equity where the matters involved are all purely legal. *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. ed. 1005; *Osborn v. Bank*, 9 Wheat. (U. S.) 739, 6 L. ed. 204; *Board of Supervisors v. Deyoe*, 77 N. Y. 219. Conversely, if remedies are



must rest of course on a lawful right, and must be so complex or of such a character that none of the legal remedies, nor all of them combined, are sufficient to afford a full and adequate remedy between the parties.<sup>42</sup>

The abolition of the separate court did not and does not abolish the distinction between legal and equitable remedies or affect the jurisdiction. So in some of the states the same courts have both jurisdictions, the cases, however, being enrolled on separate dockets, one the law docket, the other the chancery.

The ancient view that equity was a mere residuum of grace where-with to mitigate the rigors of the common law no longer reflects the nature of equity. At the present time the jurisdiction and procedure in equity is a thoroughly settled, orderly, judicial procedure with its well established forms of action, quite as technical in all its details as is the practice on the other side of the docket.<sup>43</sup>

provided equity will not act until these have been attempted. *San Joaquin etc. Co. v. Stanislaus County*, 155 Cal. 21, 99 Pac. 365, citing *Tennessee v. Condon*, 189 U. S. 64, 23 Sup. Ct. 579, 47 L. ed. 709.

But the giving of a new code remedy does not abrogate the ancient equity jurisdiction. *Munro v. Callahan*, 55 Neb. 75, 70 Am. St. Rep. 366, 75 N. W. 151; *Meyer v. Smith*, 59 Neb. 30, 80 N. W. 273.

42. *Watson v. Sutherland*, 5 Wall. (U. S.) 71, 18 L. ed. 580; *Connecticut Mut. L. Ins. Co. v. Bear*, 26 Fed. 582.

**Illustration:** *Lightfoot v. Davis*, 198 N. Y. 261, 91 N. E. 582. In 1875 Bowen stole from Lightfoot several school bonds, face value \$4,000. He collected the sums as the bonds matured. L. could not trace them. After B's death, 24 years later, a memorandum disclosed the fact of the theft and collection. L. brought suit against administrator, praying that the defendant account for the proceeds, if traceable, if not, for a money judgment. Defendant interposed pleas of the statutes of limitation on the theory that the conversion took place and an action could have been brought more than ten years prior. It was held that the case was one of equity—general head fraud, species of trust, and the fund not being traceable relief by way of a money judgment was awarded.

43. See *Burgess v. Wheate*, 1 Wm. Black. (Eng.) 123; *Bond v. Hopkins*, 1 Schm. & Lef. (Eng.) 413, 428; *Manning v. Manning*, 1 Johns. Ch. (N. Y.)

527, 530. See Andrews' *American Law*, 1533, 1535, 1536 and notes.

**Illustration:**—*Beall v. Fox*, 4 Ga. 404, was a bill in equity by the executors of Fox against his heirs at law asking the direction of the court as to their duty as executors in administering charities provided for in the will. The heirs at law denied the jurisdiction of the court, claiming that it was limited by a statute providing that the superior courts in the several counties shall exercise the powers of a court of equity in all cases where a common law remedy is not adequate to compel parties in any cause to discover on oath all requisite points necessary to the investigation of truth and justice; to discover transactions between co-partners and co-executors; to compel distribution of intestate estates and the payment of legacies; to discover fraudulent transactions for the benefit of creditors, and the proceedings in all such cases shall be by bill. The argument was that the equity jurisdiction was confined to the particular cases enumerated and did not embrace the system of equity jurisprudence as it existed in Great Britain as a part of the common law adopted in Georgia. The court speaking of the common law says: "It cannot be denied but that the Chancery, as it judgeth in Equity, is a part of the law of the land, and of the *ancient Common Law*, for Equity is, and *always has been, a part of the law of the land.*" And after further argument continues: "We have endeavored to show, that the principles of Equity were introduced into the Jurisprudence of Great Britain, at a very early period, not for the pur-

### Sec. 10. An Action and a Suit in Equity—How Distinguished.

The lawyer obliged to select a forum and a form of remedy encounters the practical question of the inherent distinction between law and equity and what elemental facts of his case entitle him to proceed in either forum, or compel him to resort to one. The sanction of the two species of law is under our system the same, although a somewhat different aspect appears to be the source of equitable principles and purely legal rules, that is to say: the source of equity is found more in the domain of what was formerly called natural law, reason and good conscience, whereas law is based upon the customs of the people and the determinate will of the various branches of government operating together.

In a system of law which distinguishes between equitable and legal procedure one would suppose that criteria for distinguishing the two would engage the first attention of jurists, but the most substantial criterion which now exists is the determination of whether under the facts involved the party has the right to have a jury trial. The cases cited by Mr. Justice Sharswood in the Haines Appeal, show that the limit beyond which the jurisdiction of equity cannot be conferred is fixed by the constitutional provisions as to trial by jury.<sup>44</sup>

Legislative codifiers have treated this subject in the simplest manner by declaring that the distinction between legal and equitable actions is abolished. This is the acme of simplicity, but in the practical sense of the word is not simple, for it consists merely in an attempt to ignore essential distinctions. The courts have been obliged to re-establish some criteria, and, in doing so, with practical unanimity have restored the same standard and the same system which existed in all the states

pose of creating any *new law*, but to give a more perfect and practical effect to the *general laws* of that country, and thereby became a necessary part of that judicial system of laws, which we adopted in this country, so far as the same were suited to our circumstances and conditions."

In *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412, Lumpkins, Judge, speaking of a doctrine advanced by Chancellor Desaussure, says: "We decline, however, endorsing the doctrine to this extent, not caring to go beyond the case made by the record, to provoke a controversy with those who 'fear there is a tendency in the judicial mind of the age, to seek first for the equity of the case, as it is termed, and then for the law to support it,' which *complaint*, by the way, I take to be a merited compliment to the purer and more elevated morality which adorns the pages of modern jurisprudence. I am content, however,

to abide by the equity 'of the Hardwicks, the Thurlows and the Eldons of England—of the Marshalls, the Washingtons and the Kents' (and Storrs) 'of the United States—an equity without discretion, fixed as the principles of the Common Law, and like it, worthy of the freemen of whose fortunes it disposes."

44. See Haines' Appeal, 73 Pa. 169.

"The essential difference, which distinguishes the courts of equity from courts of law, seems to be rather in the mode of proceeding than in the subjects of their jurisdiction. These differences in the mode of proceeding consist in compelling a discovery on the oath of the party; (2) in the method of trial by depositions in writing, taken in any part of the world; (3) and in the mode of relief by giving a more specific and extensive remedy than can be had in the courts of law." Cooper's Pleading (Introduction) p. 25.

under the common law and which now exists everywhere, namely: that cases in which trial by jury may be required are legal actions, and cases theretofore tried without a jury are equitable.<sup>45</sup>

The nearest approach to a practical test which ever has existed, or which exists at the present time, is this: Where the nature of the cause of action is such as to render it inherently impracticable to adapt it to any of the established forms of legal action in such a manner as to provide adequate and complete relief, and where the facts involved fall under some of the established heads of equity, the action must be treated as equitable.<sup>46</sup>

The practical distinctions between legal and equitable actions are quite as important at the present day and in the code states as ever they were in England or in any of the common law states, and these subjects will receive adequate treatment under proper heads in the body of this work.<sup>47</sup>

**Sec. 11. Pleading — Are There Several Systems?** Is there a system of code pleading, a system of common law pleading, a system of

45. Mason, J., in *Hill v. McCarthy*, 3 N. Y. Code Rep. 49, says: "While, however, the present code of procedure has abolished all distinction between law and equity, so far as the form of the action and the jurisdiction of this court is concerned, and so far as the mode of commencing suits and the forms of pleadings, etc., are concerned, still there is recognized, so far as the forum before which the trial shall be had, to a certain extent, a distinction still. The two hundred and fifty-third section of the code provides that whenever an *issue of fact* shall be joined in an action for the recovery of money only, or of specified personal or real property, it must be tried by a jury, unless a jury trial be waived as provided in section 266, or a reference be ordered as provided in sections 270, 271; and the two hundred and fifty-fourth section provides that *every other issue of facts* shall be tried by the court unless the court shall order the whole or some specified question of fact therein to be tried by a jury, or shall refer it as provided by sections 270, 271. It will readily be perceived upon a moment's reflection that the effect of sections 253 and 254 is to throw the trial of all questions of fact in the old common-law actions upon the court and a jury; and at the same time to throw the trial of the whole class of equity suits upon the court without a jury, unless for some special reason the court shall order such issue to be tried by a jury." See *Lessee of Livingstone v. Moore*, 7

Pet. 469, 8 L. ed. 751; *Miller v. Edison El. Illum. Co.*, 184 N. Y. 17, 76 N. E. 734, 3 L. R. A. (N. S.) 1060.

46. The views of Mr. Justice Field are entitled to especial weight because of his relationship to the late David Dudley Field, whose code was adopted in the State of Mr. Justice Field's residence (California). In a proceeding under the Organic Act of Montana involving a statute substantially like the California statute, Mr. Justice Field said: "The formal distinctions in the pleadings and modes of procedure are abolished; but the essential distinction between law and equity is not changed. The relief which the law affords must still be administered through the intervention of a jury, unless a jury be waived; the relief which equity affords must still be applied by the court itself." *Basey v. Gallagher*, 20 Wall. (U. S.) 670, 22 L. ed. 452.

47. *Hahl v. Sugo*, 169 N. Y. 109, 62 N. E. 135, 88 Am. St. Rep. 539, 61 L. R. A. 226, furnishes a striking illustration of the result of attempts to obliterate actual differences and to introduce new names. The parties were adjoining lot owners. Defendant built a house encroaching on plaintiff's lot. In 1896 plaintiff brought an action to recover possession. A judgment was rendered establishing plaintiff's right. "That judgment contained a provision directing the defendant to forthwith remove from said premises all obstruc-



equity pleading, a system of criminal law pleading, each of which is based upon principles distinct from the principles which dominate the others?

*The object of all system is the same, viz: to inform the court and the opposite party of what is attempted to be litigated and thereby submit an issue or issues for trial.* It would seem natural, therefore, that the same logical method of thinking would produce similar results in all systems, varied only by the specific object of each particular

tions and erections of every kind placed thereon by her. In all other respects it was the ordinary judgment in an action to recover the possession of real property. That provision of the judgment was stricken out by the court on the defendant's motion, and thereafter the plaintiffs issued to the sheriff of Erie county an execution in the usual form. This execution was subsequently returned by the sheriff with an endorsement thereon stating in substance that the strip of land described therein was occupied by a portion of the stone foundation and brick wall of defendant's house and that it was impracticable for him to remove the same. After such return of the execution and before the commencement of the action at bar, the plaintiffs made a motion at a Special Term for an order directing the defendant to remove that portion of the wall of her house which encroaches upon the plaintiffs' land, which motion was denied.

"Thereupon the plaintiffs brought this action in equity to compel the defendant to remove said encroaching walls from their land. The Supreme Court at Special Term granted the relief prayed for and the judgment entered upon this decision was unanimously affirmed by the Appellate Division.

"The appeal to this court brings up the question whether two separate actions can be maintained upon a single cause of action.

"Section 3339 of the Code of Civil Procedure provides: 'There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished.' Under section 481 of the Code, the requisites of a complaint are simply that it shall contain: (1) 'A plain and concise statement of the facts,

constituting each cause of action, without unnecessary repetition,' and (2) 'a demand of the judgment to which the plaintiff supposes himself entitled.'

"These sections of the Code, and others, which need not be specifically referred to, clearly evince the legislative intent to strip our modern procedure of the cumbrous forms and distinctions which made the practice under the common law and the earlier statutes so burdensome in its details and so uncertain in its results. Upon examining that portion of the Code which deals with actions to recover real property (Ch. 14, tit. 1, art. 1) we find that the old term 'ejectment' has been discarded in the title and it is now entitled 'Actions to recover real property.' This change of name was, obviously, a part of the plan of the codifiers to reduce our practice to a simple and composite scheme under which all of the rights of litigants, both legal and equitable, so far as they are consistent with each other and affect the same parties, can be tried in one action and be merged in a single judgment. One of the essential features of such a scheme is to make a separate provision for causes of action that are inconsistent with each other or affect different parties or require different places of trial, and this has been done in section 484 and various other kindred sections of the Code which specifies what causes of action may be joined in the same complaint. It is true that in the chapter of the Code relating to actions to recover real property the name and many of the incidents of the former action of ejectment still persist, but this is undoubtedly due to that conservatism of the law which has ever led our legislators and courts to use familiar names and to reason in old terms when enacting or construing



pleading.<sup>48</sup> Mr. Justice Rodman of North Carolina pointed out that the New York code (copied in North Carolina), "enacts rules of pleading which *essentially*, and in all the respects in which the com-

statutes designed to produce reforms in our law and practice. . . .

"Let us now see whether the plaintiffs have more than one cause of action arising out of the wrong of the defendant, and if not, what that cause of action is. The plaintiffs are the owners of a strip of land upon which the defendant has wrongfully entered and erected a wall which is a portion of her house. The facts alleged show one primary right of the plaintiffs and one wrong done by the defendant which involves that right. Therefore, the plaintiffs have stated but a single cause of action, no matter how many forms and kinds of relief they may be entitled to. The relief prayed for, or to which they may be entitled, is no part of their cause of action (Pomeroy's Code Remedies, § 455).

"The plaintiffs' right is to recover possession of their land. The defendant's wrong consists in the entry upon and use of that land without plaintiffs' consent. The particular nature of that wrong may require the application of different remedies for the enforcement of the right. But that does not change the nature of the cause of action, nor entitle the plaintiffs to split it into several causes of action. The complaint in the first action stated the facts upon which plaintiffs based their claim of title and right to possession. Under its allegations the title as well as the right to possession could be tested. (Caggar v. Lansing, 64 N. Y. 417.) The right to possession involved the removal of the encroaching wall, for without such removal there could be no real transfer of possession. This in turn required equitable relief which, under proper pleadings and appropriate method of trial, could have been granted in the same action in which the title and right of possession were adjudicated." (The court in the first case refused to order the removal saying that the plaintiff should go to equity; the court in the last case said the remedy was at law and proceeded): "The application of these principles to the case at bar requires the re-

versal of the judgment of the courts below and the dismissal of the plaintiffs' complaint; but in view of the hardships visited upon the plaintiffs by the palpable and continuing wrong of the defendant, the reversal should be without costs."

The simple manner in which an identical case is handled in Massachusetts is illustrated in *Curtis Mfg. Co. v. Spencer Wire Co.*, 203 Mass. 448, 89 N. E. 534.

48. Speaking of an action against a bailee to recover the possession of personal property involving that condition of facts where the bailee had parted with the property, the supreme court of California says: "While we have no forms of action here, yet when the averments of facts in a complaint show the case to be one for which a particular form of action would have been a proper one at common law, then the general principles of pleading and practice apply to it which apply to the special form of common law action." Further, *arguendo*, the court said: "The cause of action in the case at bar is based on a contract of bailment; the original taking was not unlawful, but the detention was. Now that is just the kind of wrong for which at common law the action of detinue was especially appropriate, and the averments in the complaint in the case at bar are substantially those required in such action. . . . Now, it was no defense to the action of detinue to plead that the defendant, before the commencement of the action, had wrongfully disposed of the property, and, therefore, was not in possession of it." The court then traces the principle in the common law and continues: "The principles declared in the foregoing authorities are eminently just, and are founded on the maxim that no one can take advantage of his own wrong; and they are as applicable now to an action based on a contract of bailment as they were to such an action when it had to be brought under the special form of detinue." *Faulkner v. First Nat. Bank*, 130 Cal. 258, 264, 266, 62 Pac. 463.

mon law system is distinguished from the chancery system of ascertaining the issue, are those of the common law."<sup>49</sup>

**Principles of Allegation.** — Professor Lubé in his treatise on Equity Pleading advanced the theory that there was a very close analogy and similarity between the rules and principles of equity and common law pleading. In his reasoning or argument he shows not merely analogy and similarity, but for the most part identity. In the original inception of chancery pleading it was of small importance to state or frame issues. But in time formal issues were introduced into chancery practice, and the later chancery practice required pleaders to frame these issues. When this stage was reached the only distinction between equity and common law pleading related to that part of pleading devoted to bills of discovery, or those portions of bills devoted to procuring a discovery. Thus Van Santvoord in his treatise on Pleading under the New York code states the old law with sufficient accuracy. Under the old practice in chancery a bill of complaint might have a twofold object: discovery and relief. A bill for discovery and relief in addition to the grounds for relief might state matters of evidence which were material in establishing the main charge, or in determining the nature or extent of relief.<sup>50</sup> But the bill merely for relief should contain allegations of fact entitling a party to it substantially in the same form as averments in an action at law. This was the old rule of equity pleading.<sup>51</sup> The pleading should consist, not of inference or argument, but of allegations of fact stated with as much brevity and precision as possible.

Since discovery is expressly abolished by the codes and has become practically obsolete in all the states by reason of the changes in the law of evidence, the reason for the old bill of discovery no longer exists, and it is seldom encountered in practice.<sup>52</sup>

**As to Criminal Indictments and Information.** — Criminal pleaders find it convenient and necessary when stating the case in the form of an indictment or an information to bear in mind that there are many offenses which have been so long recognized and given a specific name as to have become the subject of an established formula setting forth the essential facts constituting the offense. These are precisely similar to established forms of action. There are also other cases which were not recognized in the same manner, but are created by statutory provisions, saying in substance that whoever does this or that shall be punished without naming the offense, *e. g.*: adulterates butter, etc., etc. This distinction is not rendered unimportant by the fact that the old common law crime is made the subject of statutory declaration

49. *Keener v. Finger*, 70 N. C. 35.

50. *Mechanics' Bank v. Levy*, 3 Paige (N. Y.) 696.

51. *Chambers v. Chalmers*, 4 Gill & J. (Md.) 420, 441, 23 Am. Dec. 572; *Hood v. Inman*, 4 Johns. Ch. (N. Y.) 437.

52. That the effect of the statutes permitting parties to be called as witnesses was clearly recognized by lawyers is shown by the fact that the title of the first bill enacted in Illinois for that purpose was: "*An Act to dispense with*

or definition, for, as has been said, there are few crimes which are left to rest wholly on the common law, untouched by statutory revision, restatement or definition.<sup>53</sup> And if the act was a crime at common law it remains a common law crime notwithstanding that the legislature has re-enacted the common law. As to the substantial principles of statement a criminal indictment or information does not differ materially from any other pleading setting up a cause for the action of the court.

**Sec. 12. Systems of Practice.** — One who makes a broad and systematic comparative investigation of the several systems of practice, whether the form of proceeding be the ordinary civil actions or ordinary equity actions, or the unusual actions known as special proceedings, cannot fail to be impressed with the similarity in fundamental matters rather than with the differences in detail encountered in various jurisdictions. Thus the principle of due process of law requires that every person against whom an action is brought, and against whom a judgment is sought, shall be notified and given an opportunity to be heard, not only as to the beginning and pendency of the suit, but as to every step which is taken in the progress of that suit. It is absolutely fundamental and jurisdictional that the party be notified, but it is quite immaterial just how that notice is given, provided he is duly notified according to the nature of the proceeding. Upon this substantial thing there is absolute uniformity. No principle is involved in the details.

Appearance in court is the next step. It is quite immaterial whether the actual appearance is required or allowed. The substantial thing is an opportunity to be heard at a definite time and place by a tribunal having the same power to hear and determine the suit in the same manner that the same tribunal would hear any other suit or defendant.

The rules of practice all have in view substantially the same ends, namely, the due and orderly despatch of the business in the courts; reasonable protection of the parties against surprise, inadvertence or mistake; the creation of a record which shall be a muniment to govern and protect the parties, and a monument to display the condition of the law of the land.

**Sec. 13. Modern Actions Recognized By Names.** — Lord Brougham, in his speech on law reform in 1828, pointed out that the ancient pleaders bottomed their system on a few cardinal rules. The first great rule of pleading was intended to compel the litigant parties to disclose fully and distinctly the nature of their respective contentions. The second rule required that no needless impediment could be thrown in the way of either party. The third called for the eliminating of prolixity and needless repetition. The fourth excluded departure from grounds once taken. The result of the agitation of which this

*the bill of Discovery.*" The bill was | feet was to render its use unnecessary. not abolished as in the codes but the ef- | 53. *Benson v. McMahon*, 127 U. S.



speech was a great feature was the "Uniformity of Process Act" (2 Will. IV, c. 39) which was passed in 1832 and swept away at once between fifty and sixty species of actions, and became the basis of the Hilary Rules, 4 Will. IV (1834).

Not to pursue in detail the history of law reform, a mention of the Common Law Procedure Acts of 1852-3-5 and a comment on them by the author of a treatise on their provisions will throw light not only on this subject, but upon the whole subject of pleading and practice. Finlason, in his introduction says: "It is written that there is nothing new under the sun; and the history of common law procedure illustrates the saying. All that has ever been evil in it has arisen from an oblivion of its ancient principles; and every step in its improvement is a recurrence to the past, every real reform is a restoration. This may appear paradoxical to those who have not studied its old records; but the writer finds in them the proof that the paradox is truth."

It is beyond our purpose to notice the course of reform in America, but the important point for the practical lawyer to observe is that nowhere in any of the attempts at reform has any attempt been made to ignore, abolish or change the fundamental rules of pleading or the distinctions between causes of action.

**Sec. 14. Classification and Enumeration of Actions.**—Actions, like almost everything else, may be classified from several view points, and it is essential to clearness of comprehension that these view points be not confused or mixed.

From their operation and effect actions are classed as actions *in personam* and actions *in rem*, that is to say: the former are adversary contests between and operate upon only parties or privies to the actions; the latter are more properly called "proceedings *in rem*," and, because they affect the status or condition of the person or thing which is the subject of the suit, they operate upon all the world. The Roman classification of actions as real and personal is identical with this and must not be confused with the same expressions in English and American law.

From the nature of the cause of action and the subject of the action, it has become habitual to classify all private adversary actions recognized in English and American law as either *real* or *mixed* or *personal*. It is the essence of a real action that it be solely and only for the recovery of some interest in land recognized as real property. For whenever damages, which are peculiarly a recompense and therefore of a personal nature, are recovered in the same action wherein the real thing may be recovered, the action is distinguished by the name of a *mixed* action. The only real action under the English law which survived the statute 2 & 3 Will. IV, was the action of dower. It is doubtful if any pure real action survives in American law, although the case of *Van Rensselaer v. Wright*,<sup>54</sup> seems to be purely a real action. If so, no change having taken place, there is a real action in New York.

157, 8 Sup. Ct. 1249, 32 L. ed. 234. 54. 121 N. Y. 626, 25 N. E. 3.



Mixed actions are plainly distinguishable into two classes. The first class includes those involving only possession and damages, and embraces *Forceful Entry and Detainer*, and the peculiar action existing in Pennsylvania, called *Equitable Ejectment*, although this name is not exclusively confined to Pennsylvania. The second class embraces those involving possession, title and damages, including *Ejectment, Waste, Writ of Entry and Trespass to Try Title*.

Personal actions are universally subdivided into actions *ex contractu* and actions *ex delicto*.

Actions *ex contractu* are *Debt* in several forms, *Account, Covenant and Assumpsit*, the latter being always grounded upon a promise, express or implied.

Actions *ex delicto* generally have the recovery of damages as their sole object, but not always so, as they may be mixed in this respect, notable examples being *Detinue* and *Replevin*. All other *ex delicto* actions may be again classified according to whether or not the action is based upon actual force as the ground of the action.

Actions *ex delicto* where force is of the gist are all of the species *Trespass*.

The subdivisions of *Trespass* are:

- (a.) *Trespass to the Person*, technically called *vi et armis*;
- (b.) *Trespass by Taking Possession of Goods*, technically called *de bonis asportatis*; and
- (c.) *Trespass Quare Clausum Fregit*, for intrusions upon land.

"Trespass on the case" is a phrase expressing the idea in English and American law of injuries consisting of violation of relative rights where the theory and ground of the action is neither actual force nor actual contract, although both the elements of actual force and actual contract may exist in the *res gestae*. It is impossible to enumerate all the peculiar injuries which have been made the subject of such actions, or to anticipate what form some new method of injury may take on, but the following forms of action have been found to apply to acts and events so frequently recurring as to have attained a name and generally applicable formula of action, namely:

TROVER (being the well known remedy for the conversion of personal property);

MALICIOUS PROSECUTION;

FALSE IMPRISONMENT (under color of legal process);

LIBEL AND SLANDER;

FRAUD AND DECEIT;

MALICIOUS INTERFERENCE;

CRIMINAL CONVERSION;

ALIENATING AFFECTIONS OF HUSBAND OR WIFE;

DEPRIVATION OF CIVIL RIGHTS (such as the right to vote);

REPLEVIN (an action to recover possession of goods wrongfully taken or wrongfully withheld).

These constitute the main body of actions and will be found to afford a remedy for almost every wrong or deprivation of right ordinarily accruing.

SCIRE FACIAS is generally applied to public rights, but is sometimes resorted to as a private remedy.

**Public Civil Actions.** — The rights of the public are generally enforced (where they do not partake of the nature of a mere private right of ownership remediable under the above forms the same as a suit of a private individual), by processes which, for want of a better name, are sometimes grouped under the heading of "Extraordinary Remedies," although they are in ordinary and every-day use.

These "Great Public Writs," as they were called in the English law, are:

MANDAMUS;  
QUO WARRANTO;  
SCIRE FACIAS;  
PROHIBITION;  
CERTIORARI; and  
HABEAS CORPUS.

The latter two, however, are frequently made use of as actions by individuals against the public or some public official; and *habeas corpus* is almost always a proceeding by private individuals, having for its object an inquiry as to the legality of the detention of one person in the personal custody of another.

**Special Proceedings.** — There are a number of proceedings which do not take on the form of any of those enumerated above. The principal of these are:

PARTITION UNDER STATUTES;  
CONDEMNATION PROCEEDINGS UNDER THE LAW OF EMINENT DOMAIN;  
SPECIAL ASSESSMENT PROCEEDINGS FOR PUBLIC IMPROVEMENTS;  
PROBATE PROCEEDINGS;  
PROCEEDINGS TO PROTECT PERSONS *non compos mentis*;  
ADOPTION PROCEEDINGS.

**Actions in Maritime Causes.** — For these see title "ADMIRALTY."

**Sec. 15. Code Disposition of These Actions.** — Though the codes generally declare that the forms of action are abolished, the distinctions between the substantial causes of action are recognized as to all the great variety above enumerated.<sup>55</sup>

55. "The complaint alleged conversion and the case was tried on that theory. While no particular form of complaint is now essential to a recovery under our Code practice (§ 481), and courts are authorized to disregard errors and defects in pleadings, or other proceedings which do not affect the substantial rights of the adverse party (§ 723), it is none the less true that the substantial differences which control and determine the rights of parties are still in force. (Pomeroy's Remedies and Remedial Rights, § 108; Goulet v. Asseler, 22 N. Y. 225; Eldridge v. Adams, 54 Barb. 417.) The case having been tried upon the theory of a conversion, the judgment in trover must be supported by the same proof that was necessary under the

Civil remedies under the codes are divided into actions and special proceedings.<sup>56</sup>

Auxiliary remedies which are numerous and which pervade, of course, every branch of procedure, must not be confused with the actions to which they pertain. The principal of these are:

ATTACHMENT;

CAPIAS;

GARNISHMENT;

TRUSTEE PROCESS;

INJUNCTIONS;

WRITS OF ASSISTANCE;

WRIT OF PROTECTION TO WITNESSES OR PARTIES (for example, where parties or witnesses are visiting foreign jurisdictions for the sole purpose of testifying or prosecuting and defending, the courts will sometimes protect them against the service of process).

The fact that there is an auxiliary remedy does not change the nature of the cause of action or the character of the pleading.<sup>57</sup>

**Sec. 16. Established Forms of Suit in Equity.**—Because of the flexibility of the procedure, there is more mingling of several natures of relief in equity than at law; and yet every suit in chancery must proceed upon some definite theory and fall under some well recognized head of equity jurisdiction.

An equity suit resembles an action of trespass on the case *ex contractu*. So it is said that equity will relieve in every meritorious case, because in many cases the courts of law cannot by reason of their inflexible rules. The inquiry is not, whether there is a remedy at law, but whether that court is able to give full and complete redress.<sup>58</sup> Whether equity or law shall take jurisdiction depends, in many cases, upon the power of the court to afford an adequate remedy under the equitable action of trespass on the case.<sup>59</sup>

Suits in equity may be classified according to the principal object of the suit into sixteen species of suit, the elemental features being quite as clearly marked as are the forms of action at law, namely:

SUITS TO COLLECT MONEY (Accounting; Creditors' Suits; Foreclosures);

SUITS FOR CONTRIBUTION AND SUBROGATION;

SUITS TO ENFORCE CONTRACT (Specific Performance and Injunction Against Breach Suits To Relieve From Obligations; Rescission, Cancellation or Reformation of Contracts; Correcting, Setting Aside, Enjoining Collection or Reviving Judgments and Decrees; Dissolution of Marriage, Divorce and Separate Maintenance);

common law." *Wamsley v. Atlas S. Co.*, 168 N. Y. 533, 540, 61 N. E. 896, 85 Am. St. Rep. 699.

56. See *In re Estate of Joseph*, 113 Cal. 660, 50 Pac. 768; *In re Central Irr. Dist.*, 117 Cal. 382, 49 Pac. 354; *Smith v. Westerfield*, 88 Cal. 374, 26 Pac. 206; *Bixler's Appeal*, 59 Cal. 550.

57. *Faulkner v. First Nat. Bank*, 130 Cal. 258, 62 Pac. 463.

58. *Vicksburg v. Ragsdale*, 54 Miss. 200.

59. See *United States v. Milwaukee R. T. Co.*, 145 Fed. 1007, 1010.

BILLS *quia timet* (the object of which is to provide against the future fraudulent use of records and documents, thereby protecting executory or contingent interests, and which are: Bills To Remove Clouds; Interpleader Bills, Bill of Peace, Injunction against Waste; Bills To Perpetuate Testimony);

BILLS RELATING TO TRUSTS (To Establish and Enforce Pure Trusts; To Establish Constructive and Resulting Trusts; Bills To Trace Funds; Bills To Enforce Charities);

SUITS PRIMARILY RELATING TO WILLS (To Set Aside To Establish; To Construe and To Permit Elections Under);

SUITS TO ADMINISTER ESTATES OR TO CONTROL THE ADMINISTRATION (where the ordinary proceedings are inadequate);

BILLS RELATING TO DOWER AND COURTESY;

PARTNERSHIP (Accountings and Bills for Dissolution);

SUITS TO RESTRAIN COLLECTION OF TAXES;

BILLS OF REVIVOR;

BILLS TO PREVENT TORTS (for example: Enjoining Nuisances; Preventing Trespass and Waste; Enjoining Libel or Violations of Privacy; Enjoining Strikes and Boycotts);

BILLS TO ESTABLISH LIENS;

BILLS TO PROTECT PURELY PERSONAL RIGHTS (for example: The Right of Privacy and the Protection of Infants and *non compos mentis* Persons Under the Original "Parens Patriae" of the State);

BILLS TO PARTITION LAND;

BILLS OF DISCOVERY.

Auxiliary remedies in equity are the Great Writs of *Ne Exeat*, Injunction, Writ of Restitution, Writ of Execution and Attachment.

**Sec. 17. Conclusion.** — Such then is a broad general outline of the system of procedure which obtains in the United States of America — a system which has been built up laboriously by the efforts of jurists, legislators and judges throughout many generations.

The simplicity of the system can be appreciated only when it is borne in mind that the law is not increased in size by being constantly more and more subdivided. The working out of specific rules under some general principle or fundamental rule only defines but does not enlarge. A hundred cases which upon their final determination take their rank as precedents do not add one particle to the law, though they may add to its confusion or to its definiteness, and undoubtedly do require greater discernment and care on the part of those who have undertaken the work of exposition.



# ABATEMENT, PLEAS OF

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CROSS-REFERENCES:

Actions;	Infants;
Aliens;	Jurisdiction;
Another Action Pending;	Parties;
Appeal;	Process;
Arbitration and Award;	Revivor;
Corporations;	Service of Process and Papers;
Death;	Variance;
Husband and Wife;	Verification.

**I. DEFINITIONS AND DISTINCTIONS.**—The abolition of the original writ in all jurisdictions and the changes made as to the formal order of pleading in the code states has made some change in the application of the rules established under the common law system in relation to abatement. The principles underlying these rules, however, do not depend upon forms of action and are recognized in all jurisdictions. The reason for the distinction between the names of pleas and the order of their use is found in the character of the facts intended to be submitted to the court by them. Those pleadings which, without denying the existence of a right or cause of action, are aimed to show that the cause of action in its present form as submitted and in the jurisdiction where it is submitted will not lie, are called “*dilatory*” because they only delay without denying.

At common law a *dilatory plea* is one which seeks to excuse the defendant from pleading to or answering the declaration.<sup>1</sup>

A *plea in abatement* is a *dilatory plea*.<sup>2</sup>

**Pleas in Abatement and in Bar Distinguished.**—A plea in bar goes to the merits of an action to defeat it, while a plea in abatement, as the term implies, seeks merely to defeat the proceeding for the present time.<sup>3</sup>

1. *Mahoney v. New South Bldg. & L. Assn.*, 70 Fed. 513; *Parks v. McClellan*, 44 N. J. L. 552, 558, *citing* 3 Black. Comm. 301.

2. **U. S.**—*United States v. Greene*, 113 Fed. 683; *Wilson v. Winchester & P. R. Co.*, 82 Fed. 15, 18. **Alaska.**—*Elliott v. Kuzek*, 2 Alaska 587. **Cal.**—*Bernheim Distilling Co. v. Elmore* (Cal. App.), 106 Pac. 720. **Del.**—*Lycoming Fire Ins. Co. v. Bush*, 1 Marv. 181, 40 Atl. 947. **Fla.**—*Easterlin v. State*, 43 Fla. 565, 31 So. 350. **Ga.**—*Adams v. Branan*, 120 Ga. 530, 48 S. E. 128. **Ill.**—*Davids v. People*, 192 Ill. 176, 61 N. E. 537. **Ind.**—*C. Callahan Co. v. Wall Rice Mill. Co.* (Ind. App.), 89 N. E. 418; *Rush v. Foos Mfg. Co.*, 20 Ind. App. 515, 51 N. E. 143. **Kan.**—*State v. Skinner*, 34 Kan. 256, 8 Pac. 420. **Me.**—*Hibbard v. Newman*, 101 Me. 410, 64 Atl. 720. **Mich.**—*National Fraternity v. Wayne Circuit Judge*, 127 Mich. 186, 86 N. W. 540.

**Judicial Definitions.**—“This (the word ‘abate’) is a generic term, derived from the French word *abattre*, and signifies to quash, beat down or destroy. 3 Black. Com. 168. The modes of abatement are various, but the thing is simple and uniform. A plea of abatement is one mode of quashing a writ; but it is not the only

one.” *Case v. Humphrey*, 6 Conn. 130, 140.

A plea in abatement is one “which shows cause to the Court why the defendant should not be impleaded, or, if impleaded, not in the manner and form he now is.” *Middlebrook v. Ames*, 5 Stew. & P. (Ala.) 158, 166; *Mantz v. Hendley*, 2 Hen. & M. (Va.) 308, 313.

“A plea in abatement is entered to save expense by preventing a trial when the action in its present form is not legally supportable.” *McNeill v. West*, 3 N. C. 51.

3. **Cal.**—*Wilcox v. Luco*, 118 Cal. 639, 45 Pac. 676, 50 Pac. 758, 62 Am. St. Rep. 305. **Ill.**—*Pitt’s Sons Mfg. Co. v. Commercial Nat. Bank*, 121 Ill. 582, 13 N. E. 156. **Ind.**—*Moore v. Sargent*, 112 Ind. 484, 14 N. E. 466; *Kunkle v. Coleman* (Ind. App.), 92 N. E. 61; *Voluntary Relief Dept. v. Spencer*, 17 Ind. App. 123, 46 N. E. 477, 478. **Mass.**—*Whiton v. Balch*, 203 Mass. 576, 89 N. E. 1045, 1046. **Miss.**—*Rice v. Patterson*, 92 Miss. 666, 46 So. 255, plea held to be in bar and not in abatement.

Facts which delay but do not cause a discontinuance are called “in suspension of action,” holding it in abeyance until some change of time or circumstances, as for example, in time



Under the Codes. — Under the code practice, pleas in abatement, as such, have been abolished. An answer in abatement is a defense to a pending action.<sup>4</sup>

**II. GROUNDS FOR ABATEMENT.** — A. IN CIVIL SUITS. — 1. In General. — Many grounds for abatement, especially in civil actions, are not treated in this topic, but will be taken up and discussed in other parts of this work.<sup>5</sup>

2. Action Prematurely Brought. — The premature institution of a suit is ground for a plea in abatement.<sup>6</sup>

3. Failure to Pay or Secure Accrued Costs. — That the plaintiff has recommenced an action previously dismissed without paying or securing the costs of the former suit is a ground for a plea in abatement.<sup>7</sup>

of war an alien enemy is temporarily disabled. *Hutchinson v. Brock*, 11 Mass. 119.

A "plea in abatement is one in which is set up matter tending to defeat or suspend the suit or proceeding in which it is interposed, but which does not debar the plaintiff from recommencing another action at some other time or in some other way." *Chicago & B. Stone Co. v. Nelson*, 32 Ind. App. 355, 69 N. E. 705. See also *Hurst v. Everett*, 21 Fed. 218; *Botto's Exr. v. Botto*, 25 Ky. L. Rep. 2130, 80 S. W. 174.

A denial that property assessed was subject to taxation in a suit by the state for taxes goes to the merits, and, if true, constitutes a partial answer in bar rather than in abatement. *Darnell v. State (Ind.)*, 90 N. E. 769.

4. *Bergkofski v. Ruzofski*, 74 Conn. 204, 50 Atl. 565.

The distinction between the characters of the pleas is still observed. *Gardner v. Clark*, 21 N. Y. 399.

See *infra*, VI, "Timeliness, Order and Waiver of Pleas."

5. Pendency of Another Action, see title "Another Action Pending;" Death of Parties, see title "Death;" Converture, see title "Husband and Wife;" No Such Corporation, see title "Corporations;" Want of Jurisdiction, see title "Jurisdiction;" Misjoinder and Non-Joiner of Parties, see title "Parties;" Defective Service of Process, see title "Process;" Infancy, see title "Infants;" Variance Between Summons and Declaration, Ac-

cusation and Affidavit, see title "Variance;" Alienage, see title "Aliens;" Misnomer, see title "Parties."

6. Ga. — *Adams v. Branan*, 120 Ga. 530, 48 S. E. 128; *Horne v. Rodgers*, 103 Ga. 649, 30 S. E. 562; *Goodrich v. Atlanta, etc. Assn.*, 96 Ga. 803, 22 S. E. 585; *Alexander v. State*, 56 Ga. 478; *Realty Co. v. Ellis*, 4 Ga. App. 402, 61 S. E. 832; *Jester v. Bainbridge State Bank*, 4 Ga. App. 469, 61 S. E. 926.

Ill. — *Bacon v. Schepflin*, 185 Ill. 122, 56 N. E. 1123. Ind. — *Voluntary Relief Dept. v. Spencer*, 17 Ind. App. 123, 46 N. E. 477. Ore. — *McClung v. McPherson*, 47 Ore. 73, 82 Pac. 13, affirming judgment, 47 Ore. 73, 81 Pac. 567. Pa. — *Boyle's Lunacy*, 20 Pa. Super. 1. Utah. — *Clayton v. Dinwoodey*, 33 Utah 251, 93 Pac. 723, 728.

In Virginia the statute provides that "Any person entitled to recover money by action on any contract may . . . obtain judgment for such money after fifteen days' notice." The rule of the text has been applied to a notice of motion for judgment on a note prematurely served on a defendant. *Schofield v. Palmer*, 134 Fed. 753.

7. Board of Education v. Kelley, 126 Ga. 479, 55 S. E. 238; *Wright v. Jett*, 120 Ga. 995, 48 S. E. 345; *Johnson v. Central of Georgia R. Co.*, 119 Ga. 185, 45 S. E. 988; *Sweeney v. Malloy*, 107 Ga. 80, 32 S. E. 858; *Stirk v. Banking Co.*, 79 Ga. 495, 5 S. E. 105; *Langston v. Marks*, 68 Ga. 435; *Sparks Imp. Co. v. Jones*, 4 Ga. App. 61, 60 S. E. 910; *Cabell v. Payne*, 2 J. J. Marsh. (Ky.) 134.

**4. Submission to Arbitration.**—The fact that the cause has been submitted to arbitration is a ground for abatement.<sup>8</sup>

**B. IN CRIMINAL ACTIONS.—1. In General.**—In criminal cases a plea in abatement is proper when founded either on some defect apparent on the face of the indictment, without reference to any extrinsic fact, or upon some matter of fact outside the record which would render the indictment insufficient.<sup>9</sup> But defects apparent on the face of the indictment are frequently taken advantage of by demurrer.<sup>10</sup>

The office of a plea in abatement is not to present matters for determination which can be litigated under a plea in bar,<sup>11</sup> nor to serve the office of a demurrer.<sup>12</sup>

**2. No Proper Preliminary Examination.**—In some jurisdictions the defendant in a criminal case is entitled to a preliminary examination, and it is therefore a proper ground for a plea in abatement that an accused was not accorded a sufficient preliminary examination relating to the crime charged.<sup>13</sup>

8. *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366.

9. **U. S.**—*United States v. Wells*, 163 Fed. 313. **Ala.**—*Nugent v. State*, 19 Ala. 540; *State v. Williams*, 5 Port. 130. **Ark.**—*Wilburn v. State*, 21 Ark. 198. **Fla.**—*Donald v. State*, 31 Fla. 255, 12 So. 695. **Ind.**—*Pointer v. State*, 89 Ind. 255; *Uterburgh v. State*, 8 Blackf. 202; *Eggleston v. State*, 6 Blackf. 436. **Kan.**—*State v. Dunn*, 75 Kan. 799, 90 Pac. 231, that an accused was under the age of sixteen and only liable to be tried by another court, is properly raised by plea in abatement. **Mich.**—*Washburn v. People*, 10 Mich. 372. **Mo.**—*State v. Firey*, 122 S. W. 1007; *State v. Sharpe*, 119 Mo. App. 386, 95 S. W. 298. **Neb.**—*Steiner v. State*, 78 Neb. 147, 110 N. W. 723 (*citing* 1 Chit. Cr. Law 445); *State v. Bailey*, 57 Neb. 204, 77 N. W. 654; *Whitner v. State*, 46 Neb. 144, 64 N. W. 704. **N. C.**—*State v. Horton*, 63 N. C. 595. **Va.**—*Day v. Com.*, 2 Gratt. 562. **Eng.**—*Rex v. Hammersmith*, 1 Stark. 357, 2 E. C. L. 425; 2 Hale P. C. 236; 2 Hawkins P. C., c. 25, § 70.

**Mistake in endorsing indictment "a true bill,"** when the grand jury had ordered their clerk to endorse it "not a true bill," may be taken advantage of by plea in abatement. *State v. Horton*, 63 N. C. 595.

The question as to legality and competency of evidence upon which an indictment is based must be presented by plea in abatement. *State v. Clark*, 61 W. Va. 625, 63 S. E. 402.

10. See titles "Indictment and Information;" "Demurrers."

11. **Neb.**—*Sothman v. State*, 66 Neb. 302, 92 N. W. 303; *State v. Bailey*, 57 Neb. 204, 77 N. W. 654. **N. C.**—*State v. Long*, 143 N. C. 670, 57 S. E. 349. **Tenn.**—*Keneval v. State*, 107 Tenn. 581, 64 S. W. 897.

Thus in a prosecution for selling intoxicating liquor to an Indian, whether the person named in the information as having purchased the liquor was or was not an Indian cannot be raised by a plea in abatement. *State v. Bailey*, 57 Neb. 204, 77 N. W. 654.

**Plea of former jeopardy** is a plea in bar and not in abatement. *Klein v. State*, 157 Ind. 146, 60 N. E. 1036.

**Pendency of Another Indictment.**—That another indictment is pending against accused for the same cause is not a proper ground for a plea in abatement. **Ala.**—*Bell v. State*, 115 Ala. 25, 22 So. 526. **Fla.**—*Knight v. State*, 42 Fla. 546, 28 So. 759. **Ind.**—*Hardin v. State*, 22 Ind. 347. **Mass.**—*Com. v. Drew*, 3 Cush. 279. **Neb.**—*Bartley v. State*, 53 Neb. 310, 73 N. W. 744. **Eng.**—*Reg. v. Goddard*, 2 Ld. Raym. 920.

See *Williams v. State*, 57 Ga. 478. See also *People v. Fisher*, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501.

*Compare Austin v. State*, 12 Mo. 393. 12. *Davis v. Fitzgerald*, 6 Ga. App. 532, 65 S. E. 319.

13. **Kan.**—*State v. Bailey*, 32 Kan. 83, 3 Pac. 769. **Neb.**—*Jahnke v. State*, 68 Neb. 154, 94 N. W. 158, *re*

**3. Right To Prosecute by Information.** — The question of the right to prosecute by information may be raised by plea in abatement.<sup>14</sup>

**4. Defective Venue.** — Where an accused seeks to raise the objection that the offense was committed, if at all, in another county than that in which he is charged with having committed it, the remedy is by plea in abatement, which is practically a motion to remove to the proper county, and not a motion to quash.<sup>15</sup> But where it is insisted that the acts constituting the offense were not committed in the state at all, it may be shown as a matter of defense under the general issue.<sup>16</sup>

**5. Crime Charged Not the One for Which Extradited.** — The objection that the crime for which an accused is placed on trial is not the crime for which he was extradited is properly raised by a plea in the nature of a plea in abatement.<sup>17</sup>

**6. Different Offenses Charged in Indictment and Preliminary Complaint.** — An objection that an offense charged in an information differs from that named in the preliminary complaint is properly raised by plea in abatement, and not by motion to quash.<sup>18</sup>

**7. Improper Composition of Grand Jury.** — An objection going to the organization of the grand jury as a whole,<sup>19</sup> or to the competency

*versed on other points*, 104 N. W. 154; *Reed v. State*, 66 Neb. 184, 92 N. W. 321; *Cowan v. State*, 22 Neb. 519, 35 N. W. 405. **Pa.** — *Com. v. Schoen*, 25 Pa. Super. 211.

In Missouri a plea in abatement to an indictment alleging dismissal of charges by information before preliminary examination is properly overruled, since the statute providing that no information shall be filed charging a capital offense until after preliminary examination has no reference to indictment. *State v. Gieseke*, 209 Mo. 331, 108 S. W. 525.

14. *State v. Katzman*, 161 Ind. 504, 69 N. E. 157; *Lankford v. State*, 144 Ind. 428, 43 N. E. 444; *Nichols v. State*, 127 Ind. 406, 413, 26 N. E. 839.

**While Grand Jury in Session.** — The question as to right to prosecute by information while the grand jury is in session, can only be raised, under the Indiana statute, by a verified plea in abatement. *Hobbs v. State*, 133 Ind. 404, 32 N. E. 1019, 18 L. R. A. 774.

15. *State v. Lewis*, 142 N. C. 626, 55 S. E. 600, 7 L. R. A. (N. S.) 669 (*citing* *Revisal*, 1905, § 3239); *State v. Carter*, 126 N. C. 1011, 35 S. E. 591; *State v. Lytle*, 117 N. C. 799, 801, 23 S. E. 476; *State v. Outerbridge*, 82 N. C. 617.

Plea seems defective for want of certainty which alleges that, if the de-

fendant is guilty of the crime of which he stands charged, it is either in the county of N——, H——, “or” C——, and not in R——. *State v. Carter*, 126 N. C. 1011, 35 S. E. 591.

**Rule the Same in Felonies as in Misdemeanors.** — *State v. Outerbridge*, 82 N. C. 617.

16. *State v. Lytle*, 117 N. C. 799, 23 S. E. 476; *State v. Mitchell*, 83 N. C. 674.

17. *State v. Roller*, 30 Wash. 692, 71 Pac. 718.

18. *Whitner v. State*, 46 Neb. 144, 64 N. W. 704 (where the court indicated that this would apply also to an indictment); *Hill v. State*, 42 Neb. 503, 60 N. W. 916; *Cowan v. State*, 22 Neb. 519, 35 N. W. 405.

19. **Ala.** — *Crawford v. State*, 112 Ala. 1, 21 So. 214; *Nugent v. State*, 19 Ala. 540; *State v. Greenwood*, 5 Port. 474; *State v. Williams*, 5 Port. 130. **Ark.** — *Wilburn v. State*, 21 Ark. 198; *Brown v. State*, 13 Ark. 96; *Shropshire v. State*, 12 Ark. 190. **Fla.** — *Tervin v. State*, 37 Fla. 396, 20 So. 551; *Ex parte Warris*, 28 Fla. 371, 9 So. 718; *Potsdamer v. State*, 17 Fla. 895; *Burroughs v. State*, 17 Fla. 643. **Ind.** — *Henning v. State*, 106 Ind. 386, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756. **Md.** — *Clare v. State*, 30 Md. 163. **Mass.** — *Com. v. Smith*, 9 Mass. 107.



of individual members,<sup>20</sup> may ordinarily be raised by a plea in abatement, although certain limitations are sometimes imposed.<sup>21</sup> In some jurisdictions a plea in abatement alleging irregularities in the selection of the grand jury is only permitted in case the accused has had no opportunity to raise the objection by challenge,<sup>22</sup> while in others it is

Miss.—*Rawls v. State*, 8 Smed. & M. 599; *McQuillen v. State*, 8 Smed. & M. 587. Neb.—*State v. Bailey*, 57 Neb. 204, 77 N. W. 654. Tenn.—*State v. Dines*, 10 Humph. 512. Vt.—*State v. Ward*, 60 Vt. 142, 14 Atl. 187. Wis.—*Newman v. State*, 14 Wis. 393.

**Jurors Not Drawn in Presence of Proper Officers.**—*Tucker v. State*, 152 Ala. 1, 44 So. 587.

**Jurors Improperly Sworn.—No Ground for Plea.**—*Smith v. State*, 28 Miss. 728.

**Form of Plea to Indictment, Omitting Caption.**—“And now comes the above named defendant, R. F. Colson, who says his true name is Richard F. Colson, in his own proper person, and attended by his counsel in the court here, who has been indicted by the grand jury at this said term of said court upon a charge of . . . , and says that said court ought not to take cognizance of and have maintain and prosecute said indictment against him.

“(1) Because protesting that he is not guilty of the same, nevertheless the said defendant says that the said grand jury which found and brought said indictment against him is an illegal grand jury and without authority of law to present an indictment against this defendant, that is to say: etc.

“(2) Because the grand jury presenting said indictment against this defendant is not the same grand jury which was drawn, summoned, selected, chosen, empanelled, sworn, organized, and charged by the court at the organization of the court on the first day thereof to sit and act as a grand jury in and for the said county during the present term of said court, as appears of record, said grand jury having been constituted as follows: etc.

“Wherefore this defendant says that the said grand jury which found and brought said indictment against him is an illegal grand jury and without authority of law to present an indictment against this defendant. And

this the said defendant is ready to verify; wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the premises in the said indictment above specified.” *Colson v. State*, 51 Fla. 19, 40 So. 183.

20. U. S.—*Crowley v. United States*, 194 U. S. 461, 24 Sup. Ct. 731, 48 L. ed. 1075. Ala.—*State v. Middleton*, 5 Port. 484. Fla.—*Potsdamer v. State*, 17 Fla. 895; *Kitrol v. State*, 9 Fla. 9. Ga.—*McFarlin v. State*, 121 Ga. 329, 49 S. E. 267. Ind.—*Mershon v. State*, 51 Ind. 14; *Hardin v. State*, 22 Ind. 347. Me.—*State v. Carver*, 49 Me. 588, 77 Am. Dec. 275. Miss.—*McQuillen v. State*, 8 Sm. & M. 587. R. I.—*State v. Hefferman*, 28 R. I. 477, 68 Atl. 364; *State v. Davis*, 12 R. I. 492, 34 Am. Rep. 704. Tenn.—*State v. Duncan*, 7 Yerg. 271. Tex.—*Martin v. State*, 22 Tex. 214; *Van Hook v. State*, 12 Tex. 252, 268 (a leading case); *State v. Foster*, 9 Tex. 65. Va.—*McCue v. Com.*, 103 Va. 870, 49 S. E. 623. W. Va.—But see *Bradford v. State*, 4 W. Va. 763.

21. Non-prejudicial irregularities insufficient to support plea. *Cooper v. State*, 120 Ind. 377, 22 N. E. 320; *Schultz v. State*, 133 Wis. 215, 113 N. W. 428. See also U. S.—*United States v. Greene*, 113 Fed. 683. Ala.—*Tucker v. State*, 152 Ala. 1, 44 So. 587; *Germolgez v. State*, 99 Ala. 216, 13 So. 517. Mo.—*State v. Turlington*, 102 Mo. 642, 15 S. W. 141.

**Irregularity Must Amount to Corruption.**—*State v. Turner*, 63 Kan. 233, 65 Pac. 217; *State v. Skinner*, 34 Kan. 256, 8 Pac. 420.

Whether jurors were “reputable” or not cannot be inquired into on plea in abatement. *Hardin v. State*, 22 Ind. 347. See also *State v. McGinley*, 4 Ind. 7.

22. U. S.—*United States v. Hammond*, 2 Woods 197, 26 Fed. Cas. No. 15,294. Ga.—*Folds v. State*, 123 Ga. 167, 51 S. E. 305; *Edwards v. State*, 121 Ga. 590, 49 S. E. 674; *McFarlin v.*



said that a plea in abatement cannot be interposed under any circumstances, the proper remedy being by challenge before indictment found or by motion to quash afterwards.<sup>23</sup>

It is not a ground of abatement that the key to the jury box was not deposited with the county treasurer.<sup>24</sup>

**8. Improper Proceedings of Grand Jury.**—Irregularities in the proceedings of the grand jury are, in some jurisdictions, a proper ground for a plea in abatement,<sup>25</sup> while in others it is held that when an indictment has been returned into open court, duly endorsed, it is conclusive evidence of the regularity of the finding, and that the proper number concurred therein, and the same cannot be controverted by plea in abatement.<sup>26</sup>

An alleged improper charge of the court to the grand jury does not constitute a ground for a plea in abatement.<sup>27</sup>

**9. Misnomer.**—Misnomer of accused in an indictment or information may be taken advantage of by plea in abatement.<sup>28</sup>

State, 121 Ga. 329, 49 S. E. 267; Fisher v. State, 93 Ga. 309, 20 S. E. 329; Lascelles v. State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216. **Ind.**—Hauk v. State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; Pointer v. State, 89 Ind. 255; McClary v. State, 75 Ind. 260; Mershon v. State, 51 Ind. 14. **Ia.**—Dixon v. State, 3 Iowa 416. **Miss.**—Lee v. State, 45 Miss. 114. **Mo.**—State v. Crane, 202 Mo. 54, 100 S. W. 422, 426; State v. Connell, 49 Mo. 282; State v. Bleekley, 18 Mo. 428. **Ohio.**—Huling v. State, 17 Ohio St. 583; Geiger v. State, 25 Ohio C. C. 742; Lindsay v. State, 24 Ohio C. C. 1. **Okla.**—Stanley v. United States, 1 Okla. 336, 33 Pac. 1025. **Tex.**—Kemp v. State, 11 Tex. App. 174.

Grounds of former challenge cannot be made basis for plea. McClary v. State, 75 Ind. 260; Meiers v. State, 56 Ind. 336.

23. State v. Lang, 75 N. J. L. 1, 66 Atl. 942, affirmed, 68 Atl. 210; Com. v. Chauncey, 2 Ashm. (Pa.) 90.

**In Oregon.**—United States v. Mitchell, 136 Fed. 896.

24. Simmons v. State (Ala.), 48 So. 606.

25. Pointer v. State, 89 Ind. 255. See Territory v. Smith, 12 N. M. 229, 78 Pac. 42.

**Non-Concurrence of Sufficient Number of Jurors.**—Donald v. State, 31 Fla. 255, 12 So. 695; Low's Case, 4 Me. 439, 16 Am. Dec. 271.

**Presence of Unauthorized Persons.** State v. Firey (Mo.), 122 S. W. 1007.

See Lawrence v. Com., 86 Va. 573, 10 S. E. 840.

**Importunity of Attorney.**—Miller v. State, 42 Fla. 266, 28 So. 208.

**Misconduct of District Attorney.** United States v. Wells, 163 Fed. 313.

**Failure To Return Indictment Into Open Court.**—State v. Firey (Mo.), 122 S. W. 1007.

26. **Conn.**—State v. Fasset, 16 Conn. 457. **Ind.**—Creek v. State, 24 Ind. 151, 155; Stewart v. State, 24 Ind. 142. **Ia.**—State v. Fowler, 52 Iowa 103, 2 N. W. 983. **N. J.**—State v. Dayton, 23 N. J. L. 49, 53 Am. Dec. 270. See also State v. Lang, 75 N. J. L. 1, 66 Atl. 942. **S. C.**—State v. Boyd, 2 Hill 288, 27 Am. Dec. 376. **Tex.**—Dockery v. State, 35 Tex. Crim. 487, 34 S. W. 281.

**Insufficiency of Evidence Before Grand Jury Not a Ground.**—State v. Comer, 157 Ind. 611, 62 N. E. 452; Hope v. People, 83 N. Y. 418, 38 Am. Rep. 460.

**Prosecuting Attorney's Failure To Endorse on Indictment Names of Material Witnesses, no Ground.**—State v. Barrington, 198 Mo. 23, 95 S. W. 235, 238, writ of error dismissed, 205 U. S. 483, 27 Sup. Ct. 582, 51 L. ed. 890.

27. Stahl v. State, 11 Ohio C. C. 23, 5 Ohio C. D. 29.

28. **U. S.**—See Lee v. United States, 156 Fed. 948, 84 C. C. A. 448. **Ala.**—Daniels v. State, 60 Ala. 56; Lawrence v. State, 59 Ala. 61; Miller v. State, 54 Ala. 155; Lynes v. State, 5 Port. 236, 30 Am. Dec. 561. **Ark.**—Gabe v. State,

**III. BY WHOM PLEA MAY BE OR MUST BE MADE.**—As a rule, at common law, want of jurisdiction or privilege to be sued in another county or district could only be pleaded in *propria persona* because a plea by attorney was supposed to be filed by leave of court and the asking of leave was considered as a tacit admission of the jurisdiction;<sup>29</sup> but this rule is doubtless otherwise under the code practice allowing all answers to be signed by attorney,<sup>30</sup> and has been expressly repudiated in at least two jurisdictions.<sup>31</sup> In all other cases a plea in abatement may be signed and filed by defendant in person,<sup>32</sup> or by attorney.<sup>33</sup> It has been held that a plea of misnomer in person, without the signature of counsel, was irregular.<sup>34</sup>

Several defendants sued on a joint contract may plead in abatement a defect of service as to one because it is a matter in which they have a joint interest.<sup>35</sup> And, in fact, it has been held permissible for one of such defendants to plead defective service as to the other.<sup>36</sup> But

6 Ark. 519. **Ill.**—*Dauids v. People*, 192 Ill. 176, 61 N. E. 537. **Ind.**—*Gardner v. State*, 4 Ind. 632. **Me.**—*State v. Knowlton*, 70 Me. 200. **Mass.**—*Com. v. Fredericks*, 119 Mass. 199; *Com. v. Dedham*, 16 Mass. 141. **Mo.**—*Carpenter v. State*, 8 Mo. 291. **N. H.**—*State v. Narearm*, 69 N. H. 237, 45 Atl. 744. **Ohio.**—*State v. Bell Tel. Co.*, 36 Ohio St. 296, 38 Am. Rep. 583. **S. C.**—*State v. Lorey*, 2 Brev. 395. **Tex.**—See *Wilcox v. State*, 31 Tex. 586. **Wis.**—*State v. Brunell*, 29 Wis. 435. **Eng.**—*Rex v. Shakespeare*, 10 East 83, 2 Hale P. C. 237.

**Misnomer Either of Christian or Surname.**—*Washington v. State*, 68 Ala. 85.

**29. Ark.**—*Watkins v. Brown*, 5 Ark. 197. **Ill.**—*Mineral Point R. Co. v. Keep*, 22 Ill. 9, 74 Am. Dec. 124. **Md.**—*Tyler v. Murray*, 57 Md. 418. **Tenn.**—*Boon v. Rahl*, 1 Heisk. 12; *Shelby v. Johnson*, 7 Humph. 503. **Vt.**—*Kenney v. Howard*, 67 Vt. 375, 31 Atl. 850. **Va.**—*Hortons v. Townes*, 6 Leigh 47, 58.

**Fact that plea is signed by attorney** is no indication that it was not made by defendant, where the plea purports to be in proper person and not by attorney. *Bank of Tennessee v. Anderson*, 3 Sneed (Tenn.) 669.

**In England** in the common law courts, a distinction is made between pleas of privilege and those to the jurisdiction. The former may be pleaded by attorney, but the latter only in *propria*

*persona*. *Hunter v. Neek*, 3 M. & G. 181, 42 E. C. L. 102.

**Amicus Curiae Incapable of Filing Plea.**—See *Baily v. Schrader*, 34 Ind. 260; *Piggott v. Kirkpatrick*, 31 Ind. 261; *Little v. Thompson*, 24 Ind. 146.

**30.** *California Code Civ. Proc.*, § 446; *New York Code Civ. Proc.*, § 421. And see the codes and practice acts of the various states.

**31.** *Prim v. Davis*, 2 Ala. 24; *Richardson v. Pruitt's Admr.*, 3 Tex. 223.

**32.** *State v. Middleton*, 5 Port. (Ala.) 484. See *California Code Civ. Proc.*, § 446, and the codes and practice acts of the various states.

**33. Ill.**—*Dauids v. People*, 192 Ill. 176, 61 N. E. 537; *Holloway v. Freeman*, 22 Ill. 197. **Md.**—*Tyler v. Murray*, 57 Md. 418; *Yoe v. Gelston*, 37 Md. 233. **Neb.**—*Bohanan v. State*, 15 Neb. 209, 18 N. W. 129. **Tenn.**—*Cheatham v. Trotter*, 7 Tenn. 198.

**A Corporation Can Only Plead by Attorney.**—*Nispel v. Western U. R. Co.*, 64 Ill. 311; *Nixon, Ellison & Co. v. S. W. Ins. Co.*, 47 Ill. 444.

**34.** *De Normanville v. Meyer*, 1 Chitty, 209, 18 E. C. L. 67. The report of this case is a mere memorandum, and no reason is assigned for the rule.

**35.** *Butts v. Francis*, 4 Conn. 424. See also *Sawtelle v. Jewell*, 34 Me. 543; *Thayer v. Ray*, 17 Pick. (Mass.) 166.

**36.** *Draper v. Moriarty*, 45 Conn. 476; *Curtis v. Baldwin*, 42 N. H. 398. But see *Boots v. Boots*, 84 Ind. 171; *Campbell v. Hampton*, 11 Lea (Tenn.) 440.

joint defendants cannot plead matter strictly personal to one,<sup>37</sup> nor can a defendant plead in abatement matter which in no wise prejudices his rights, but is personal and peculiar to his co-defendants.<sup>38</sup> A plea in abatement by a co-defendant on a personal ground, not applicable to another, will not inure to the benefit of the latter.<sup>39</sup>

An administrator may follow up matter in abatement pleaded by his intestate.<sup>40</sup>

A garnishee cannot insist on matter which, by plea would be good in abatement. That must come from the defendant in person, or in his name by an attorney.<sup>41</sup>

#### IV. MANNER OF PRESENTING MATTER OF ABATEMENT.

A. IN GENERAL. — 1. In Civil Cases. — Under the common law, apart from jurisdictional matters, it was necessary to raise all objections of a dilatory character based on extrinsic matters, by plea.<sup>42</sup> Defects or

37. *Weaver & Gains v. Crenshaw*, 6 Ala. 873; *Shannon v. Comstock*, 21 Wend. (N. Y.) 457, 34 Am. Dec. 262.

Rule Applicable to Answers Under Code Practice. — *Fassett v. Tallmadge*, 15 Abb. Pr. (N. Y.) 206n.

38. U. S. — *Harrison v. Urann*, 1 Story 64, 11 Fed. Cas. No. 6,146. Conn. — *Hallam v. Mumford*, 1 Root 58. Me. — *Bonzey v. Redman*, 40 Me. 336. N. J. — *Harker v. Brink*, 24 N. J. L. 333. N. Y. — *Van Bramer v. Cooper*, 2 Johns. 279; *De Forest v. Jewett*, 1 Hall 137.

See also *Craig v. Cummings*, 2 Wash. C. C. 505, 1 Pet. C. C. 431, 6 Fed. Cas. No. 3,331.

39. *Moore v. Smith*, 2 B. Mon. (Ky.) 340.

40. *Guild v. Richardson*, 6 Pick. (Mass.) 364.

41. *Cheatham v. Trotter*, 7 Tenn. 198.

In Massachusetts a trustee having effects may, in the name of his principal, take any legal exception in abatement, as defective service on the principal. *Blake v. Jones*, 7 Mass. 29. And a trustee may plead in abatement in his own name, and take any exception to the validity of the service in respect to himself. *Thayer v. Ray*, 17 Pick. (Mass.) 166; *Blake v. Jones*, 7 Mass. 29. And consult the codes and statutes of the various other states.

42. U. S. — *Wickliffe v. Owings*, 17 How. 47, 51, 15 L. ed. 44; *Livingston v. Story*, 11 Pet. 351, 393, 9 L. ed. 746; *Schofield v. Palmer*, 134 Fed. 753, 756; *Marshall v. Otto*, 59 Fed.

249; *Pierce v. Feagans*, 39 Fed. 587.

Ala. — *Jordan v. Bell*, 8 Port. 53.

Ark. — *Bailey v. Rockafellow*, 57 Ark.

216, 21 S. W. 227; *Melvin v. Steam-*

*boat Gen. Shields*, 15 Ark. 207. Conn. —

*Bishop v. Vose*, 27 Conn. 1; *Ashmead v.*

*Colby*, 26 Conn. 308. Fla. — See E. O.

*Painter Fertilizer Co. v. Du Pont*, 54

Fla. 288, 45 So. 507. Ill. — *Greer v.*

*Young*, 120 Ill. 184, 191, 11 N. E.

167; *Union Nat. Bank v. First Nat.*

*Bank*, 90 Ill. 56; *Sibert v. Thorp*, 77

Ill. 43; *McNab v. Bennett*, 66 Ill. 159;

*Davis v. Taylor*, 41 Ill. 408; *Holloway*

*v. Freeman*, 22 Ill. 197; *Mineral Point*

*R. Co. v. Keep*, 22 Ill. 9, 74 Am. Dec.

124. Compare: *Protection Life Ins.*

*Co. v. Palmer*, 81 Ill. 88. Ind. —

*Baily v. Schrader*, 34 Ind. 260; *Lud-*

*wick v. Beckamire*, 15 Ind. 198;

*Cooper v. Reenes*, 13 Ind. 53. Ia. —

See *Funk & Hardman v. Israel*, 5

*Iowa* 438. Ky. — *Anderson's Admr. v.*

*Irvine*, 11 B. Mon. 341. *Hibbard v.*

*Newman*, 101 Me. 410, 64 Atl. 720;

*Stephenson v. Davis*, 56 Me. 73; *Badger*

*v. Towle*, 48 Me. 20; *Chamberlain v.*

*Lake*, 36 Me. 388. Mass. — *Day v.*

*Floyd*, 130 Mass. 488. *Trull v. How-*

*land*, 10 Cush. 109, 57 Am. Dec. 82;

*Nye v. Liscombe*, 21 Pick. 265. Mich. —

*Webb v. Mann*, 3 Mich. 139. N. H. —

*Bishop v. Min. Co.*, 62 N. H. 455; *Edu-*

*cational Soc. v. Varney*, 54 N. H. 376;

*Kempton v. Savings Inst.*, 53 N. H. 589.

See also *Haverhill Ins. Co. v. Prescott*,

38 N. H. 398. N. C. — *Killian v. Ful-*

*bright*, 25 N. C. 9; *Sheppard v. Briggs*,

9 N. C. 369; *Green v. Mangum*, 7 N. C.

39. Ohio. — *Stahl v. State*, 5 Ohio C.



mistakes apparent upon the face of the declaration, independently of any reference to the writ, it was held should be taken advantage of by demurrer.<sup>43</sup> As to intrinsic matters the court, *ex-officio*, may abate the writ or the suit.<sup>44</sup>

Generally under the code,<sup>45</sup> as well as by the chancery practice,<sup>46</sup> all matters in abatement of an intrinsic nature must be presented by demurrer;<sup>47</sup> and matters *dehors* the record must be taken advantage

D. 29. **Tenn.**—*Peters v. Neely*, 16 Lea 275; *Kendrick v. Davis*, 3 Coldw. 524; *Grove v. Campbell*, 9 Yerg. 7; *Posey v. McCubbins*, 5 Yerg. 235. **Vt.**—*Bliss v. Smith*, 42 Vt. 199; Connecticut, etc. *Rivers R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181; *Culver v. Balch*, 23 Vt. 618. **Va.**—*Garrard v. Henry*, 6 Rand. 112. **W. Va.**—*Middleton v. White*, 5 W. Va. 572; *Valley Bank v. Berkeley Bank*, 3 W. Va. 386. **Eng.**—*Addison v. Overend*, 6 T. R. 766, 101 Eng. Reprint 816; *Blackborough v. Graves*, 1 Mod. 102, 86 Eng. Reprint 765, *Mayor v. Bolton*, 1 B. & P. 40.

In Maine the statute authorizing brief statements of special matter in defense does not supersede the use of pleas in abatement for setting up dilatory defenses. *Stewart v. Smith*, 98 Me. 104, 56 Atl. 401.

**Conditional Answer in Abatement Improper.**—*Whiton v. Balch*, 203 Mass. 576, 89 N. E. 1045.

A plea *puis darrein continuance* is the term used for a plea in abatement setting up matters arising after issues joined. **U. S.**—*Thompson v. United States*, 103 U. S. 480, 26 L. ed. 521; *Yeaton v. Lynn*, 5 Pet. 224, 8 L. ed. 105. **Ga.**—*Howes v. Chester*, 33 Ga. 89. **Md.**—*United States Bank v. Merchants Bank*, 7 Gill 415; *Agnew v. Gettysburg Bank*, 2 Har. & G. 478.

See title "*Puis Darrein Continuance*."

**Waiver of Plea.**—See *infra*, VI, "Timeliness, Order and Waiver of Plea."

**Relaxation in Justice's Court.**—Pleading in a justice's court is not required to be technical. So a defect which, in another court, should be taken advantage of by plea in abatement in a justice's court may be pointed out by motion. *Fisher v. Northrup*, 79 Mich. 287, 44 N. W. 610, 7 L. R. A. 629, where the defect was the want of plaintiff's christian name.

43. *Bean v. Green*, 4 Cush. (Mass.)

279; *Hastrop v. Hastings*, 1 Salk. 212, 91 Eng. Reprint 189; *Will's Gould on Pleading*, 434.

44. *Adams v. Leland*, 7 Pick. (Mass.) 64; *Warren v. Saunders*, 27 Gratt. (Va.) 259.

45. **Ala.**—*Blankenship v. Blackwell*, 124 Ala. 355, 27 So. 551, 82 Am. St. Rep. 175. **Ark.**—*Grider v. Apperson & Co.*, 32 Ark. 332. **Colo.**—*Davis v. Wannamaker*, 2 Colo. 637. **Ga.**—*Realty Co. v. Ellis*, 4 Ga. App. 402, 61 S. E. 832. **Ky.**—*Grant v. Tams & Co.*, 7 T. B. Mon. 218. **Mont.**—*Wetzstein v. Boston etc. Min. Co.*, 28 Mont. 451, 72 Pac. 865. **N. Y.**—*Hornfager v. Hornfager*, 6 How. Pr. 279. See *New York Civ. Code Proc.* § 488. **N. C.**—*Alexander v. Norwood*, 118 N. C. 381, 24 S. E. 119; *Curtis v. Piedmont Lumb. & M. Co.*, 109 N. C. 401, 13 S. E. 944; *Smith v. Moore*, 79 N. C. 82; *Charlotte Bank v. Britton*, 66 N. C. 365. **Ore.**—*Fiore v. Ladd*, 29 Ore. 528, 46 Pac. 144. **S. C.**—*Kiddell v. Bristow*, 67 S. C. 175, 45 S. E. 174. **Tex.**—*Johnston v. Price*, 2 Wills. Civ. Cas. § 756. **Wis.**—*Moir v. Dodson*, 14 Wis. 279; *Millett v. Hayford*, 1 Wis. 401.

If such defects are not taken advantage of by demurrer they are waived. *Hyde & Sons v. Lesser*, 93 App. Div. 320, 87 N. Y. Supp. 878; *Van Zandt v. Grant*, 67 App. Div. 70, 73 N. Y. Supp. 600.

46. **U. S.**—*Municipal Invest. Co. v. Gardiner*, 62 Fed. 954. **Ga.**—*Kendrick v. Whitfield*, 20 Ga. 379. **N. Y.**—*Varick v. Dodge*, 9 Paige 149. **Tenn.**—*Boyd v. Martin*, 9 Heisk. 382.

An election contest is in the nature of a chancery suit and a plea in abatement is not proper practice, though the cause has been transferred to the common law docket. *Quartier v. Dowriat*, 219 Ill. 326, 76 N. E. 371.

47. Matters which may be raised by demurrer cannot be presented by answer. *Zabriskie v. Smith*, 13 N. Y.

of by answer,<sup>48</sup> and by plea, in equity — not by general answer,<sup>49</sup> or

322, 336; *Ingraham v. Baldwin*, 12 Barb. (N. Y.) 9.

48. **U. S.** — *Greene v. City of Tacoma*, 53 Fed. 562; *Hurst v. Everett*, 21 Fed. 218. **Ala.** — *Blankenship v. Blackwell*, 124 Ala. 355, 27 So. 551, 82 Am. St. Rep. 175; *Ellis v. Martin*, 60 Ala. 394. **Alaska.** — *Osgood v. Donnelly*, 1 Alaska 385. **Cal.** — *California Sav. & Loan Soc. v. Harris*, 111 Cal. 133, 43 Pac. 525; *Ontario State Bank v. Tibbits*, 80 Cal. 68, 22 Pac. 66; *Southern Pac. R. Co. v. Purcell*, 77 Cal. 69, 18 Pac. 886; *Phillips v. Goldtree*, 74 Cal. 151, 13 Pac. 313; *Sweeney v. Stanford*, 67 Cal. 635, 8 Pac. 444; *Eustace Trenor v. C. P. R. Co.*, 50 Cal. 222; *Bernheim Dist. Co. v. Elmore* (Cal. App.), 106 Pac. 720. **Colo.** — *Watson v. Lemen*, 9 Colo. 200, 11 Pac. 88. **Ga.** — *Carr v. State*, 106 Ga. 737, 32 S. E. 844; *Realty Co. v. Ellis*, 4 Ga. App. 402, 61 S. E. 832. **Ind.** — *Eel River R. Co. v. State ex rel. Kistler*, 143 Ind. 231, 42 N. E. 617; *Curtis v. Gooding*, 99 Ind. 45; *Johnson v. Miller*, 47 Ind. 376, 17 Am. Rep. 699; *Wade v. State*, 37 Ind. 180; *Ragan v. Haynes*, 10 Ind. 348; *Indianapolis St. R. Co. v. Seerley*, 35 Ind. App. 467, 72 N. E. 169, 1034. **Iowa.** — *Allison v. Chicago & N. W. R. Co.*, 42 Iowa 274, 286; *Meunch v. Breitenbach*, 41 Iowa 527; *Rawson v. Guiberson*, 6 Iowa 507. **Kan.** — *Bliss v. Burnes*, McCahon 91. **Ky.** — *Scottish Union etc. Ins. Co. v. Strain*, 24 Ky. L. Rep. 958, 70 S. W. 274. **Mo.** — *Bernecker v. Miller*, 44 Mo. 102. **Neb.** — *Kyd v. Exchange Bank*, 56 Neb. 557, 76 N. W. 1058; *Burlington Voluntary Relief Dept. v. Moore*, 52 Neb. 719, 73 N. W. 15; *Herbert v. Wortendyke*, 49 Neb. 182, 68 N. W. 350; *Hurlbert v. Palmer*, 39 Neb. 158, 57 N. W. 1019; *Hall v. Strode*, 19 Neb. 658, 28 N. W. 312. **N. Y.** — *Styles v. Fuller*, 101 N. Y. 622, 4 N. E. 348; *Burnside v. Matthews*, 54 N. Y. 82; *Meinhardt v. Excelsior Brew. Co.*, 82 App. Div. 627, 81 N. Y. Supp. 1042; *Isear v. Hoadley*, 44 App. Div. 161, 60 N. Y. Supp. 609; *Ansorge v. Kaiser*, 22 Abb. N. C. 305, 3 N. Y. Supp. 785; *Wright v. Maseras*, 56 Barb. 521; *Hornfager v. Hornfager*, 6 How. Pr. 13. **N. C.** — *Alexander v. Norwood*, 118 N. C. 381, 24 S. E. 119; *Curtis v.*

*Piedmont Lumb. & M. Co.*, 109 N. C. 401, 13 S. E. 944; *Montague v. Brown*, 104 N. C. 161, 10 S. E. 186; *Blackwell v. Dibbrell*, 103 N. C. 270, 9 S. E. 192; *Silver Val. Min. Co. v. Baltimore, etc. Co.*, 99 N. C. 445, 6 S. E. 735; *Hawkins v. Hughes*, 87 N. C. 115; *Smith v. Moore*, 79 N. C. 82. **Ohio.** — *Allen v. Miller*, 11 Ohio St. 374; *Smith v. Smith*, 21 Cin. L. Bul. 295, 10 Ohio Dec. (Reprint) 494; *Berger v. Moessinger*, 5 Ohio C. C. 432. **Ore.** — *Sutherland v. Bloomer*, 50 Ore. 398, 93 Pac. 135; *Fiore v. Ladd*, 29 Ore. 528, 46 Pac. 144; *Elder v. Rourke*, 27 Ore. 363, 41 Pac. 6. **S. C.** — *Kiddell v. Bristow*, 67 S. C. 175, 45 S. E. 174; *Comstock v. Alexander*, 2 Spear 274. **Tex.** — *Brooks v. Galveston City R. Co.* (Tex. Civ. App.), 74 S. W. 330; *Ackermann v. Ackermann Schnetzen Verein* (Tex. Civ. App.), 60 S. W. 366. **Va.** — *Hilton & Allen v. Consumers Can Co.*, 103 Va. 255, 48 S. E. 899. **W. Va.** — *Pennington v. Gillaspie*, 63 W. Va. 541, 61 S. E. 416. **Wis.** — *E. M. Fish Co. v. Young*, 127 Wis. 149, 106 N. W. 795; *Vincent v. Starks*, 45 Wis. 458; *Dutcher v. Dutcher*, 39 Wis. 651; *Millett v. Hayford*, 1 Wis. 401.

Under a statutory enactment providing that the defendant may demur where it is apparent from the complaint that there is a misjoinder of parties plaintiff, and where there is a defect of parties, plaintiff or defendant, a misjoinder of defendants is not ground for demurrer because "defect" refers to an omission and not to a misjoinder. *Adams v. Slingerland*, 87 App. Div. 312, 84 N. Y. Supp. 323; *Tew v. Wolfsohn*, 77 App. Div. 454, 79 N. Y. Supp. 286.

**Waiver of Plea.** — See *infra*, VI, "Timeliness, Order and Waiver of Pleas."

49. **U. S.** — *Wickliffe v. Owings*, 17 How. 47, 15 L. ed. 44; *Livingston's Exr. v. Story*, 11 Pet. 351, 9 L. ed. 746; *United States v. American Bell Tel. Co.*, 29 Fed. 17; *Sharon v. Hill*, 26 Fed. 722; *United States v. Gillespie*, 6 Fed. 722. **N. Y.** — *Cummins v. Bennett*, 8 Paige 79. **Vt.** — *Battell v. Matot*, 58 Vt. 271, 5 Atl. 479.

Compare *Duke v. Duke*, 70 N. J. Eq. 135, 62 Atl. 466, holding that an ob-

by motion.<sup>50</sup> In this the federal courts are governed by the 39th equity rule adopted by the supreme court.

**Objections Taken by Motion.**—In some jurisdictions a motion to abate is proper when the essential facts of the defect relied upon appear by an inspection of the record.<sup>51</sup>

**2. In Criminal Actions.**—Generally defects and irregularities apparent and not apparent on the face of the information or indictment must be taken advantage of by plea in abatement.<sup>52</sup> In some

jection to the jurisdiction of the person may be taken by plea, to the jurisdiction over the subject-matter, by answer.

**Defect of Parties May Be Raised in Answer.**—The fifty-second equity rule prescribed by the United States supreme court, makes provision for such a speedy disposition of all suggestions in the answer in regard to defective parties that no necessity exists for a plea. *United States v. Gulespie*, 6 Fed. 803.

50. *Blankenship v. Blackwell*, 124 Ala. 355, 27 So. 551; 82 Am. St. Rep. 175; *Guarantee Co. v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909.

51. **U. S.**—*United States v. American Bell Tel. Co.*, 29 Fed. 17; *Walker v. Flint*, 2 McCrary 341. **Ala.**—*Blankenship v. Blackwell*, 124 Ala. 355, 27 So. 551, 82 Am. St. Rep. 175. **Colo.**—*Western Union Tel. Co. v. Claymore*, 2 Colo. 32; *Cody v. Raymond*, 1 Colo. 272. **Conn.**—*Bishop v. Vose*, 27 Conn. 1. **Fla.**—*Campbell v. Chaffee*, 6 Fla. 724. **Ga.**—*Central R. Co. v. Coleman*, 88 Ga. 294, 14 S. E. 382; *Killen v. Compton*, 57 Ga. 63. **Ill.**—*Willard v. Zehr*, 215 Ill. 148, 74 N. E. 107; *Greer v. Young*, 120 Ill. 184, 191, 11 N. E. 167; *Holton v. Daly*, 106 Ill. 131; *Holloway v. Freeman*, 22 Ill. 197. **Ia.**—*Funk v. Isreal*, 5 Iowa 438. **Me.**—*Hibbard v. Newman*, 101 Me. 410, 64 Atl. 720; *Mansur v. Coffin*, 54 Me. 314; *Badger v. Towle*, 48 Me. 20; *Chamberlain v. Lake*, 36 Me. 388; *Cook v. Lothrop*, 18 Me. 260. **Md.**—*Gitting v. State*, 33 Md. 458; *Hamilton v. State*, 32 Md. 348. **Mass.**—*Crosby v. Harrison*, 116 Mass. 114; *Haynes v. Saunders*, 11 Cush. 537; *Brown v. Weber*, 6 Cush. 560; *Amidown v. Peck*, 11 Mete. 467; *Nye v. Liscombe*, 21 Pick. 263. **N. H.**—*Educational Society v. Varney*, 54 N. H. 376; *Crawford v. Crawford*, 44 N. H. 428. **Tenn.**—*Padgett v. Ducktown Sulphur, etc. Co.*,

97 Tenn. 690, 37 S. W. 698; *Wiley v. Roiden*, 2 Baxt. 227; *Armstrong v. Harrison*, 1 Head 379. **Vt.**—*Gustin v. Carpenter*, 51 Vt. 585; *Bent v. Bent*, 43 Vt. 42; *Bliss v. Smith*, 42 Vt. 198; *Howard v. Walker*, 39 Vt. 163; *Bennett v. Allen*, 30 Vt. 684; *Washburn v. Hammond*, 25 Vt. 648; *Connecticut, etc. R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181; *Bliss v. Connecticut & P. R. Co.*, 24 Vt. 428; *Culver v. Balch*, 23 Vt. 618. **Va.**—*Hilton v. Consumer's Can. Co.*, 103 Va. 255, 48 S. E. 899. **W. Va.**—*Netter-Oppenheimer & Co. v. Elfant*, 63 W. Va. 99, 59 S. E. 892.

52. **U. S.**—*United States v. Wells*, 163 Fed. 313. **Ga.**—*Johnson v. State* (Ga. App.), 67 S. E. 224. **Ind.**—*Pointer v. State*, 89 Ind. 255; *Uterburgh v. State*, 8 Blackf. 202. **Me.**—*State v. Maher*, 49 Me. 569. **Mich.**—*Washburn v. People*, 10 Mich. 372. **Mo.**—*State v. Firey*, 122 S. W. 1007. **Neb.**—*Whitner v. State*, 46 Neb. 144, 64 N. W. 704. **N. C.**—*State v. Burton*, 138 N. C. 575, 50 S. E. 214.

**Mode of presentation cannot be questioned** after plea filed and issue taken thereon. *Nordan v. State*, 143 Ala. 13, 39 So. 406. See also *United States v. Wells*, 163 Fed. 313.

**Leading Case.**—In *Vanhook v. State*, 12 Tex. 252, it was said as a result of the authorities, that irregularities in impanelling and selecting the grand jury can be taken advantage of, in general, only by a challenge to the array, but that incompetency or want of qualifications of the jurors may be pleaded in abatement. See also *Crowley v. United States*, 194 U. S. 461, 24 Sup. Ct. 731, 48 L. ed. 1075.

**Exception Equivalent to Plea.**—*Wolf v. Willingham* (Tex. Civ. App.), 107 S. W. 60.

**Before federal grand juries**, state statutes control the practice, in the absence of federal enactment, but where a state statute fails to point out any



jurisdictions a motion to quash is equivalent to a plea in abatement,<sup>53</sup> and in others the plea in abatement has been abolished.<sup>54</sup>

**B. CONCURRENT PLEAS. — 1. In Abatement.** — a. *At Common Law.* Under the common law it was irregular to file two separate pleas of abatement contemporaneously, when inconsistent with each other.<sup>55</sup>

b. *Under the Codes and Statutes.* — Under the code practice several pleas in abatement may be pleaded at the same time.<sup>56</sup>

**2. In Bar and Abatement.** — At common law and even under the codes and statutes of some states, pleas in bar and abatement cannot be successfully joined, joinder constituting a waiver of the right to rely on the matter in abatement.<sup>57</sup> But under the code practice in most states, and under the statutes of a few others, where a defendant

method whereby a particular question may be raised, a plea in abatement is proper if generally authorized in such cases. *United States v. Wells*, 163 Fed. 313.

**53. Ky.** — *Com. v. Smith*, 10 Bush 476. **Md.** — *Pontier v. State*, 107 Md. 384, 68 Atl. 1059. **Mo.** — *State v. Bishop*, 22 Mo. App. 435. **N. C.** — *State v. Paramore*, 146 N. C. 604, 60 S. E. 502. **Wyo.** — *Nicholson v. State*, 106 Pac. 929.

**Motion to Quash Simpler Course.** — *Washburn v. People*, 10 Mich. 372.

**54. People v. Hoogkerk**, 96 N. Y. 149; *People v. Scannell*, 36 Misc. 483, 73 N. Y. Supp. 1067; *People v. Petrea*, 30 Hun 98, *affirmed*, 92 N. Y. 128.

**55.** "By the order of pleading, a plea to the jurisdiction is the first plea to be interposed, and therefore it must precede a plea in abatement, because the latter impliedly admits jurisdiction, which the defendant is therefore afterwards precluded from denying. Hence the defendant below, if he had intended to rely upon a want of jurisdiction in the city court, should have pleaded only to the jurisdiction, and if that plea was overruled, then interposed his plea in abatement, instead of pleading, in connection with the first, the latter plea, by which the fact of jurisdiction denied in the first was admitted. There is an obvious incongruity in trying at the same time an issue or issues which both admit and deny that the court has jurisdiction of the case. The question of jurisdiction should be first determined. The effect of the plea in abatement in this case, as it admitted the jurisdiction of the court, was, in our opinion, to supersede

or waive the matters set up in the plea to the jurisdiction; and the latter plea was therefore properly disregarded or overruled; and the authorities on this subject decisively sustain this conclusion." *Sherwood v. Stevenson*, 25 Conn. 431. And see *Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. ed. 699; *Wells v. Patton*, 50 Kan. 732, 33 Pac. 15.

**56. Rice v. Patterson**, 92 Miss. 666, 46 So. 255; *James v. Dowell*, 7 Smed. & M. (Miss.) 333; *Pharis v. Conner*, 3 Smed. & M. (Miss.) 87.

**Order of Pleading.** — An attack on the writ should precede a plea of privilege to be sued in another county. *Texas, etc. R. Co. v. Lynch* (Tex. Civ. App.) 73 S. W. 65.

**In Vermont** the statute authorizing several pleas does not extend to pleas in abatement. *Culver v. Balch*, 23 Vt. 618.

**57. U. S.** — *Marshall v. Otto*, 59 Fed. 249; *Oregonian R. Co. v. R. and Nav. Co.*, 27 Fed. 277; *Jordan v. Wilkens*, 3 Wash. C. C. 110, 13 Fed. Cas. No. 7, 527; *Dowell v. Cardwell*, 4 Sawy. 217, 7 Fed. Cas. No. 4,039; *Adams v. White*, 2 Pittsb. R. 21, 1 Fed. Cas. No. 68. **Ala.** — *Hart v. Turk*, 15 Ala. 675; *Cleveland v. Chandler*, 3 Stew. 489. **D. C.** — *Robinson v. Parker*, 11 App. Cas. 132. **Ind.** — *Carmien v. Cornell*, 148 Ind. 83, 47 N. E. 216; *Smith v. Pedigo*, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433; *Moore v. Sargent*, 112 Ind. 484, 14 N. W. 466; *Glidden v. Henry*, 104 Ind. 278, 1 N. E. 369, 54 Am. Rep. 316; *Dwiggins v. Clark*, 94 Ind. 57; *Kenyon v. Williams*, 19 Ind. 44; *Carpenter v. Mercantile Bank*, 17 Ind. 253; *Huntington Mfg. Co. v. Schofield*, 23

is allowed to include in his answer all defenses he may have, he may join a plea in abatement with a plea in bar.<sup>58</sup> Matter in abatement

Ind. App. 95, 62 N. E. 106; Voluntary Relief Dept. v. Spencer, 17 Ind. App. 123, 46 N. E. 477; Midland R. Co. v. Stevenson, 6 Ind. App. 207, 33 N. E. 254. But see Thompson v. Greenwood, 28 Ind. 327; Jones v. Foundry Co. 14 Ind. 89. **La.**—Robbins v. Martin, 43 La Ann. 488, 9 So. 108; Mix v. Creditors, 39 La. Ann. 624, 2 So. 391. But see Tupery v. Edmondson, 32 La. Ann. 1146; McGuire v. Peck, 14 La. 187; Segrest v. Hood, 1 Rob. 108. **Md.**—Glenn v. Williams, 60 Md. 93; Cruzen v. McKaig, 57 Md. 454; Deheaulme v. Boisenf, 4 H. & M. 413. **Miss.**—Dean v. McKinstry, 2 Smed. & M. 213; Pearce v. Young, Walker 259. **N. J.**—Kerr v. Willetts, 48 N. J. L. 78, 2 Atl. 782; Ewald v. Ortynsky (N. J. Eq.), 75 Atl. 577. **Pa.**—Lindsley v. Malone, 23 Pa. 24; Bldg. & Loan Assn. v. Fire Ins. Co., 23 Pa. Super. 88.

**Compare** McConkey v. Slate Co., 14 Pa. Co. Ct. 514, holding that in case a plea in abatement and in bar are filed contemporaneously, all benefit of the former being reserved in the latter, the matter in abatement is not waived. **Tenn.**—Southern R. Co. v. Brigman, 95 Tenn. 624, 32 S. W. 762; Douglass v. Belcher, 7 Yerg. 105. **Can.**—Shore v. Green, 6 Manitoba 322; Brown v. York Co., 8 Ont. Pr. 139.

**Rule Applicable Though Plea in Bar Not Good.**—Lowry v. Kinsey, 26 Ill. App. 309.

Under the Oregon code a denial of plaintiff's citizenship is frivolous when joined with matter in bar. Gager v. Harrison, 9 Fed. Cas. No. 5,171.

In Massachusetts a contrary rule has been generally adhered to for over a century. In O'Loughlin v. Bird, 123 Mass. 600, which expressly overruled the cases of Morton v. Sweetser, 12 Allen (Mass.) 134, and Pratt v. Sanger, 4 Gray (Mass.) 84, the court, citing many Massachusetts cases in support of the doctrine, said: "If a defendant pleads in abatement of the writ, and to the merits of the action, in the proper order, the fact that both pleas are filed at the same time, and even upon the same paper, does not, in this Commonwealth, operate as a waiver of the plea in abatement, if seasonably filed.

This mode of pleading is often convenient to both parties; to the defendant by stating, and to the plaintiff by giving him notice of, all the defences on which the defendant intends successively to rely, if the trial and judgment upon the first shall not dispose of the whole case; and it is sanctioned by a usage of more than a century."

**58. U. S.**—Platt v. Cole, 5 Fed. 260. **Ark.**—Union Guaranty etc. Co. v. Craddock, 59 Ark. 593, 28 S. W. 424; Erb v. Perkins, 32 Ark. 428. But see Johnson v. Killian, 6 Ark. 172. **Cal.**—Baldwin v. Second St. Cable R. Co., 77 Cal. 390, 19 Pac. 644; Swamp, etc. Land Dist. v. Teek, 60 Cal. 403; Hastings v. Stark, 36 Cal. 123. **Fla.**—E. O. Painter Fertilizer Co. v. Du Pont, 56 Fla. 511, 45 So. 928. But see Putnam Lumb. Co. v. Ellis-Young Co., 50 Fla. 251, 39 So. 193, decided before the enactment of the statute of 1907. **Ia.**—Moffitt v. Chicago Chronicle Co., 107 Iowa 407, 78 N. W. 45. **Minn.**—Page v. Mitchell, 37 Minn. 368, 34 N. W. 896. **Mo.**—State v. Gieseke, 209 Mo. 331, 108 S. W. 525; Little Rock Tr. Co. v. Southern Missouri, etc. R. Co., 195 Mo. 669, 93 S. W. 944; Meyer v. Phoenix Ins. Co., 184 Mo. 481, 83 S. W. 479, affirming 95 Mo. App. 721, 69 S. W. 639; Johnson v. Detrick, 152 Mo. 243, 53 S. W. 891; Christian v. Williams, 111 Mo. 429, 20 S. W. 96; Cohn v. Lehman, 93 Mo. 574, 6 S. W. 267 (expressly disapproving Moody v. Deutsch, 85 Mo. 237); Byler v. Jones, 79 Mo. 261; Norvell v. Porter, 62 Mo. 309; Wiececarver v. Mercantile Ins. Co., 137 Mo. App. 247, 117 S. W. 698, (explaining Little v. Harrington, 71 Mo. 390, which expressly overruled Rippstein v. St. Louis Mut. L. Ins. Co. 57 Mo. 86; Fordyce v. Hathorn, 57 Mo. 120, and holding that pleas in abatement and in bar can only be joined when the grounds of abatement are extraneous to the record); McIntire v. Calhoun, 27 Mo. App. 513; Roberts v. State Ins. Co., 26 Mo. App. 92; Thompson v. Bronson, 17 Mo. App. 456. **Neb.**—Templin v. Kimsey, 74 Neb. 614, 105 N. W. 89; Herbert v. Wortendyke, 49 Neb. 182, 68 N. W. 350 (extraneous matter in abatement properly joined); Hurlburt v. Palmer,

should be separately and distinctly stated when joined with matter in bar,<sup>59</sup> and should precede the latter.<sup>60</sup>

In equity practice in the federal courts a plea in abatement can be filed with a plea in bar.<sup>61</sup>

**V. REQUISITES AND SUFFICIENCY OF PLEAS.** — A. AS TO FORM. — 1. In General. — Since pleas in abatement are not favored, correctness of form is a matter of substance and any defect of form is fatal;<sup>62</sup> but it has been held that a plea in abatement to an indict-

39 Neb. 158, 57 N. W. 1019. **N. Y.** — *Gardner v. Clark*, 21 N. Y. 399, reversing 6 How. Pr. 449; *Sweet v. Tuttle*, 14 N. Y. 465; *Peck v. Kirtz*, 15 N. Y. St. 598; *Bridge v. Payson*, 5 Sandf. 210; *Groshons v. Lyons*, 1 Code Rep. 348, 16 Barb. 461. **Ore.** — *Lassas v. McCarty*, 47 Ore. 474, 84 Pac. 76; *Oregon Cascade R. Co. v. Bailey*, 3 Ore. 164; *Oregon Cent. R. Co. v. Scoggin*, 3 Ore. 161; *Hopwood v. Patterson*, 2 Ore. 49. **R. I.** — *Hayden v. Stone*, 13 R. I. 106. **Tenn.** — *Thach v. Mutual Acc. Assn.* 114 Tenn. 271, 87 S. W. 255. **Tex.** — *Hagood v. Dial*, 43 Tex. 625. **W. Va.** — *Maupin v. Scottish U. & N. Ins. Co.*, 53 W. Va. 557, 45 S. E. 1003. **Wis.** — *Crowns v. Forest Land Co.*, 99 Wis. 103, 74 N. W. 546 (where the same matter is pleaded both in abatement and in bar, the latter overrides the former); *Raymond v. Sheboygan*, 70 Wis. 318, 35 N. W. 540; *Hooker v. Green*, 50 Wis. 271, 6 N. W. 816; *County v. Van Stralen*, 45 Wis. 678; *Dutcher v. Dutcher*, 39 Wis. 651; *Freeman v. Carpenter*, 17 Wis. 126.

In *Green v. City of Tacoma*, 53 Fed. 562, the court discussing the Washington procedure said: "According to my understanding of the decision in *Roberts v. Lewis*, [144 U. S. 653, 12 Sup. Ct. 781, 36 L. ed. 579] rule 7 of this court, which requires matter in abatement to be pleaded separately before answering to the merits, is not applicable to actions at common law."

**Reason for Statutory Changes.** — The delay and inconvenience incident to presenting pleas in successive order led to statutory changes to facilitate the disposition of cases. *E. O. Painter Fertilizer Co. v. DuPont*, 54 Fla. 288, 45 So. 507.

**Same Defense Cannot Be Pleaded in Abatement and in Bar.** — *Hooker v.*

*Green*, 50 Wis. 271, 6 N. W. 816; *Dutcher v. Dutcher*, 39 Wis. 651, 661.

A plea of tender is a plea to the merits within the meaning of the Tennessee statute and may be pleaded with a plea in abatement. *Cincinnati, etc. R. Co. v. McCollum*, 105 Tenn. 623, 59 S. W. 136.

Under the Mississippi code if a plea in bar and one in abatement be joined, the opposite party is entitled to judgment as for want of proper pleading. *Rice v. Patterson*, 92 Miss. 666, 46 So. 255.

In Iowa the joining of a plea in abatement with a plea in bar is expressly authorized by statute, but it is held that it is only a good plea in abatement which can be so joined. *Moffitt v. Chicago Chronicle Co.*, 107 Iowa 407, 78 N. W. 45.

In Michigan by rule of court it is permissible to join a plea in abatement with the general issue. *National Fraternity v. Wayne Circuit Judge*, 127 Mich. 186, 86 N. W. 540.

59. *Bray v. Peace*, 131 Ga. 637, 62 S. E. 1025.

60. **Ind.** — *Jones v. Foundry Co.*, 14 Ind. 89. **La.** — *Tupery v. Edmondson*, 32 La. Ann. 1146. **R. I.** — *Hayden v. Stone*, 13 R. I. 106; *Gardner v. James*, 5 R. I. 235.

61. See United States Equity Rule 32, *Rose's Code of Fed. Proc.*, Vol. 2, p. 1792. This is not the general equity rule. *Tyler v. E. G. Bernard Co. (Tenn. Ch.)*, 57 S. W. 179.

62. *Switzer v. State (Ga.)*, 65 S. E. 1079 (plea held sufficient in form); *Sutherland v. Bloomer*, 50 Ore. 398, 93 Pac. 135.

Plea of another action pending is more favorably regarded than mere dilatory pleas. Notwithstanding this, it must be accurate. **U. S.** — *Dred Scott*



ment need not be worded with the strictest technical and verbal accuracy;<sup>63</sup> although great strictness is required in framing it.<sup>64</sup>

**2. Must Be in Writing.**—A plea in abatement must be in writing; an oral plea will not be entertained.<sup>65</sup>

**3. Entitling Cause.**—When a dilatory plea is filed, the law requires the strictest technicality, in the title of the cause, the court, and term, and time, and everything which serves to identify it with the cause in which it is intended to be filed.<sup>66</sup> It has been held, however, that in the title of the case it is sufficient to give the name of the defendant alone,<sup>67</sup> though if the name of one only of several defendants is stated with the additional words *et al* this has been decided insufficient by the same court.<sup>68</sup>

**4. Entitling Plea.**—By the rules of interpretation that prevail under the codes, the court does not look to the name given to any pleading, but to the facts set forth therein. It is therefore unnecessary that a plea in abatement should be expressly entitled as such.<sup>69</sup>

**5. Commencement.**—No formal commencement is necessary.<sup>70</sup>

*v. Sanford*, 19 How. 393, 15 L. ed. 691. Conn.—Gould *v. Smith*, 30 Conn. 88. Ill.—Buckles *v. Harlan*, 54 Ill. 361. Mich.—O'Brien *v. Alpena Circuit Judge*, 106 Mich. 42, 63 N. W. 997. Eng.—Roberts *v. Moon*, 5 T. R. 487, 101 Eng. Reprint 274.

See *infra*, title “Another Action Pending.”

63. Lindsey *v. State*, 69 Ohio St. 215, 69 N. E. 126.

64. United States *v. Greene*, 113 Fed. 683; Davids *v. People*, 192 Ill. 176, 61 N. E. 537.

65. Ala.—Crawford *v. State*, 112 Ala. 1, 21 So. 214. Ark.—Hardwick *v. Campbell & Co.*, 7 Ark. 118. Ga.—Bishop *v. Woodward*, 103 Ga. 281, 29 S. E. 968. Mass.—Osborn *v. Osborn*, 114 Mass. 516. See Jacobs *v. Mellen*, 14 Mass. 132. N. H.—Morse *v. Calley*, 5 N. H. 222. S. C.—State *v. Farr*, 12 Rich. 24. Tenn.—Crutchfield *v. Durando*, 3 Lea 68; Grove *v. Campbell*, 9 Verg. 7.

Before justices or in suits originating before them and carried to a higher tribunal, pleas in abatement are *ore tenus*, except in cases where they are required to be under oath. Neville *v. Northcutt*, 7 Coldw. (Tenn.) 294.

66. Davids *v. People*, 192 Ill. 176, 61 N. E. 537; Fowler *v. Arnold*, 25 Ill. 284; Holloway *v. Freeman*, 22 Ill. 197; Bellamy *v. Oliver*, 65 Me. 108.

The use of the contraction “vs.” between the names of the parties to the

cause, is proper and quite as appropriate as the word “against” could be, and the title of the cause is not open to the objection that it is not wholly in the English language. Smith *v. Butler*, 25 N. H. 521. See further title “Abbreviations.”

67. Cook *v. Yarwood*, 41 Ill. 115.

68. Fowler *v. Arnold*, 25 Ill. 284.

69. Whelan *v. Rio Grande W. R. Co.*, 111 Fed. 326. But see Bray *v. Peace*, 131 Ga. 637, 62 S. E. 1025.

Plea in abatement treated as answer in abatement where it is such in substance. Whelan *v. Rio Grande W. R. Co.*, 111 Fed. 326.

70. Prim *v. Davis*, 2 Ala. 24; National Parlor Furn. Co. *v. Strauss*, 75 Ill. App. 276, 279.

But see Miss.—Proskey *v. West*, 8 Smed. & M. 711. N. Y.—Shaw *v. Dutcher*, 19 Wend. 216, no objection that the word “prays,” a singular instead of a plural verb, is used in the introductory prayer. Eng.—Harris *v. Reynolds*, 7 Q. B. 71, 53 E. C. L. 69.

**Commencement Held Sufficient.**—“And defendant comes and says that he is in no wise guilty of the trespass aforesaid.” McLaughlin *v. De Young*, 3 Gill & J. (Md.) 4.

**Approved Form.**—“And —, against whom the plaintiffs have issued their original writ,” is the usual mode of commencing a plea in abatement. Docker *v. King*, 5 Taunt. 652, 1 E. C. L. 222. **Approved Form in Plea of Mis-**



**6. Conclusion.** — a. *In General.* — Except as otherwise provided by statute,<sup>71</sup> a prayer for judgment is essential.<sup>72</sup> But it has been held that a plea cannot be defeated because of a defective prayer.<sup>73</sup> Where the only defect complained of is in the service of the writ, a conclusion by praying judgment of the writ alone is sufficient.<sup>74</sup> But the fact that the prayer is for judgment of the declaration as well as the writ is but a circumstantial defect, if any.<sup>75</sup>

Where a plea is to the entire proceedings or to part of the writ and some of the counts of the declaration, it is not defective because praying judgment both of the declaration and writ.<sup>76</sup>

Where under statute the declaration is a necessary part of the writ a plea may conclude with a prayer of judgment of the writ, although the fault is not in that part which is given in the writ, but in the declaration.<sup>77</sup>

b. *Form.* — (I.) *In General.* — The form frequently used is that the "writ,"<sup>78</sup> or "declaration,"<sup>79</sup> or that the "writ and declaration" may be quashed;<sup>80</sup> though if a plea is for plaintiff's disability, it should

nomer. — "And Basil W., against whom the said plaintiffs have exhibited their said declaration by the name of Baswell W., comes and defends," etc., a plea of this nature commencing "and the said Basil W." is bad on special demurrer as defendant admits himself to be the person sued. *Hyde v. Watson*, 1 Denio (N. Y.) 670.

71. In many code states where matters of abatement may be raised by answer, it is unnecessary to conclude the answer with a prayer. See the codes and statutes of the various states.

72. *Ala.* — *Lyles v. Clements*, 49 *Ala.* 445. *Ark.* — *Wade v. Bridges*, 24 *Ark.* 569; *Lownes, Orgill & Co. v. Brown*, 22 *Ark.* 359. *Conn.* — *Mitchell v. Smith*, 74 *Conn.* 125, 49 *Atl.* 909; *Coughlin v. McElroy*, 72 *Conn.* 444, 44 *Atl.* 743. *Ill.* — *Chicago, etc. R. Co. v. Jenkins*, 103 *Ill.* 588; *Buckles v. Harlan*, 54 *Ill.* 361; *Ross v. Nesbit*, 7 *Ill.* 252. *Me.* — *Cassidy v. Holbrook*, 81 *Me.* 589, 18 *Atl.* 290 (holding a prayer of "judg. of said writ" to be defective); *Fahy v. Brannagan*, 56 *Me.* 42; *Hazzard v. Haskell*, 27 *Me.* 549. *N. H.* — *Yelverton v. Conant*, 18 *N. H.* 123; *Clark v. Brown*, 6 *N. H.* 434; *Pike v. Bagley*, 4 *N. H.* 76 (holding the conclusion "wherefore, etc." to be insufficient). *N. Y.* — *Harkness v. Harkness*, 5 *Hill* 213; *Shaw v. Dutcher*, 19 *Wend.* 216; *Haywood's Exrs. v. Chestney*, 13 *Wend.* 495. *R. I.* — *Bullock v. Bolles*, 9 *R. I.* 501.

*Eng.* — *Bowyer v. Cook*, 5 *Mod.* 145, 87 *Eng. Reprint* 573.

73. *Brooks v. Patterson*, 1 *Johns. Cas.* (N. Y.) 328; *Gray v. Flowers*, 24 *Vt.* 533.

See also the codes and practice acts of the various states.

74. *Colburn v. Tolles*, 13 *Conn.* 524.

75. *Draper v. Moriarty*, 45 *Conn.* 476.

76. *Edmondson v. Carnall*, 17 *Ark.* 284; *Southard v. Hill*, 44 *Me.* 92, 69 *Am. Dec.* 85.

77. *Brigham v. Este*, 2 *Pick.* (Mass.) 420; *Hsley v. Stubbs*, 5 *Mass.* 280.

78. *Ala.* — *Banks v. Lewis*, 4 *Ala.* 599.

*Ill.* — *Buckles v. Harlan*, 54 *Ill.* 361.

*S. C.* — *Blair v. Thomas*, *Dud.* 288.

A prayer "that defendant is not bound to answer" is sufficient. *Blair v. Thomas*, *Dud.* (S. C.) 288.

A plea for defective service of a writ of error is properly concluded by praying judgment of the writ. *Colburn v. Tolles*, 13 *Conn.* 524.

For a variance of the writ and summons, a conclusion "Wherefore he prays judgment of the writ," etc., is sufficient. *Baker v. Brown*, 18 *N. H.* 551.

79. *Blair v. Thomas*, *Dud.* (S. C.) 288.

80. *Ark.* — *Edmondson v. Carnall*, 17 *Ark.* 284. *Conn.* — *Draper v. Moriarty*, 45 *Conn.* 476. *Me.* — *Southard v. Hill*, 44 *Me.* 92, 69 *Am. Dec.* 85.

variance between writ and declaration, prayer "of the writ and declara-

conclude with a prayer for judgment whether the defendant ought to be compelled to answer.<sup>81</sup>

If the death of one of the parties is alleged the prayer should be for judgment whether the court will proceed further.<sup>82</sup>

A plea to the jurisdiction should conclude asking judgment whether the court should take cognizance of the suit or if the defendant ought to answer.<sup>83</sup>

**Conclusion to the Country.**—A plea in abatement, traversing the causes of attachment set out in an affidavit, properly concludes to the country.<sup>84</sup>

In criminal cases the plea should conclude with a prayer that the information or indictment be quashed.<sup>85</sup>

(II.) **Form Dependent on Kind of Process.**—Where suit is commenced by *capias*, prayer should be for judgment of the *plaint*; <sup>86</sup> and where by declaration, for judgment of the declaration.<sup>87</sup>

c. *Prayer Determinative of Character.*—Where matter in abatement concludes in bar it must be so treated; its character must be determined not from the subject matter of the plea, but from its conclusion.<sup>88</sup>

d. *Commencement and Conclusion With Prayer.*—A plea alleging matter extraneous to the writ is defective if it commences and also concludes with a prayer for judgment of the writ.<sup>89</sup> But a plea in abatement for intrinsic matters may,<sup>90</sup> and it has been held should,<sup>91</sup> both begin and conclude with a prayer of judgment.

**Conflict Between Commencing and Concluding Prayer.**—A plea is not defective because commencing with a prayer that the writ may be

tion and that the same may be quashed" is good. *Bonneau v. Dickenson & Co.*, 12 Ala. 475.

81. *West Feliciana R. Co. v. Johnson*, 3 How (Miss.) 273; *Rex v. Westby*, 10 East (Eng.) 85, note c.

When a temporary disability of the complainant to sue is pleaded the plea should conclude with a prayer, "that the bill shall remain without day until the disability be removed." *Beck v. Beck*, 36 Miss. 72.

82. *Knowles v. Rowell*, 8 N. H. 542.

83. Ala.—*Fields v. Walker*, 23 Ala. 163. Ill.—*Pooler v. Southwick*, 126 Ill. App. 204. N. H.—*Knowles v. Rowell*, 8 N. H. 542. Va.—*Horton v. Townes*, 6 Leigh 58. Eng.—*Bowyer v. Cook*, 5 Mod. 145, 87 Eng. Reprint 573.

84. *Boon v. Rahl*, 1 Heisk. (Tenn.) 14.

85. U. S.—*United States v. Hammond*, 2 Woods 197, 26 Fed. Cas. No. 15,294. Ala.—*State v. Middleton*, 5 Port. 484. Mich.—*Findley v. People*, 1 Mich. 234. Tenn.—*Lewis v. State*, 1 Head 329.

86. *Shaw v. Dutcher*, 19 Wend. (N. Y.) 216. Compare *Harkness v. Harkness*, 5 Hill (N. Y.) 213.

87. *Shaw v. Dutcher*, 19 Wend. (N. Y.) 216.

88. See *infra*, V, A, 7, notes 95, 96.

89. *Pike v. Bagley*, 4 N. H. 76; *Waterman v. Holmes*, 62 Vt. 463, 20 Atl. 729; *Smith v. Chase*, 39 Vt. 89; *Holden v. Scanlin*, 30 Vt. 177; *Gray v. Flowers*, 24 Vt. 533; *Landon v. Roberts*, 20 Vt. 286. See also *Foxwist v. Tremaine*, 2 Saund. 207, 85 Eng. Reprint 996. Compare *Wires v. Griswold*, 26 Vt. 97.

90. *Knowles v. Rowell*, 8 N. H. 542.

91. Me.—*Cassidy v. Holbrook*, 81 Me. 589, 18 Atl. 290. N. H.—*Pike v. Bagley*, 4 N. H. 76. Eng.—*Foxwist v. Tremaine*, 2 Saund. 207, 85 Eng. Reprint 996.

Compare *Knowles v. Rowell*, 8 N. H. 542, holding that the distinction between praying judgment in the beginning and conclusion of the plea, if the matter be apparent on the face of the writ, and of praying it only in the conclusion if it be *dehors*, is quite too

abated and concluding with a prayer that it may be quashed.<sup>92</sup> And it has been held that where a plea begins with a prayer for judgment of the writ and declaration and ends with a prayer for judgment of the writ alone, the prayer for judgment of the declaration should be treated as surplusage.<sup>93</sup>

e. *Under Code Practice*.—Under the code practice, an answer in abatement is not required to contain any prayer for the particular relief demanded, or any statement as to what he may consider to be the legal effect of the facts he sets up.<sup>94</sup>

7. **Beginning and Conclusion Determinative of Character**.—The beginning and conclusion of a plea are usually determinative of its character. The weight of authority is to the effect that a plea cannot be in abatement unless the commencement and conclusion each conforms to the requirement for such pleas;<sup>95</sup> although it has been held that the conclusion is determinative of the character of a plea without reference to the commencement.<sup>96</sup> As a rule the subject-matter cannot be looked to,<sup>97</sup> although the rule is otherwise in Alabama.<sup>98</sup>

8. **Waiver of Objections to Form**.—Setting a plea down for argument is a waiver of all objection to its form.<sup>99</sup>

9. **Verification**.—As a rule a plea in abatement should be verified

fanciful to be supported. "No sound reason can be shown why it was ever adopted, even in the days when great nicety was required."

92. *Lyman v. Dodge*, 13 N. H. 197.

93. *Buckles v. Harlan*, 54 Ill. 361. Compare *March v. Burns*, 1 U. C. C. P. 334, holding that where a plea commences with a prayer that the writ be quashed and concludes with a prayer that the declaration and writ be quashed, the plea is defective for the inconsistency.

94. *Dawley v. Brown*, 9 Hun (N. Y.) 461, reversed on other points, 79 N. Y. 390.

For a discussion of the forms of conclusion prior to the code, see *Harkness v. Harkness*, 5 Hill (N. Y.) 213; *Shaw v. Dutcher*, 19 Wend. (N. Y.) 216.

95. *Ala.*—*Goldsticker v. Stetson & Co.*, 21 Ala. 404; *Banks v. Lewis*, 4 Ala. 599. *Del.*—*Spencer v. Dutton*, 1 Har. 75. *Ill.*—*Pitts Sons' Mfg. Co. v. Commercial Nat. Bank*, 121 Ill. 582, 13 N. E. 156. *Mudge v. Rinkle*, 45 Ill. App. 612. *Ky.*—*Wickliffe v. Carroll*, 14 B. Mon. 169. *Md.*—*McLaughlin v. De Young*, 3 Gill & J. 4. *Mass.*—*Guild v. Richardson*, 6 Pick. 368. *Mich.*—*Findley v. People*, 1 Mich. 231. *N. J.*—*Garr v. Stokes*, 16 N. J. L. 405. *N. Y.*—*Exrs. of Schoonmaker v. El-*

*mendorf*, 10 Johns. 49. *Ore.*—*Sutherland v. Bloomer*, 50 Ore. 398, 93 Pac. 135. *Tenn.*—*Hargis v. Ayres*, 8 Yerg. 467. *Vt.*—*Waterman v. Holmes*, 62 Vt. 463, 20 Atl. 729. *Eng.*—*Medina v. Stoughton*, 1 Ld. Raym. 593, 91 Eng. Reprint 1297.

96. *Shaw v. Dutcher*, 19 Wend. (N. Y.) 216; *Thomee v. Lloyd*, 1 Ld. Raym. 336, 91 Eng. Reprint 1120.

See also *supra*, V, A, 6, c, "Prayer Determinative of Character."

97. *Ill.*—*Pitts Sons' Mfg. Co. v. Commercial Nat. Bank*, 121 Ill. 582, 13 N. E. 156. *Ky.*—*Wickliffe v. Carroll*, 14 B. Mon. 169; *Leathers' Representatives v. Meglasson*, 2 T. B. Mon. 63. *Mass.*—*Guild v. Richardson*, 6 Pick. 368. *N. Y.*—*Shaw v. Dutcher*, 19 Wend. 216. *Ore.*—*Sutherland v. Bloomer*, 50 Ore. 398, 93 Pac. 135. *Eng.*—*Godson v. Good*, 6 Taunt. 587, 1 E. C. L. 492; *Medina v. Stoughton*, 1 Ld. Raym. 593, 91 Eng. Reprint 1297.

98. *Mohr v. Chaffe*, 75 Ala. 389; *Day v. Huckabee*, 60 Ala. 425. But see *Hart v. Turk*, 15 Ala. 675; *Casey v. Cleveland*, 7 Port. (Ala.) 445. See also the codes and practice acts of the various states.

99. *Computing Scale Co. v. Moore*, 139 Fed. 197.



to show the good faith of the pleader.<sup>1</sup> A verification, stating that the plea is true is sufficient without adding the words "in substance and in fact," although the use of the latter phrase is quite general.<sup>2</sup>

**B. AS TO SUBJECT-MATTER. — 1. In General.** — Dilatory pleas are not favored: in the language of the old cases they are odious. To state the degree of exactness and certainty to which a plea or answer in abatement must conform, various expressions have been employed. It has been frequently said that the least inaccuracy in pleas of this kind is fatal. Such a pleading is strictly construed against the pleader. It must allege every fact necessary to its sufficiency and must be certain, positive and direct. It cannot be aided by amendment or inference.<sup>3</sup> A plea in abatement is bad if it contains matter in bar.<sup>4</sup>

The same degree of accuracy and precision is usually required in criminal cases.<sup>5</sup>

1. *Ala.* — *Beverett v. State*, 156 *Ala.* 101, 47 *So.* 133. *Ill.* — *Grand Lodge etc. v. Randolph*, 186 *Ill.* 89, 57 *N. E.* 882. *Me.* — *Bellamy v. Oliver*, 65 *Me.* 108. *Wis.* — *Roby v. State*, 96 *Wis.* 667, 71 *N. W.* 1046.

For a full discussion of this subject, see title "Verification."

2. *Armstrong v. State*, 101 *Tenn.* 389, 47 *S. W.* 492.

3. *U. S.* — *Agnew v. United States*, 165 *U. S.* 36, 17 *Sup. Ct.* 235, 41 *L. ed.* 624; *Green v. Underwood*, 86 *Fed.* 427, 30 *C. C. A.* 162; *Computing Scale Co. v. Moore*, 139 *Fed.* 197; *Ehrman v. Teutonia Ins. Co.*, 1 *Fed.* 471, 1 *McCrary* 123. *Ala.* — *Karthauss v. Nashville etc. R.*, 140 *Ala.* 433, 37 *So.* 268; *Roberts v. Heim*, 27 *Ala.* 678. *Ark.* — *Clark v. Latham*, 25 *Ark.* 16. *Cal.* — *Larco v. Clements*, 36 *Cal.* 132; *Bernheim Dist. Co. v. Elmore* (*Cal. App.*), 106 *Pac.* 720. *Conn.* — *Miller v. Cross*, 73 *Conn.* 538, 48 *Atl.* 213; *Budd v. Meriden Elec. R. Co.*, 69 *Conn.* 272, 3 *Atl.* 683; *Clark v. Warner*, 6 *Conn.* 355; *Parsons v. Ely*, 2 *Conn.* 377; *Wadsworth v. Woodford*, 1 *Day* 280. *Ga.* — *Jester v. Bainbridge State Bank*, 4 *Ga. App.* 469, 61 *S. E.* 926. *Ill.* — *Willard v. Zehr*, 215 *Ill.* 148, 74 *N. E.* 107; *Nixon, Ellison & Co. v. S. W. Ins. Co.*, 47 *Ill.* 444. *Ind.* — *C. Callahan Co. v. Milling Co.*, 89 *N. E.* 418; *Musgrave v. State*, 133 *Ind.* 297, 32 *N. E.* 885; *Ohio Oil Co. v. Griest*, 30 *Ind. App.* 84, 65 *N. E.* 534. *Ia.* — *Dicks v. Cash*, 7 *Mart.* (*N. S.*) 362. *Me.* — *Hibbard v. Newman*, 101 *Me.* 410, 64 *Atl.* 720; *Hazzard v. Haskell*, 27 *Me.* 549. *Mich.* — *Dubois v. Hutchinson*, 40 *Mich.* 262. *N. Y.* —

*Haywood's Exrs. v. Chestney*, 13 *Wend.* 495. *R. I.* — *Capwell v. Sipe*, 17 *R. I.* 475, 23 *Atl.* 14, 33 *Am. St. Rep.* 890; *Ellis v. Ellis*, 4 *R. I.* 110. *Tenn.* — *Baker v. Compton*, 2 *Head* 471. *Tex.* — *Breen v. Texas & P. R. Co.*, 44 *Tex.* 302; *O'Neil v. Murray* (*Tex. Civ. App.*), 94 *S. W.* 1090; *Russell & Co. v. F. W. Heitmann & Co.* (*Tex. Civ. App.*), 86 *S. W.* 75. *Vt.* — *Morse v. Nash*, 30 *Vt.* 76; *Pearson v. French*, 9 *Vt.* 349. *W. Va.* — *State v. Taylor*, 57 *W. Va.* 228, 50 *S. E.* 247. *Wis.* — *E. M. Fish Co. v. Young*, 127 *Wis.* 149, 106 *N. W.* 795.

**Courts Will Not Deny to Language Used Its Ordinary Import.** — *Draper v. Moriarty*, 45 *Conn.* 476.

4. *Ind.* — *Harvey v. State*, 94 *Ind.* 159. *Mass.* — *Mattel v. Conant*, 156 *Mass.* 418, 31 *N. E.* 487. *Mo.* — *Houghland v. Dent*, 52 *Mo. App.* 237.

5. *U. S.* — *United States v. Standard Oil Co.*, 154 *Fed.* 728; *United States v. Cobban*, 127 *Fed.* 713; *United States v. Green*, 113 *Fed.* 683; *United States v. Williams*, 1 *Dill.* 485, 28 *Fed. Cas. No.* 16,716; *United States v. Hammond*, 2 *Woods* 197, 26 *Fed. Cas. No.* 15,294. *Ala.* — *State v. Brooks*, 9 *Ala.* 9. See also *Brown v. State*, 157 *Ala.* 15, 47 *So.* 1024. *Fla.* — *Menefee v. State*, 51 *So.* 555; *Thomas v. State*, 51 *So.* 410; *Colson v. State*, 51 *Fla.* 19, 40 *So.* 183; *Taylor v. State*, 49 *Fla.* 69, 38 *So.* 380; *Kelly v. State*, 44 *Fla.* 441, 33 *So.* 555; *Ford v. State*, 44 *Fla.* 421, 33 *So.* 301; *Easterlin v. State*, 43 *Fla.* 565, 31 *So.* 350; *Knight v. State*, 42 *Fla.* 546, 28 *So.* 759, *Miller v. State*, 42 *Fla.* 266, 28 *So.* 208; *Jenkins v. State*,

**2. Whole Pleading Must Be Answered.** — Pleas in abatement, like other pleas, must answer the whole declaration, or all that they purport to answer.<sup>6</sup>

**3. Conclusions.** — The plea must state the facts relied upon and not conclusions of law,<sup>7</sup> nor the evidence of such facts.<sup>8</sup>

**4. Anticipation of Matter Tending to Defeat Plea.** — The plea must

35 Fla. 737, 18 So. 182; *Reeves v. State*, 29 Fla. 527, 10 So. 901. **Ill.** — *Brennan v. People*, 15 Ill. 511. **Ind.** — *Melville v. State*, 89 N. E. 490; *State v. Comer*, 157 Ind. 611, 62 N. E. 452; *Klein v. State*, 157 Ind. 146, 60 N. E. 1036; *State v. Wilson*, 156 Ind. 343, 59 N. E. 932; *Hauk v. State*, 148 Ind. 238, 46 N. E. 127 (petition for rehearing overruled, 47 N. E. 465); *Billings v. State*, 107 Ind. 54, 6 N. E. 914, 7 N. E. 763, 57 Am. Rep. 77; *Ward v. State*, 48 Ind. 289; *Hardin v. State*, 22 Ind. 347. **Kan.** — *State v. Lewis*, 77 Kan. 801, 90 Pac. 763; *State v. Patterson*, 66 Kan. 447, 71 Pac. 860; *State v. Hewes*, 60 Kan. 765, 57 Pac. 959; *State v. Skinner*, 34 Kan. 256, 8 Pac. 420. **Mich.** — *People v. Lauder*, 82 Mich. 109, 46 N. W. 956; *Findley v. People*, 1 Mich. 234. **Neb.** — *Baldwin v. State*, 12 Neb. 61, 10 N. W. 463. **N. J.** — *State v. Rickey*, 10 N. J. L. 83. **N. Y.** — *Dolan v. People*, 64 N. Y. 485. **R. I.** — *State v. Duggan*, 15 R. I. 412, 6 Atl. 597. **Tenn.** — *Pennel v. State*, 125 S. W. 445; *Smartt v. State*, 112 Tenn. 539, 80 S. W. 586; *Ward v. State*, 102 Tenn. 724, 52 S. W. 996; *Dyer v. State*, 11 Lea 509; *Lewis v. State*, 1 Head 329; *State v. Bryant*, 10 Yerg. 527. **Vt.** — *State v. Ward*, 60 Vt. 142, 14 Atl. 187; *State v. Emery*, 59 Vt. 84, 7 Atl. 129. **Va.** — *Tilley v. Com.*, 89 Va. 136, 15 S. E. 526; *Lawrence v. Com.*, 86 Va. 573, 10 S. E. 840. **W. Va.** — *State v. Taylor*, 57 W. Va. 228, 50 S. E. 247. **Eng.** — *Rex v. Cooke*, 2 B. & C. 871, 4 D. & R. 592, 2 L. J. K. B. (O. S.) 152, 9 E. C. L. 375; *O'Connel v. Reg.*, 11 Cl. & F. 155, 8 Eng. Reprint 1061.

*Contra*, *State v. Flemming*, 66 Me. 152.

**Plea Held Sufficient.** — *Switzer v. State* (Ga.), 65 S. E. 1079.

**Plea cannot be aided by reference to the process or other papers in the case where they are not made a part of the plea.** *Melville v. State* (Ind.), 89 N. E. 490; *C. Callahan Co. v. Milling Co.*

(Ind.), 89 N. E. 418; *Pearson v. French*, 9 Vt. 349.

**Material Allegation of Indictment Should Be Stated.** — A plea in abatement, in order to defeat a prosecution, ought at least to state the substance of the material allegations of the indictment relied upon as the ground for abating the prosecution. *Musgrave v. State*, 133 Ind. 297, 32 N. E. 885.

**6.** *Finch v. Galigher*, 181 Ill. 625, 54 N. E. 611.

**7. U. S.** — *United States v. Cobban*, 127 Fed. 713. See *Bolln v. Nebraska*, 176 U. S. 83, 20 Sup. Ct. 287, 44 L. ed. 382; *Audenried v. Milling Co.*, 124 Fed. 697. **D. C.** — *Thompson v. United States*, 30 App. Cas. 352. **Fla.** —

*O'Brien v. State*, 55 Fla. 146, 47 So. 11. **Ill.** — *Willard v. Zehr*, 215 Ill. 148, 74 N. E. 107. **Ind.** — *Musgrave v. State*, 133 Ind. 297, 32 N. E. 885. **Kan.** — *State v. Patterson*, 66 Kan. 447, 71 Pac. 860, an allegation that defendant "has never had any preliminary examination as required by law for the offense charged," states a conclusion of law. **N. J.** — *Birch v. King*, 71 N. J. L. 392, 59 Atl. 11. **N. Y.** — *Cassidy v. Arnold*, 100 App. Div. 412, 91 N. Y. Supp. 570. **Ohio.** — *Lindsey v. State*, 69 Ohio St. 215, 69 N. E. 126.

**Plea of defect of parties not specifying defect, ineffectual.** *Hawkins v. Mapes-Reeves Const. Co.*, 82 App. Div. 72, 81 N. Y. Supp. 794.

**Compelled To Testify Before Grand Jury Is a Conclusion.** — *State v. Comer*, 157 Ind. 611, 62 N. E. 452; *State v. Duncan*, 78 Vt. 364, 63 Atl. 225, 112 Am. St. Rep. 922, 4 L. R. A. (N. S.) 1144.

**Allegations of prejudice by improper selection of grand jurors are insufficient without averment of facts showing injury.** *Agnew v. United States*, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. ed. 624; *Lowdon v. United States*, 149 Fed. 673, 79 C. C. A. 361. See also *United States v. Cobban*, 127 Fed. 713.

**8.** *Clem v. State*, 33 Ind. 418, 425.

anticipate and negative all matters which, if alleged by the opposing party, would defeat it.<sup>9</sup> Thus a plea in abatement to an indictment alleging irregularity in the formation of the grand jury must aver facts showing that the organization of that body could not have been

9. **U. S.**—United States *v.* Green, 113 Fed. 683. **Ala.**—Brown *v.* State, 157 Ala. 15, 47 So. 1024, failure to negative description of the name under the averment of an alias in an affidavit in a criminal prosecution. **Fla.**—Colson *v.* State, 51 Fla. 19, 40 So. 183; Taylor *v.* State, 49 Fla. 69, 38 So. 380; Knight *v.* State, 42 Fla. 546, 28 So. 759. **Ga.**—Timberlake *v.* State, 100 Ga. 66, 27 S. E. 158, where a plea averring that certain witnesses who testified before the grand jury were not required to take the oath was held defective for failing to negative the finding of the indictment upon the evidence of other witnesses to whom a lawful oath was administered. **Ill.**—Willard *v.* Zehr, 215 Ill. 148, 74 N. E. 107. **Ind.**—Darnell *v.* State, 90 N. E. 769 (holding unimportant an allegation that defendant was a non-resident, jurisdiction having been acquired in the way provided by the statute in such cases); C. Callahan Co. *v.* Milling Co., 89 N. E. 418; Melville *v.* State, 89 N. E. 490; State *v.* Comer, 157 Ind. 611, 62 N. E. 452; Klein *v.* State, 157 Ind. 146, 60 N. E. 1036 (holding insufficient a plea in abatement averring failure of the state to accord defendant a trial within the time specified by statute, there being no allegation that the delay was not caused by defendant's own act); Ohio Oil Co. *v.* Griest, 30 Ind. App. 84, 65 N. E. 534; Rush *v.* Foos Mfg. Co., 20 Ind. App. 515, 51 N. E. 143. **Kan.**—State *v.* Patterson, 66 Kan. 447, 71 Pac. 860; State *v.* Hewes, 60 Kan. 765, 57 Pac. 959. **Me.**—Hibbard *v.* Newman, 101 Me. 410, 64 Atl. 720; Copeland *v.* Hewett, 93 Me. 554, 45 Atl. 824 (holding a plea alleging non-joinder of parties to be defective in failing to aver the residence of the supposed co-defendants to be in the state when the action was brought); Tweed *v.* Libbey, 37 Me. 49. **Md.**—McCauley *v.* State, 21 Md. 556, holding that a plea in abatement based on the fact that suit on behalf of the state was not brought by the state's attorney should negative the exceptions when such suit need not be so brought. **Mich.**—People *v.* Lauder, 82 Mich. 109,

46 N. W. 956. **N. J.**—Birch *v.* King, 71 N. J. L. 392, 59 Atl. 11, holding defective a plea averring that the cause of action arose upon navigable waters, and was exclusively within the jurisdiction of the Federal court, but failing to show that such waters were navigable waters of the United States. **N. Y.**—Schieck *v.* Donohue, 80 App. Div. 168, 79 N. Y. Supp. 233. **Ohio.**—Lindsey *v.* State, 69 Ohio St. 215, 69 N. E. 126. **Tenn.**—Dyer *v.* State, 11 Lea 509; State *v.* Wills, 11 Humph. 222. **Tex.**—Price *v.* Wakeham (Tex. Civ. App.), 107 S. W. 132; Rotan *v.* Maedgen, 24 Tex. Civ. App. 558, 59 S. W. 585. **Vt.**—State *v.* Waterman, 78 Vt. 379, 62 Atl. 1016; American Oak Leather Co. *v.* Evans B. & C. Co., 70 Vt. 118, 39 Atl. 633 (holding that a plea in an attachment proceeding alleging no interest in the attached goods at the time of or since the attachment was insufficient for failing to exclude the possibility that they were in defendant's possession under circumstances making them attachable). **W. Va.**—State *v.* Taylor, 57 W. Va. 228, 50 S. E. 247. See Netter-Oppeneheimer & Co. *v.* Elfant, 63 W. Va. 99, 59 S. E. 892. **Eng.**—Rex *v.* Cooke, 2 B. & C. 871, 4 D. & R. 592, 2 L. J. K. B. (O. S.) 152, 9 E. C. L. 375.

**A plea averring plaintiff's insanity** at the commencement of the suit is bad for failing to aver that he had been found so by inquisition or that any committee had been appointed. Dudgeon *v.* Watson, 23 Fed. 161. See Florida, etc. R. Co. *v.* Bell, 87 Fed. 369, 31 C. C. A. 9.

**Irregularities in Proceedings Before Grand Jury.**—A plea alleging that an attorney was allowed to consult with the grand jury is demurrable, for failing to aver the state's attorney's willingness to perform his duties. Taylor *v.* State, 49 Fla. 69, 38 So. 380.

A plea alleging the presence of the attorney-general in the grand jury room is insufficient for failure to negative the fact that his presence was at the jury's request, or that the discussion and influence also alleged were in the matter



legal under any circumstances.<sup>10</sup> And a plea alleging the disqualification of an individual grand juror, where allowed,<sup>11</sup> must negative all conditions and exceptions under which the disqualification would not have existed.<sup>12</sup> And a plea of another action pending, to be effectual, must negative every circumstance under which the first would not be a bar to the later suit.<sup>13</sup> In case improper service of process is alleged, the pleader must exclude every possibility that proper service might have been had.<sup>14</sup>

of giving legal advice, merely, and which does not allege that he discussed the facts or evidence before the grand jury or that he was present when the question was taken upon the finding of the indictment. *Smartt v. State*, 112 Tenn. 539, 80 S. W. 586.

Where want of preliminary examination is alleged, if a preliminary examination is unnecessary in case accused was a fugitive, the plea must negative the latter fact. *State v. Riggs*, 47 Kan. 507, 28 Pac. 204; *State v. White* (Kan.), 25 Pac. 33.

Where lack of opportunity to challenge is alleged in a plea to an indictment for prejudice of jurors because of accused's incarceration, the plea is defective, failing to aver confinement at the time the jury was sworn. *Hauk v. State*, 148 Ind. 238, 46 N. E. 127, petition for rehearing overruled, 47 N. E. 465.

Allegation of presence of person in grand jury room, not an official, in a plea to an indictment is insufficient for failing to aver that such person was not a witness. *Lawrence v. Com.*, 86 Va. 573, 10 S. E. 840.

An averment that an incompetent witness testified before the grand jury in a plea to an indictment, is insufficient for failing to allege the materiality of his testimony and that he was the sole witness to the fact testified to. *People v. Lauder*, 82 Mich. 109, 46 N. W. 956.

10. Ala.—*State v. Brooks*, 9 Ala. 9. Fla.—*Thomas v. State*, 51 So. 410; *Menefee v. State*, 51 So. 555; *Taylor v. State*, 49 Fla. 69, 38 So. 380; *Kelly v. State*, 44 Fla. 441, 33 So. 235; *Tervin v. State*, 37 Fla. 396, 20 So. 551. Ind.—*State v. Newer*, 7 Blackf. 307. Me.—*State v. Ward*, 64 Me. 545. R. I.—*State v. Mead*, 15 R. I. 416, 6 Atl. 867; *State v. Duggan*, 15 R. I. 412, 6 Atl. 597. Tenn.—*McC Campbell v. State*, 116 Tenn. 98, 93 S. W. 100.

Tex.—*Sayle v. State*, 8 Tex. 120. Va.—*Com. v. Thompson*, 4 Leigh 667, 26 Am. Dec. 339. W. Va.—*State v. Carter*, 49 W. Va. 709, 39 S. E. 611.

Presumption in Favor of Regularity Must Be Negatived.—*State v. Scarborough*, 55 Md. 345; *State v. Rife*, 18 R. I. 596, 30 Atl. 467.

11. In West Virginia the statute provides that "no presentment or indictment shall be quashed or abated on account of the incompetency or disqualification of any one or more of the grand jurors who found the same." *State v. Carter*, 49 W. Va. 709, 39 S. E. 611.

12. *Shiver v. State*, 41 Fla. 630, 27 So. 36; *Wellman v. State*, 100 Ga. 576, 28 S. E. 605.

Lack of Opportunity To Challenge. *Edwards v. State*, 121 Ga. 590, 49 S. E. 674; *Fisher v. State*, 93 Ga. 309, 20 S. E. 329; *Lascelles v. State*, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216; *Hauk v. State*, 148 Ind. 238, 46 N. E. 127, petition for rehearing overruled, 47 N. E. 465.

Prejudice Must Be Shown.—*United States v. Tuska*, 14 Blatchf. 5, 28 Fed. Cas. No. 16,550.

In Vermont the statute provides that one shall not act as a juror who has acted within a certain length of time. A plea in abatement averring that a member of the grand jury which found the indictment had acted as petit juror within such time is defective, failing to negate that he acted as special juror, since if such were the case, the statute would not apply. *State v. Waterman*, 78 Vt. 379, 62 Atl. 1016.

13. See title "Another Action Pending."

14. U. S.—*United States v. Standard Oil Co.*, 154 Fed. 728. Conn.—*Levy v. Metroplis Mfg. Co.*, 48 Atl. 429; *Budd v. Meriden Elec. R. Co.*, 69 Conn. 272, 37 Atl. 683. Ind.—*C. Calahan Co. v. Milling Co.*, 89 N. E. 418;

In some jurisdictions the state is allowed to prosecute by information under certain conditions. To make a plea in abatement sufficient against such a prosecution, it must affirmatively show that none of these conditions existed at the time the prosecution was begun.<sup>15</sup>

**5. Duplicity.**—A plea in abatement presenting two or more distinct and sufficient grounds for abatement, either of which, if true, would necessitate a finding on the issue in defendant's favor is bad for duplicity.<sup>16</sup>

**6. Duty to Give Plaintiff Better Writ.**—*a. Generally.*—Where the objection set up in a plea in abatement is to the form and not to the substance,<sup>17</sup> of the writ, defendant in his plea must give his adversary a better writ, *i. e.*, he must demonstrate to plaintiff wherein the alleged defects lie, that they may be corrected.<sup>18</sup> So in answers

Ohio Oil Co. v. Griest, 30 Ind. App. 84, 65 N. E. 534.

**15.** Klein v. State, 157 Ind. 146, 60 N. E. 1036; State v. Wilson, 156 Ind. 343, 59 N. E. 932; State v. Drake, 125 Ind. 367, 25 N. E. 434; State v. Hewes, 60 Kan. 765, 57 Pac. 959.

**16. Ala.**—Cobb v. Miller, Ripley & Co., 9 Ala. 499; Cobb v. Force Bros. & Co., 6 Ala. 468. **Ark.**—The Napoleon v. Etter, 6 Ark. 103. **Vt.**—State v. Emery, 59 Vt. 84, 7 Atl. 129. **Va.**—Guarantee Co. v. First Nat. Bank, 95 Va. 480, 28 S. E. 909.

Thus a plea in abatement in a criminal prosecution, because the grand jury did not consist of twenty-three lawful jurors, because the persons from which it was drawn were not legally selected, and because of the unconstitutionality of the statute under which the jury was drawn, is duplicitous. State v. McNay, 100 Md. 622, 60 Atl. 273.

**17. If the defect is of substance,** necessarily no better writ can be had and the rule does not apply. **Conn.**—Wadsworth v. Woodford, 1 Day 28. **Mass.**—Wilson v. Nevers, 20 Pick. 20; Guild v. Richardson, 6 Pick. 364. **Vt.**—Boston Type etc. Foundry v. Spooner, 5 Vt. 93. **Va.**—Warren v. Saunders, 27 Gratt. 259.

**18. U. S.**—Computing Scale Co. v. Moore, 139 Fed. 197; Card v. Hines, 35 Fed. 598; Evans v. Davenport, 4 McLean 574, 8 Fed. Cas. No. 4,558. **Ala.**—Mohr v. Chaffe Bros. & Co., 75 Ala. 387; Mitchell v. Turner, 37 Ala. 660; Rose v. Thompson, 17 Ala. 628; Crawford v. Slade, 9 Ala. 887, 44 Am. Dec. 463. **Cal.**—Nevills v. Shortridge, 146 Cal.

277, 79 Pac. 972. **Conn.**—Levy v. Metropolis Mfg. Co., 73 Conn. 559, 48 Atl. 429; Wadsworth v. Woodford, 1 Day 28. **D. C.**—Ferguson v. Washington & G. R. Co., 6 App. Cas. 525. **Ill.**—Keokuk & H. Bridge Co. v. Wetzel, 228 Ill. 253, 81 N. E. 864; Chicago, etc. R. Co. v. Munger, 78 Ill. 300; American Exp. Co. v. Haggard, 37 Ill. 465, 87 Am. Dec. 257; Grand Lodge v. Cramer, 60 Ill. App. 212; Gregg v. Sumner, 21 Ill. App. 110. **Ind.**—Needham v. Wright, 140 Ind. 190, 39 N. E. 510; State v. Lannoy, 30 Ind. App. 335, 65 N. E. 1052; Rush v. Foos Mfg. Co., 20 Ind. App. 515, 51 N. E. 143; Brown v. Underhill, 4 Ind. App. 77, 30 N. E. 430. **Ky.**—Bell v. Layman, 1 T. B. Mon. 39, 15 Am. Dec. 83. **Me.**—Brown v. Gordon, 1 Me. 165. **Mass.**—Wilson v. Nevers, 20 Pick. 20, 23; Langdon v. Potter, 11 Mass. 313; Lovell v. Doble, Quincy 88. **Mich.**—East v. Cain, 49 Mich. 473, 13 N. W. 822. **N. Y.**—Hawkins v. Mapes-Reeves Constr. Co., 178 N. Y. 236, 70 N. E. 783; Stiefel v. Berlin, 28 App. Div. 103, 51 N. Y. Supp. 147; White v. Miller, 7 Hun 427. **Pa.**—Bakes v. Reese, 150 Pa. 44, 24 Atl. 634; Casporus v. Jones, 7 Pa. 120; Horton v. Cook, 2 Watts 40; Witmer v. Schlatter, 15 Serg. & R. 150. **S. C.**—Mitchum v. Droze, 11 Rich. L. 196; Miller v. Ford, 4 Rich. L. 376, 55 Am. Dec. 687. **Tex.**—Texas etc. R. Co. v. Lynch, 97 Tex. 25, 75 S. W. 486; State v. Goodnight, 11 S. W. 119; Timmin v. Weatherford, Dall. 590. **Va.**—Deatrick's Admr. v. State Life Ins. Co., 107 Va. 602, 59 S. E. 489; Warren v. Saunders, 27 Gratt. 259; Hortons v. Towne, 6 Leigh 47. **Eng.**—Evans v. Stevens, 4

in abatement under the code practice, the defect must be so pleaded as to enable the plaintiff to cure the same by amendment.<sup>19</sup>

b. *In Pleas of Misnomer*.—In a plea for misnomer of defendant, his true name must be averred.<sup>20</sup> And, although defendant's true surname is used in the declaration, he must state that in his plea as well as his true Christian name, alleged to have been defectively stated.<sup>21</sup> The plea must negative the fact that the defendant is or was known and called by the name employed,<sup>22</sup> and must state his surname with certainty.<sup>23</sup> A plea alleging "and the defendant" comes and says that his name is, etc., is demurrable, as defendant admits himself to be the person sued.<sup>24</sup>

T. R. 224, 100 Eng. Reprint 986; *Warner v. Irby*, 2 Ld. Raym. 1178, 92 Eng. Reprint 279 (ruling case).

19. *Clark v. Oregon S. L. R. Co.*, 29 Mont. 317, 74 Pac. 734; *Richardson & B. Co. v. Utah S. & H. Co.*, 28 Utah 85, 77 Pac. 1.

20. *Ala.*—*Freeman v. Pullen*, 119 Ala. 235, 24 So. 57; *Mohr v. Chaffe Bros. & Co.*, 75 Ala. 387; *Cantley & Co. v. Moody*, 7 Port. 443. *Ga.*—*Oliver v. Wilson*, 29 Ga. 642. *Ky.*—*Louisville, etc. R. Co. v. Hall*, 12 Bush 131. *Mont.*—*Clark v. Oregon S. L. R. Co.*, 29 Mont. 317, 74 Pac. 734. *N. Y.*—*White v. Miller*, 7 Hun 427. *Pa.*—*Witmer v. Schlatter*, 15 Serg. & R. 150. *Eng.*—*Docker v. King*, 5 Taunt. 652, 1 E. C. L. 222; *Haworth v. Spraggs*, 8 T. R. 515, 101 Eng. Reprint 1521.

**Objections to Initials.**—A plea objecting to the use of the initial standing for defendant's Christian name should disclose the true name. *Cantley & Co. v. Moody*, 7 Port. (Ala.) 443. And a plea averring the incorrectness of one of two initials used in describing defendant in the writ, should give the whole of the name belonging to him and not merely correct the mistake as to the initial. If the initial not corrected represents a name in itself, or, if defendant is known only in that way, he should so state. *Davis v. Philbrick*, 87 Me. 196, 32 Atl. 874.

21. *Peake v. Davis*, 5 Taunt. 653, 1 E. C. L. 222; *Docker v. King*, 5 Taunt. 652, 1 E. C. L. 222; *Haworth v. Spraggs*, 8 T. R. 515, 101 Eng. Reprint 1521.

22. *U. S.*—*Linton v. First Nat. Bank*, 10 Fed. 894, holding that in an action by a husband and wife in behalf of the latter, a plea alleging that his

surname was fictitious was defective in failing to deny that such name was at the time of filing of the bill and afterward the plaintiff's known and recognized surname. *Ala.*—*Ruffin v. State*, 124 Ala. 91, 27 So. 307; *Freeman v. Pullen*, 119 Ala. 235, 24 So. 57. *Fla.*—*Waldron v. State*, 41 Fla. 265, 26 So. 701. *Ga.*—*Stinchcomb v. State*, 119 Ga. 442, 46 S. E. 639, a criminal case holding insufficient a plea "that he has never been known and called by the name of G. S., alias B. S.; that his name is not G. S., alias B. S., as alleged in the bill of indictment . . . but his true name is, and ever has been, W. S.," for failing to aver unequivocally that defendant has never been known as either G. S. or B. S. *Ind.*—*McCrory v. Anderson*, 103 Ind. 12, 2 N. E. 211. *Minn.*—*Lyons v. Rafferty*, 30 Minn. 526, 16 N. W. 420.

23. *Peake v. Davis*, 5 Taunt. 653, 1 E. C. L. 222, holding also that the defendant, in so pleading, must appear by his right name.

24. *Feasler v. Schriever*, 68 Ill. 322.

**Form for Pleading Misnomer.**—

John Smith  
sued by the name  
of William Smith  
against  
James Brown.

John Smith against whom the said James Brown hath complained by the name of William Smith, in his own person comes and says that he is named and called by the name of John Smith, and by that name and surname has always been hitherto and is now named and called, and that he never was and is not now named or called by the name of William, etc.



A plea alleging misnomer of plaintiff should state the name under which alone plaintiff might have sued.<sup>25</sup>

A plea of misnomer is deficient which fails to tender an issue upon the truth of the sheriff's return.<sup>26</sup>

c. *Another Action Pending*. — As to the duty to give a better writ in a plea of another suit pending, reference is made to another part of this work.<sup>27</sup>

d. *Defect of Parties*. — In a plea of defect of parties, plaintiff or defendant, a better writ must be given. The question as to what allegations are necessary will be discussed elsewhere.<sup>28</sup>

e. *Defective Execution and Service of Process*. — Reference is made to another title for a treatment of the rules for determining what averments are necessary in giving plaintiff a better writ in a plea alleging defective execution and service of process.<sup>29</sup>

f. *Want of Jurisdiction*. — A plea to the jurisdiction in a transitory action must show a more proper and sufficient jurisdiction.<sup>30</sup>

g. *Variance Between Declaration and Writ*. — Where a plea in abatement avers a variance between the declaration and the writ, the writ must be set forth.<sup>31</sup>

7. *Demand of Oyer*. — In some instances it is necessary to crave oyer of the writ.<sup>32</sup>

**VI. TIMELINESS, ORDER AND WAIVER OF PLEAS.** — A. WHERE ABATABLE MATTERS EXIST BEFORE SUIT BROUGHT. — **1. In General.** — a. *In Civil Actions*. — (1.) *In General*. — It is well settled that a plea in abatement questioning the jurisdiction of the court to try the cause may be filed at any time.<sup>33</sup>

25. *Gardiner v. Cross*, 6 Rob. (La.) 454.

In *Bowen v. Shapeott*, 1 East 542, 102 Eng. Reprint 209, the plaintiff sued by the name of Sarah Shapeott. The defendant pleaded that "the said Sarah now is, and before, and at the time of suing out her original writ aforesaid, was called and known by the surname of Shipcott," traversing that she was known by the name of Shapeott.

26. *National Parlor Furniture Co. v. Strauss*, 75 Ill. App. 276.

27. See title "*Another Action Pending*."

28. See title "*Parties*."

29. See title "*Process*."

30. See title "*Jurisdiction*."

31. *Nichols v. Smalley*, 7 Blackf. (Ind.) 200; *Lary v. Evans*, 35 N. H. 172. See also title "*Variance*."

32. A plea in abatement alleging that the action was brought in one county and that the summons was directed to the sheriff of another, no de-

fendant residing in the county of the action, should incorporate a demand of oyer of the summons and officer's return in its opening and then state its averment. *Netter-Oppenheimer & Co. v. Elfant*, 63 W. Va. 99, 59 S. E. 892.

In *New Jersey* in order that a defendant may avail himself of an alleged variance between the writ and the declaration by plea in abatement, it is necessary to crave oyer of the writ, since in this jurisdiction the writ does not appear on the face of the declaration. *Delaware, etc. R. Co. v. City* (N. J.), 72 Atl. 83.

33. *Ala.* — *Karthous v. Nashville, etc. R. Co.*, 140 Ala. 433, 37 So. 268. *Pa.* — *Com. v. Iron, etc. Steel Co.*, 27 Pa. Super. 508. *Tex.* — *McQueen v. McDaniel* (Tex. Civ. App.), 109 S. W. 219.

Thus where in a suit to partition an estate, defendant files a plea to the jurisdiction on the ground that the estate was in process of administration

(II.) **At Common Law.** — (A.) **IN GENERAL.** — With the exception above noted, it is necessary to plead all matter in abatement at the outset of the trial,<sup>34</sup> or at the earliest opportunity,<sup>35</sup> or at the latest before pleading to the merits,<sup>36</sup> or it is waived. A plea in abatement is not per-

in the probate court which had power to distribute the property among those entitled thereto, a contention that such plea was waived by not presenting the same and having the same determined at the first term of court after it was filed, which was not done, is without merit; since this is not a dilatory plea, such as a plea that a party is not sued in the proper county, but challenges the court's jurisdiction to try the cause which can be done at any time before final judgment. *Wilkinson v. McCart* (Tex. Civ. App.), 116 S. W. 400.

34. **La.** — *Robbins v. Martin*, 43 La. Ann. 488, 9 So. 108; *Dwight v. Linton*, 3 Rob. 57. **Mass.** — *Chamberlayne v. Nazro*, 188 Mass. 454, 74 N. E. 674. **Pa.** — *Boyle's Lunacy*, 20 Pa. Super. 1. **Tex.** — *Texas & P. R. Co. v. Lynch*, 73 S. W. 65 (holding that the previous filing of a plea of privilege constitutes a waiver of an exception or plea in abatement of the writ); *Davis v. Texas & P. R. Co.*, 12 Tex. Civ. App. 427, 34 S. W. 144.

35. **Ala.** — *Karthous v. Nashville, etc. R. Co.*, 140 Ala. 433, 37 So. 268. **Ill.** — *Fisher v. Cook*, 125 Ill. 280, 17 N. E. 763. **Ind.** — *Eel River R. Co. v. State*, 155 Ind. 433, 57 N. E. 388 (nearly three years after defendant had entered a full appearance is too late); *Clarke v. Hite*, 5 Blackf. 167. **Md.** — *Young v. Bank*, 31 Md. 66. **N. H.** — *Bedford v. Rice*, 58 N. H. 227. **Pa.** — *Myers v. Wogan*, 5 Pa. Co. Ct. 266. **Tenn.** — *Decatur Bank v. Berry*, 3 Humph. 590. **Tex.** — *Watson v. Mirike*, 25 Tex. Civ. App. 527, 61 S. W. 538. A defendant who permits three terms of court to pass without calling the court's attention to his plea in abatement waives the same. **W. Va.** — *Abell v. Penn Mut. L. Ins. Co.*, 18 W. Va. 400.

36. **U. S.** — *Wetzel, etc. R. Co. v. Tennis Bros. Co.*, 145 Fed. 458, 75 C. C. A. 266, affirming 140 Fed. 193; *Derk P. Yonkerman Co. v. Fuller's Agency*, 135 Fed. 613 (citing many authorities); *Bottom v. National B. & L. Assn.*, 123 Fed. 744. **Ala.** — *Cartwright v. West*, 47 So. 93; *Town of New Decatur v. Smith*, 148 Ala. 682, 41 So. 1028;

*Karthous v. Nashville, etc. R. Co.*, 140 Ala. 433, 37 So. 268; *Coalter v. Bell*, 2 Stew. & P. 358. **Ark.** — *State Bank v. Whiting*, 12 Ark. 119; *Odle v. Floyd*, 5 Ark. 248. **Conn.** — *Huntley v. Holt*, 59 Conn. 102, 22 Atl. 34; *James v. Morgan*, 36 Conn. 348. **Del.** — *Lycoming Fire Ins. Co. v. Bush*, 1 Marv. 181, 40 Atl. 947. **Fla.** — *E. O. Painter Fertilizer Co. v. Du Pont*, 54 Fla. 288, 45 So. 507 (a general appearance is no implied waiver of privilege); *Stewart v. Bennett*, 1 Fla. 437. **Ga.** — *McGahee v. Hilton Lumb. Co.*, 112 Ga. 513, 37 S. E. 708; *Beall v. Rust*, 68 Ga. 774. **Ill.** — *Keokuk & H. Bridge Co. v. Wetzel*, 228 Ill. 253, 81 N. E. 864; *Quartier v. Dowiat*, 219 Ill. 326, 76 N. E. 371; *Thomas v. Lowy*, 60 Ill. 512; *Ricker v. Scofield*, 28 Ill. App. 32. **Ind.** — *Watts v. Sweeney*, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615; *Keller v. Miller*, 17 Ind. 206; *Ft. Wayne Ins. Co. v. Irwin*, 23 Ind. App. 53, 54 N. E. 817. **Kan.** — *Curry v. Kansas, etc. R. Co.*, 58 Kan. 6, 48 Pac. 579; *Green v. Dunn*, 5 Kan. 254. **Ky.** — *Meggs v. Shaffer*, Hard. 65; *National Life Ins. Co. v. Tweddell*, 22 Ky. L. Rep. 881, 58 S. W. 699; *American Acc. Co. v. Fidler's Admx.*, 18 Ky. L. Rep. 161, 35 S. W. 905, 36 S. W. 528. **La.** — *Bernstein v. Dalton Clark Stave Co.*, 122 La. 412, 47 So. 753; *Mix v. Creditors*, 39 La. Ann. 624, 2 So. 391; *Dyer v. Drew*, 14 La. Ann. 657; *Giraud v. Mazier*, 13 La. Ann. 147. **Me.** — *Hazen v. Wright*, 85 Me. 314, 27 Atl. 181; *Clapp v. Balch*, 3 Me. 216. **Md.** — *Waggaman v. Nutt*, 88 Md. 265, 41 Atl. 154; *Webster v. Byrnes*, 32 Md. 86. **Mass.** — *Chamberlayne v. Nazro*, 188 Mass. 454, 74 N. E. 674; *Breed v. Breed*, 110 Mass. 532; *Seagrave v. Erickson*, 11 Cush. 89. **Mich.** — *Griffin v. Wattles*, 119 Mich. 346, 78 N. W. 122 (court rule 6, permitting the practice of accompanying a plea in abatement by a plea to the merits, to the same count does not abrogate the rule of the common law); *Hake v. Grove*, 99 Mich. 216, 58 N. W. 62; *People v. Smith*, 65 Mich. 1, 31 N. W. 599. **Miss.** — *McKey v. Torry*, 6 Cushm. 78. **Mo.** — *Fugate v. Glascock*, 7 Mo. 577.

missible after default,<sup>37</sup> after withdrawal of a plea to the merits,<sup>38</sup>

**Neb.**—Stull Bros. v. Powell, 70 Neb. 152, 97 N. W. 249; Grand Lodge A. O. U. W. v. Bartes, 64 Neb. 800, 90 N. W. 901; Baker v. Union S. Y. Nat. Bank, 63 Neb. 801, 89 N. W. 269, 93 Am. St. Rep. 484; Smith v. Spaulding, 40 Neb. 339, 58 N. W. 952. **N. H.**—Bedford v. Rice, 58 N. H. 227; Kimball v. Wellington, 20 N. H. 439. **N. J.**—DeCamp v. Miller, 44 N. J. L. 617; Wittemore v. Malcomson, 9 N. J. L. J. 338; Sherley v. Elizabeth, 4 N. J. L. J. 58. **N. Y.**—Palmer v. Evertson, 2 Cow. 417; Crygier v. Long, 1 Johns. Cas. 393; Brown v. Jones, 1 Hilt. 204. **N. C.**—Fort v. Penny, 122 N. C. 230, 29 S. E. 362. **Ore.**—McClung v. McPherson, 47 Ore. 73, 82 Pac. 13, *affirming* 81 Pac. 567; Winter v. Norton, 1 Ore. 42. **Pa.**—Smith v. People's Mut. Ins. Co., 173 Pa. 15, 33 Atl. 567; Good Intent Co. v. Hartzell, 22 Pa. 277; Riddle v. Stevens, 2 Serg. & R. 537. **R. I.**—Weaver Coal & Coke Co. v. Rhode Island Coal Co., 27 R. I. 194, 61 Atl. 426; Granite Bldg. Corp. v. Greene, 25 R. I. 586, 57 Atl. 649 (matter in abatement is waived by filing a plea in bar containing no reference to the former and not saving the benefit of it); Potter v. Smith, 7 R. I. 55. **S. C.**—Cone v. Cone, 61 S. C. 512, 39 S. E. 748; State *ex rel.* Coleman v. Cason, 11 S. C. 392; Ferguson v. King, 2 Nott & McC. 588. **S. D.**—Drake v. Great Northern R. Co., 123 N. W. 82; Heegaard v. Dakota L. & T. Co., 3 S. D. 569, 54 N. W. 656. **Tenn.**—Gilbert v. Tramell, 2 Coldw. 282; Brazelton v. Brooks, 2 Head 194; Foster v. Hall, 4 Humph. 346; Reed v. Brewer, Peck 275. **Tex.**—Taylor v. Hall, 20 Tex. 211; Drake v. Brander, 8 Tex. 351; Wolf v. Willingham (Tex. Civ. App.), 107 S. W. 60; Brooks v. Galveston City R. Co. (Tex. Civ. App.), 74 S. W. 330 (rule applicable whether the answer to the merits raises issues of law or of fact). **Vt.**—Lyman v. Central Vt. R. Co., 59 Vt. 167, 10 Atl. 346; Holdridge v. Holdridge's Estate, 53 Vt. 546; Stone v. Proctor, 2 D. Chip. 108. **Va.**—Guarantee Co. v. First Nat. Bank, 95 Va. 480, 28 S. E. 909; Howard v. Rawson, 2 Leigh 733. **W. Va.**—Maupin v. Scottish U. & N. Ins. Co., 53 W. Va. 557, 45 S. E. 1003; Riley v. Jarvis, 43 W. Va. 43, 26 S. E. 366; Valley Bank

v. Bank, 3 W. Va. 386. **Wis.**—Randall v. Lonstorf, 126 Wis. 147, 105 N. W. 663, 3 L. R. A. (N. S.) 470; Knowlton v. Culver, 2 Pinn. 86. **Eng.**—Roberts v. Moon, 5 T. R. 487, 101 Eng. Reprint 274.

Where a defect of jurisdiction over the person appears on the face of the return and is not challenged by motion to quash, the defendant by answering to the merits will be regarded as having voluntarily entered his appearance and waived his right to complain of the jurisdiction of the court over his person. And this is true notwithstanding the fact he attempts to abate the action because of the defect of jurisdiction over the person by a special plea which recites the appearance for that purpose only. *Wiecarver v. Mercantile Town Mut. Ins. Co.*, 137 Mo. App. 247, 117 S. W. 698.

In an attachment proceeding it seems that an answer to the merits is not a waiver of a statutory plea denying the grounds of attachment. *Coombs & Bro. Comr. Co. v. Block*, 130 Mo. 668, 32 S. W. 1139, overruling prior decisions. And a plea in bar to an attachment brought on the ground of non-residence is not a waiver of a prior plea in abatement based on the ground that defendant was in fact a resident. *Third Nat. Bank v. Foster*, 90 Tenn. 735, 18 S. W. 267.

**37. Ia.**—Boone v. Carroll, 35 La. Ann. 281; Chaffe v. Ludeling, 34 La. Ann. 962; Reynolds v. Reynolds, 12 La. 617. **Tex.**—Wolf v. Willingham (Tex. Civ. App.), 107 S. W. 60. **W. Va.**—Empire C. & C. Co. v. Hull C. & C. Co., 51 W. Va. 474, 41 S. E. 917; Hinton v. Ballard, 3 W. Va. 582.

**38. Del.**—Lycoming Fire Ins. Co. v. Bush, 1 Marv. 181, 40 Atl. 947. **Ind.**—Watts v. Sweeney, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615. **Tex.**—Wolf v. Willingham (Tex. Civ. App.), 107 S. W. 60. But see *U. S.*—Kern v. Huidekoper, 103 U. S. 494, 26 L. ed. 497. **Ind.**—Brink v. Reid, 122 Ind. 257, 23 N. E. 770. **Pa.**—Sandback v. Quigley, 8 Watts 460; Myers v. Wogan, 5 Pa. Co. Ct. 266.

Abuse of Discretion to Permit Such Action.—*Eden v. Osborn & Co.*, 14 Tex. Civ. App. 314, 37 S. W. 182.



after motion to dismiss for failure of evidence,<sup>39</sup> after the disposal of a prior plea of the same character,<sup>40</sup> after the filing,<sup>41</sup> or even after the overruling,<sup>42</sup> of a demurrer, after trial has commenced,<sup>43</sup> after the jury has been impaneled,<sup>44</sup> or sworn,<sup>45</sup> after verdict,<sup>46</sup> or after judgment.<sup>47</sup> An affidavit of merits precludes filing at a subsequent period an answer in abatement.<sup>48</sup> And where an answer in abatement and to the merits has been filed, defendant waives the former by giving plaintiff notice to take depositions and taking depositions on the notice.<sup>49</sup> Where by pleading to the merits defendant has waived his rights to plead in abatement, he is in no position to plead in abate-

39. *Hirsh v. Manhattan R. Co.*, 84 App. Div. 374, 82 N. Y. Supp. 754.

40. Ill.—*Grand Lodge v. Randolph*, 186 Ill. 89, 57 N. E. 882; *Bacon v. Schepflin*, 185 Ill. 122, 56 N. E. 1123. La.—*McAlpine v. Jones*, 13 La. Ann. 409. Pa.—*Witmer v. Schlatter*, 15 Serg. & R. 150. S. C.—*Mitchum v. Droze*, 11 Rich. L. 196. Tex.—*Trinity & S. R. Co. v. Brown* (Tex. Civ. App.) 46 S. W. 926.

But see *Anderson v. Rountree*, 1 Pinn. (Wis.) 115, holding that where a demurrer to a plea in abatement has been sustained because deficient in form, another plea in abatement embracing the same matter may be filed.

41. Ala.—*Powers v. Bryant*, 7 Port. 9. Ark.—*Foreman v. Gibson*, 15 Ark. 206. Mass.—*Ripley v. Warren*, 2 Pick. 592. Mich.—*Thompson v. Michigan Mut. Ben. Assn.*, 52 Mich. 522, 18 N. W. 247. Tex.—*Meyer v. Smith*, 3 Tex. Civ. App. 37, 21 S. W. 995. Wis.—*Knowlton v. Culver*, 2 Pinn. 86.

In *Indiana* a demurrer does not cut off the right to plead in abatement contesting plaintiff's right to maintain the action. *Bauer v. Samson Lodge*, 102 Ind. 262, 1 N. W. 571. But a plea questioning jurisdiction over the person will not be entertained after demurrer to the complaint. *Singleton v. O'Brien*, 125 Ind. 151, 25 N. E. 154; *Slauter v. Hollowell*, 90 Ind. 286; *Johnson v. Staley*, 32 Ind. App. 628, 70 N. E. 541; *Ft. Wayne Ins. Co. v. Irwin*, 23 Ind. App. 53, 54 N. E. 817.

42. *Butts v. Grayson*, 14 Ark. 445; *Knowlton v. Culver*, 2 Pinn. (Wis.) 86, 1 Chand. 214. But see *Deane v. Echols*, 2 App. Cas. (D. C.) 522.

43. U. S.—*Bailey v. Dozier*, 6 How. 23, 12 L. ed. 328; *Wetzel*, etc. R. Co. v. *Tennis Bros. Co.*, 145 Fed. 458, 75 C. C. A. 266, affirming 140 Fed. 193; *Orman*

*v. Salvo*, 117 Fed. 233, 54 C. C. A. 265.

Ark.—*Jetton v. Smead*, 29 Ark. 372.

Colo.—*Hardenbrook v. Harrison*, 11

Colo. 9, 17 Pac. 72. Del.—*Lycorning*

*Fire Ins. Co. v. Bush*, 1 Marv. 181, 40

Atl. 947. Kan.—*State v. Bowman*, 80

Kan. 473, 103 Pac. 84. Ky.—*Bennett*

*v. Knott*, 112 S. W. 849. Mass.—

*Chamberlayne v. Nazro*, 188 Mass. 454,

74 N. E. 674. N. Y.—*Montfort v.*

*Hughes*, 3 E. D. Smith 591. N. C.—

*Montague v. Brown*, 104 N. C. 161, 10

S. E. 186. Pa.—*Murphy v. Chase*, 103

Pa. 260. Tenn.—*McCampbell v. State*,

116 Tenn. 98, 93 S. W. 100. Tex.—

*Yarbrough v. DeMartin*, 28 Tex. Civ.

App. 276, 67 S. W. 177; *Ft. Worth*, etc.

*R. Co. v. Harlan* (Tex. Civ. App.), 62

S. W. 971; *Hall v. Howell* (Tex. Civ.

App.), 56 S. W. 561. W. Va.—*Maupin*

*v. Scottish U. & N. Ins. Co.*, 53 W. Va.

557, 45 S. E. 1003.

44. *Otis v. Warren*, 14 Mass. 239.

45. *Stiles v. Homer*, 21 Conn. 507;

*Cleveland v. Welsh*, 4 Mass. 591.

46. *English v. Grant*, 102 Ga. 35, 29

S. E. 157.

47. In *West Virginia* a plea in abatement, not being an issuable plea, cannot be filed to set aside an office judgment, and must be filed at rules before office judgment is entered, except where the cause making the filing of a plea in abatement necessary occurs after the office judgment is entered at rules, in which case it may be filed at the first opportunity afterwards. *Empire Coal & Coke Co. v. Hull Coal & Coke Co.*, 51 W. Va. 474, 41 S. E. 917; *Hinton v. Ballard*, 3 W. Va. 582.

48. *Walpole v. Gray*, 11 Allen (Mass.) 149, citing other Massachusetts cases.

49. *Shuler v. American Benev. Assn.*, 132 Mo. App. 123, 111 S. W. 618.

ment to an amended declaration or complaint.<sup>50</sup> But a demand for a bill of particulars does not constitute a waiver of matter in abatement since this, at the most, is merely a preparatory step to defense.<sup>51</sup>

(B.) GOING TO TRIAL ON MERITS. — As has already been stated, going to trial on the merits is a waiver of matter in abatement,<sup>52</sup> and also constitutes a waiver of a previously filed but undisposed of plea.<sup>53</sup>

(III.) Under Code Practice. — Under the code system of procedure an answer or demurrer based on matter in abatement must generally be filed before a trial on the merits, or it is waived.<sup>54</sup> On the other hand

50. *Chapman v. Davis*, 4 Gill (Md.) 166; *Foster v. Gulf*, etc. R. Co., 91 Tex. 631, 45 S. W. 376; *Slaughter v. Moore*, 17 Tex. Civ. App. 233, 42 S. W. 372.

A plea in abatement to the jurisdiction constitutes an abandonment of any defense to the merits either absolutely (that is to say at the option of the plaintiff, who may, of course, waive his right to insist upon the abandonment), or at best, within the discretion of the court. The court will not exercise its discretion to relieve a defendant of an abandonment of defense to the merits by reason of a prior plea in abatement where it appears that the latter was filed immediately after the same objection was raised by motion. *Audenried v. East Coast Milling Co.*, 124 Fed. 697. (Circuit Court E. D. Pennsylvania.)

51. *Oates v. Clendenard*, 87 Ala. 734, 6 So. 359; *Watkins v. Brown*, 5 Ark. 197.

52. See *ante*, next preceding note 43.

53. U. S. — *Sheppard v. Graves*, 14 How. 505, 14 L. ed. 518. Ala. — *Davis v. State*, 136 Ala. 129, 33 So. 818; *Wilson v. Oliver*, 1 Stew. 46. Conn. — *Prosser v. Chapman*, 29 Conn. 515. Fla. — *Putnam Lumb. Co. v. Ellis-Young Co.*, 50 Fla. 251, 39 So. 193, order in which plea in bar and another in abatement were filed immaterial.

Ill. — *Mitchell v. King*, 187 Ill. 452, 55 N. E. 637, 58 N. E. 310; *Gilmore v. Nowland*, 26 Ill. 200. Ind. — *Watts v. Sweeney*, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615. Ia. — *Starr v. Wilson*, *Morris* 438. Kan. — *Wells v. Patton*, 50 Kan. 732, 33 Pac. 15; *Bliss v. Burnes*, *McCahon* 91. Ky. — *Foster v. Foster*, 24 Ky. L. Rep. 1396, 71 S. W. 524; *Ragland v. Allin*, 1 A. K. Marsh. 592. Md. — *Cruzen v. McKaig*, 57 Md. 454, rule applicable regardless of the fact that an issue has been

joined on a replication to the plea in abatement. Mass. — *Clark v. Montague*, 1 Gray 446; *Burnham v. Webster*, 5 Mass. 266. Miss. — *Webster v. Tierman*, 4 How. 352. Mo. — *Rippstein v. St. Louis Mut. Life Ins. Co.*, 57 Mo. 86; *Ellis v. Lamme*, 42 Mo. 153. N. C. — *Woody v. Jordan*, 69 N. C. 189. Ore. — *Lassas v. McCarty*, 47 Ore. 474, 84 Pac. 76; *Winter v. Norton*, 1 Ore. 42. Pa. — *Potter v. McCoy*, 26 Pa. 458. R. I. — *Gardner v. James*, 5 R. I. 235. S. C. — *Kiddell v. Bristow*, 67 S. C. 175, 45 S. E. 174. Tenn. — *Eller v. Richardson*, 89 Tenn. 575, 15 S. W. 650; *Chambers v. Haley*, *Peck* 159. Tex. — *Ft. Worth*, etc. R. Co. v. *Harlan* (Tex. Civ. App.), 62 S. W. 971; *Jolly v. Pryor*, 12 Tex. Civ. App. 149, 33 S. W. 889. W. Va. — *Maupin v. Scottish U. & N. Ins. Co.*, 53 W. Va. 557, 45 S. E. 1003. Wis. — *Goodrich v. Compound School Dist. No. 5*, 2 Wis. 102.

54. Ala. — *Blankenship v. Blackwell*, 124 Ala. 355, 27 So. 551, 82 Am. St. Rep. 175. Cal. — *Luco v. Superior Court*, 71 Cal. 555, 12 Pac. 677. Colo. — *Smith v. District Court*, 4 Colo. 235. Ga. — *Paulk v. Tanner*, 106 Ga. 219, 32 S. E. 99; *Welchel v. Thompson*, 39 Ga. 559, 99 Am. Dec. 470. Ia. — *Rush v. Frost*, 49 Iowa 183. Kan. — *Reed v. Sexton*, 20 Kan. 195. La. — *Mix v. Creditors*, 39 La. Ann. 624, 2 So. 391; *Goldenbow v. Wright*, 13 La. 371; *Singleton v. Smith*, 4 La. 430. Minn. — *McNair v. Toler*, 21 Minn. 175. Mo. — *McMahan v. Hubbard*, 217 Mo. 624, 118 S. W. 481. Neb. — *Smith v. Spaulding*, 40 Neb. 339, 58 N. W. 952. N. Y. — *Meinhardt v. Excelsior Brew. Co.*, 82 App. Div. 627, 81 N. Y. Supp. 1042. *Gardiner v. Clark*, 6 How. Pr. 449. N. C. — *Blackwell v. Dibbell*, 102 N. C. 270, 9 S. E. 192. Okla. — *Leader Ptg. Co. v. Lowry*, 9 Okla. 89, 59 Pac. 242. S. C. — *Kiddell v. Bristow*, 67 S. E. 175,

it is held that the filing of a plea in abatement is a waiver of a right to plead to the merits.<sup>55</sup>

b. *In Criminal Actions.*—In criminal actions, matter in abatement may be pleaded on arraignment, and need not be pleaded during the term at which the indictment was found,<sup>56</sup> but must be interposed within a reasonable time.<sup>57</sup>

A plea in abatement must be interposed and disposed of before the interposition of a plea in bar,<sup>58</sup> or the filing of a de-

45 S. E. 174. **Tex.**—*Allen v. Reed* (Tex.), 17 S. W. 115; *Wilkinson v. McCart* (Tex. Civ. App.), 116 S. W. 400.

**Indiana and Oregon** follow the common law rule. *Chicago, etc. R. Co. v. Grantham*, 165 Ind. 279, 75 N. E. 265; *Sanders v. Hartge*, 17 Ind. App. 243, 46 N. E. 604 (citing a long line of decisions in this jurisdiction); *Rafferty v. Davis* (Ore.), 102 Pac. 305; *Fiore v. Ladd*, 29 Ore. 528, 46 Pac. 144.

**Dissolution of a plaintiff corporation** before trial cannot be set up in abatement after trial and after a judgment in defendant's favor has been reversed on error and remanded. *L. Bucki & Son Lumb. Co. v. Lumber Co.*, 128 Fed. 332, 63 C. C. A. 62.

**Power of Attorney to Make Appearance.**—The filing of a paper authorizing certain attorneys to appear for defendant and defend the action after filing of an answer pleading want of jurisdiction, does not waive such plea, since such paper is no more a general appearance than appearing at the trial and defending to the merits, and a defense to the merits and to the jurisdiction contemporaneously is permissible. *Herbert v. Wortendyke*, 49 Neb. 182, 68 N. W. 350.

**Answer May Set Up Matters in Abatement Together with Defenses on Merits.**—See *Christian v. Williams*, 111 Mo. 429, 20 S. W. 96, and *supra*, IV., B, "Concurrent Pleas."

55. *Meinhardt v. Excelsior Brew. Co.*, 82 App. Div. 627, 81 N. Y. Supp. 1042. But see *Maddox v. Central of Ga. R. Co.*, 110 Ga. 301, 34 S. E. 1036.

56. **Ala.**—*Lawrence v. State*, 59 Ala. 61. **Ind.**—*Vattier v. State*, 4 Blackf. 73. **N. C.**—*State v. Jackson*, 82 N. C. 565.

57. *Agnew v. United States*, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. ed. 624, (holding a plea averring irregularities in selecting the grand jury not relating

to competency of individual jurors to be too late when filed five days after the return of the indictment); *Lowden v. United States*, 149 Fed. 673, 79 C. C. A. 361 (holding a plea to an indictment after the latter had been filed and entered, or seventeen days after defendant's return to the jurisdiction after absence, too late); *United States v. Greene*, 113 Fed. 683 (holding that a plea to an indictment alleging irregularity in drawing the grand jury is too late when filed more than two years after indictment found and after having unnecessarily resisted the process of the court and after having resorted to dilatory proceedings in another state to prevent being brought before the court).

58. **Ala.**—*Beverett v. State*, 156 Ala. 101, 47 So. 133 (the rule of practice with reference to time of filing pleas in abatement applies to civil and not to criminal cases); *Smith v. State*, 142 Ala. 14, 39 So. 329 (cannot be filed as a matter of right); *Crawford v. State*, 112 Ala. 1, 21 So. 214; *Nixon v. State*, 68 Ala. 535. **Conn.**—*State v. Dibble*, 59 Conn. 168, 22 Atl. 155. **Fla.**—*Hodge v. State*, 29 Fla. 500, 10 So. 556; *Ellis v. State*, 25 Fla. 702, 6 So. 768. **Ind.**—*Pointer v. State*, 89 Ind. 255; *Romy v. State*, 32 Ind. App. 146, 67 N. E. 998. **Ky.**—*Com. v. Smith*, 10 Bush 476. **Me.**—*State v. Carver*, 49 Me. 588, 77 Am. Dec. 275. **Md.**—*Pontier v. State*, 107 Md. 384, 68 Atl. 1059. **Mass.**—*Com. v. Butler*, 1 Allen 4. **Miss.**—*McQuillen v. State*, 8 Smed. & M. 587. **N. C.**—*State v. Jones*, 88 N. C. 671; *State v. Seaborn*, 15 N. C. 305. **R. I.**—*State v. Heffernan*, 28 R. I. 477, 68 Atl. 364. **Tenn.**—*Dyer v. State*, 11 Lea 509. **Tex.**—*Thompson v. State* (Tex. Civ. App.), 62 S. W. 919, a plea in abatement coming after a plea of not guilty is too late. **Va.**—*Clore's Case*, 8 Gratt. 606. **W. Va.**—*State v.*



murrer,<sup>59</sup> or before an application for a change of venue,<sup>60</sup> and before trial,<sup>61</sup> or it is waived.

After challenging the sufficiency of an indictment by motion to quash, it is too late to interpose a plea of misnomer.<sup>62</sup>

An indictment or presentment can be avoided by plea in abatement on the ground of irregularities in the selection of the grand jury,<sup>63</sup> if filed at the first opportunity.<sup>64</sup>

**2. Under Rules of Court.**—The time within which pleas in abatement may be filed is sometimes limited by rule of court. Such a plea is usually required to be interposed at the first term of court.<sup>65</sup> But

Taylor, 57 W. Va. 228, 50 S. E. 247.

Wyo.—Nicholson v. State, 106 Pac. 929.

A withdrawal of a plea in bar will not enable a defendant to file a plea in abatement (Pennell v. State [Tenn.], 125 S. W. 445), unless leave of court is obtained (Pontier v. State, 107 Md. 384, 68 Atl. 1059; State v. Taylor, 57 W. Va. 228, 50 S. E. 247.)

59. Lee v. United States, 156 Fed. 948, 84 C. C. A. 448.

After withdrawal of a demurrer in a criminal case, defendant may of right interpose a plea in abatement. Brannigan v. People, 3 Utah 488, 24 Pac. 767.

60. Caldwell v. State, 41 Tex. 86.

61. Neb.—Goddard v. State, 73 Neb. 739, 103 N. W. 443. Tenn.—Epperson v. State, 5 Lea 291. Tex.—Thompson v. State (Tex. Civ. App.), 62 S. W. 919.

62. Lee v. United States, 156 Fed. 948, 48 C. C. A. 448.

63. Crowley v. United States, 194 U. S. 461, 24 Sup. Ct. 731, 48 L. ed. 1075, containing an excellent discussion of the question under consideration. Compare Com. v. Smith, 9 Mass. 106, wherein the court said that "objections to the personal qualifications of the jurors, or to the legality of the returns, are to be made before the indictment is found." But the court was careful to observe that the decision was not rested on that ground. In Com. v. Parker, 2 Pick. (Mass.) 550, 563, the court in referring to the above quotation, remarked that he had some doubts as to its correctness in all cases.

64. Two months after return of indictment is too late, there being no allegation that it was filed at the first opportunity. Pennell v. State (Tenn.), 125 S. W. 445.

The effect of the statute limiting the time within which pleas in abatement

on the ground that the grand jurors were not drawn in the presence of the proper officers can be filed, cannot be avoided by putting the defense in the shape of a motion to quash. Mooror v. State, 115 Ala. 119, 22 So. 592.

**On Arraignment.**—Crowley v. United States, 194 U. S. 461, 24 Sup. Ct. 731, 48 L. ed. 1075.

It must affirmatively appear that the accused did not have notice and opportunity to raise the question by challenge before the finding of the indictment. Folds v. State, 123 Ga. 167, 51 S. E. 305.

65. Conn.—Mitchell v. Smith, 74 Conn. 125, 49 Atl. 909, pleas in abatement must be filed on or before the opening of court on the day following the return of the writ. Fla.—E. O. Painter Fertilizer Co. v. Du Pont, 54 Fla. 288, 45 So. 507, circuit court rules require pleas in abatement as other pleas to be filed at the rule day next succeeding the rule day on which appearance is required to be entered, or next after the declaration is required to be filed. Ga.—Bray v. Peace, 131 Ga. 637, 62 S. E. 1025; Realty Co. v. Ellis, 4 Ga. App. 402, 61 S. E. 832; Sparks Imp Co. v. Jones, 4 Ga. App. 61, 60 S. E. 810. Me.—Brunswick First Nat. Bank v. Lime Rock F. & M. Ins. Co., 56 Me. 424; Mitchell v. Union Life Ins. Co., 45 Me. 104, 71 Am. Dec. 529 (plea in abatement must be filed within two days after the entry of the action). Mass.—Gerrish v. Gary, 1 Allen 213; Hastings v. Bolton, 1 Allen 529; Pratt v. Sanger, 4 Gray 84; Simonds v. Parker, 1 Mete. 508.

**A Special Appearance Does Not Relieve From a Compliance With the Rule.**—Mitchell v. Union Life Ins. Co., 45 Me. 104, 71 Am. Dec. 529.

whatever the specific limitation is, this must be complied with unless defendant is prevented from filing his plea by plaintiff's wilful neglect in filing his writ,<sup>66</sup> or by the court's failure to sit within the time for filing.<sup>67</sup>

**3. Court's Discretion.**—It has been frequently held discretionary with the court to allow the filing of a plea in abatement after the time for filing the same has expired,<sup>68</sup> but with this limitation that such action must be confined to cases in which the defendant has not pleaded to the merits and the plaintiff has not acted upon this waiver of the matter in abatement.<sup>69</sup> It is ordinarily within the discretion of the court to permit an answer to the merits to be withdrawn for the purpose of filing a plea in abatement,<sup>70</sup> but the court's discretion in allow-

66. *State Bank v. Hervey*, 21 Me. 38.

67. In *Brunswick First Nat. Bank v. Lime Rock F. & M. Ins. Co.*, 56 Me. 424, the justice designated to hold the term did not attend on the day fixed by law for its commencement. A plea in abatement was filed on the third day,—the justice having appeared on the second day. The plea was filed in season under the rule requiring a plea to be filed within two days after the entry of the action.

68. **U. S.**—*Wallace v. Clark*, 3 Woodb. & M. 359, 29 Fed. Cas. No. 17,098. **Ala.**—*Gambill v. Cooper*, 48 So. 691 (the disallowance of a plea in abatement averring plaintiff's bankruptcy is a proper exercise of the court's discretion, it appearing that a term of court had passed after the disability arose and that the plea was not interposed until after the trial was reached, late in another term of court); *Massey v. Steele*, 11 Ala. 340; *Cobb v. Miller, Ripley & Co.*, 9 Ala. 499. **Cal.**—*Coubrough v. Adams*, 70 Cal. 374, 11 Pac. 634. **Conn.**—*Charter Oak Bank v. Reed*, 45 Conn. 391. **D. C.**—*Deane v. Echols*, 2 App. Cas. 522, it is discretionary to allow a plea in abatement after the overruling of a demurrer. **Mass.**—*Rathbone v. Rathbone*, 4 Pick. 89. **Pa.**—*Riddle v. Stevens*, 2 Serg. & R. 537. **Eng.**—*Stone v. Thomas*, L. R. 5 Ch. 219, 39 L. J. Ch. 168, 22 L. T. Rep. (N. S.) 359.

**Upon Same Grounds as Prior Motion.**—It is a proper exercise of the court's discretion to permit the interposition of a plea in abatement based on the same grounds upon which a motion to dismiss was filed and overruled, a motion to set aside a judgment

by default having thereafter been granted. *Dozier Lumb. Co. v. Smith-Isburg Lumb. Co.*, 145 Ala. 317, 39 So. 714.

Whether minutes may be examined during trial with a view to interposing a plea in abatement is a matter within the discretion of the trial court. *Crawford v. State*, 112 Ala. 1, 21 So. 214.

69. *Vaughan v. Robinson*, 22 Ala. 519, reviewing authorities.

Where the question in abatement goes to plaintiff's right to bring suit because of failure to comply with some statutory provision unknown to the common law, the compliance with which would in no manner affect the justice of the cause of action, it would be an abuse of discretion to allow the filing of such a plea, especially after issue joined on pleadings not raising this issue, the parties had gone to trial, and where the matters pleaded in abatement are matters concerning which there was record evidence as accessible to defendant at the time of the original answer as at the time of the amended answer. *Drake v. Great Northern R. Co.* (S. D.), 123 N. W. 82.

70. **U. S.**—*Kern v. Huidekoper*, 103 U. S. 494, 26 L. ed. 497. **Tex.**—*Eden v. Osborne & Co.*, 14 Tex. Civ. App. 314, 37 S. W. 182. **W. Va.**—*State v. Taylor*, 57 W. Va. 228, 50 S. E. 247.

**When Motion for Leave Properly Denied.**—A motion for leave to withdraw a plea of the general issue and to file a plea of misnomer after verdict rendered, is properly denied, though it developed on plaintiff's cross-examination that her real name was other than the one under which she brought suit, it ap-

ing such action is improperly exercised when prejudicial to plaintiff's rights.<sup>71</sup> A long line of cases hold that the court may, in its discretion, allow the withdrawal of a plea of not guilty in a criminal case and permit the filing of a plea in abatement.<sup>72</sup>

**4. Ignorance No Justification for Later Plea.**—Ignorance of a cause of abatement will not justify filing a plea after the time limited.<sup>73</sup> Defendant must show that he exercised reasonable diligence to ascertain the facts upon which he desires to base a plea.<sup>74</sup>

**5. Effect of Imparance or Continuance.**—A plea in abatement will not be entertained after a general imparance,<sup>75</sup> or general continuance,<sup>76</sup> or motion to continue,<sup>77</sup> or after a motion for a continuance

pearing that plaintiff was as well known by one name as the other. *Springfield Consol. R. Co. v. Hoeffner*, 175 Ill. 634, 51 N. E. 884.

71. Thus it is manifestly improper to allow a defendant to withdraw an answer and file a plea in abatement, after a lapse of four years from the filing of the answer and when the cause of action would be barred. *Eden v. Osborn & Co.*, 14 Tex. Civ. App. 314, 37 S. W. 182.

72. *Ala.*—*Smith v. State*, 142 Ala. 14, 39 So. 329; *Hubbard v. State*, 72 Ala. 164. *D. C.*—*District v. Rupert*, 7 Mackey 208. *Fla.*—*Knight v. State*, 42 Fla. 546, 28 So. 759. *Hawaii.*—*Ter. v. Johnson*, 16 Hawaii 743. *Mo.*—*State v. Gieseke*, 209 Mo. 331, 108 S. W. 525. *N. Y.*—*People v. Allen*, 43 N. Y. 28. *N. C.*—*State v. Jones*, 88 N. C. 671. *R. I.*—*State v. Watson*, 20 R. I. 354, 39 Atl. 193, 78 Am. St. Rep. 871. *Va.*—*Reed v. Com.*, 98 Va. 817, 36 S. E. 399; *Com. v. Scott*, 10 Gratt. 749. *Wis.*—*Richards v. State*, 82 Wis. 172, 51 N. W. 652.

**Leave of Court Granted Only in Exceptional Cases.**—*Pontier v. State*, 107 Md. 384, 68 Atl. 1059; *Mills v. State*, 76 Md. 274, 25 Atl. 229.

**Conditions May Be Imposed.**—In allowing such action the court may impose conditions upon defendant which it may deem proper. *Mills v. State*, 76 Md. 274, 25 Atl. 229.

73. *Ala.*—*Moorer v. State*, 115 Ala. 119, 22 So. 592. *Conn.*—*Mitchell v. Smith*, 74 Conn. 125, 49 Atl. 909; *Huntley v. Holt*, 59 Conn. 102, 22 Atl. 34, 21 Am. St. Rep. 71. *Mass.*—*Hastings v. Bolton*, 1 Allen 529.

74. *Moorer v. State*, 115 Ala. 119, 22 So. 592.

75. *Md.*—*Young v. Bank*, 31 Md. 66. *Mass.*—*Coffin v. Jones*, 5 Pick. 61. *Pa.*—*Chamberlin v. Hite*, 5 Watts 373; *Coates v. McCamm*, 2 Browne 173. *Eng.*—*Buddle v. Willson*, 6 T. R. 369, 101 Eng. Reprint 600.

76. *Ala.*—*Laws v. State*, 144 Ala. 118, 42 So. 40, a plea in a criminal case averring that defendant was not represented by counsel on his arraignment comes too late where it appears that the case has been set down on two previous occasions for trial and that he had the benefit of counsel each time. *Ind.*—*Johnson v. Staley*, 32 Ind. App. 628, 70 N. E. 541. *Me.*—*Otis v. Ellis*, 78 Me. 75, 2 Atl. 851. *Mo.*—*Bankers Life Assn. v. Shelton*, 84 Mo. App. 634. *Tenn.*—*State v. Myers*, 10 Lea 717; *State v. Swafford*, 1 Lea 274; *State v. Faust*, 7 Coldw. 109. *Tex.*—*Peveler v. Peveler*, 54 Tex. 53; *O'Neil v. Murray* (Tex. Civ. App.), 94 S. W. 1090. *Vt.*—*Stanton v. Pro. of Haverhill Bridge*, 47 Vt. 172.

77. *David's v. People*, 192 Ill. 176, 61 N. E. 537.

But see *Collin Co. Nat. Bank v. Turner* (Tex. Civ. App.), 111 S. W. 670, wherein it was held that under a statute providing that a defendant may join in his answer several defensive matters, provided that he shall file them all at the same time, and in due order of pleading, a defendant does not waive a plea of privilege to be sued in another county, and submit itself to the court's jurisdiction by filing at the time of filing his said plea a plea to the merits and a motion to continue the case to make additional parties in the event it should be held to answer.



has been overruled.<sup>78</sup> But a continuance by consent of parties,<sup>79</sup> or at the court's own instance for the purpose of having the issues made by a plea tried by a jury on the trial of the cause on the merits,<sup>80</sup> does not have the effect indicated above. And a plea in abatement is permissible after a special imparlance entered of record.<sup>81</sup>

Where an extension of time is given to plead without limitation as to the kind of plea, a plea in abatement may be filed within such time.<sup>82</sup> But a general leave to plead, given while a plea in abatement was undisposed of, will not authorize the filing of an amended plea in abatement.<sup>83</sup>

**6. Plea Too Late on Appeal.**—In the absence of a showing of cause for delay, it is too late to file a plea in abatement on appeal.<sup>84</sup>

**B. WHERE ABATABLE MATTERS ARISE AFTER SUIT BROUGHT.**—Matters in abatement arising after a plea or answer to the merits has been filed, are pleadable,<sup>85</sup> but must be taken advantage of at the first opportunity.<sup>86</sup>

78. *Indiana etc. R. Co. v. Cohoon*, 95 Ill. App. 92.

79. *Simpson v. East Tenn. R. Co.*, 89 Tenn. 304, 15 S. W. 735; *Behrens Drug Co. v. Hamilton*, 92 Tex. 284, 48 S. W. 5; *Howeth v. Clark* (Tex.), 19 S. W. 433; *Dorrah v. McKay* (Tex. Civ. App.), 56 S. W. 611, where a continuance has been made, the order therefor reserving the right to maintain a plea in abatement, subsequent continuances failing to mention such reservation will not be construed as a waiver).

80. In *Leahy v. Ortiz*, 38 Tex. Civ. App. 314, 85 S. W. 824, it was held that a plea in abatement on the ground of privilege to be sued in another county is not waived by the fact that continuances were made by the court in order that the question of fraud raised by the plea might be tried by a jury on a trial of the cause on its merits, the orders of the court granting the continuances specially providing that the plea of privilege should not be prejudiced thereby, the matter having been each time called to the attention of the court.

81. *McCarney v. McCamp*, 1 Ashm. (Pa.) 4; *Coates v. McCamm*, 2 Browne (Pa.) 173; *Doughty v. Lascalles*, 4 T. R. 520, 100 Eng. Reprint 1152.

A statutory continuance is in the nature of a special imparlance, which saves all of defendant's rights. *Robbins v. Hill*, 12 Pick. (Mass.) 569; *Rathbone v. Rathbone*, 4 Pick. (Mass.) 89.

82. *Horn v. Noble*, 95 Ill. App. 101.

83. *Grand Lodge v. Randolph*, 186 Ill. 89, 57 N. E. 882.

84. *Ala.*—*Blankenship v. Blackwell*, 124 Ala. 355, 27 So. 551, 82 Am. St. Rep. 175. *Conn.*—*Smith v. State*, 19 Conn. 493. *Ga.*—*Adams v. Branan*, 120 Ga. 530, 48 S. E. 128; *Horne v. Rodgers*, 103 Ga. 649, 30 S. E. 562; *Berry v. Cooper*, 28 Ga. 543.

The right to a jury trial cannot be asserted by plea in abatement when filed for the first time in the supreme court. *Bolln v. Nebraska*, 176 U. S. 83, 20 Sup. Ct. 287, 44 L. ed. 382.

85. *Ark.*—*Johnson v. Killian*, 6 Ark. 172. *Md.*—*Cruzen v. McKaig*, 57 Md. 454; *Young v. Bank*, 31 Md. 66. *Tenn.*—*Yancey v. Marriott*, 1 Sneed 28.

After amendment where a statute provides that in case suit is brought against several defendants residing in different counties, jurisdiction may attach in either county, if, in an action against a corporation and an individual, jointly, in the county of the latter's residence, plaintiff discontinues as to him, a plea to the jurisdiction by the corporation at this time is interposed in due season. *Eagle Iron Co. v. Malone*, 149 Ala. 367, 42 So. 734; *Eagle Iron Co. v. Baugh*, 147 Ala. 613, 41 So. 663.

After Entry of Office Judgment at Rules.—*Empire Coal & Coke Co. v. Hull Coal & Coke Co.*, 51 W. Va. 474, 41 S. E. 917; *Hinton v. Ballard*, 3 W. Va. 582.

86. *Miss.*—*Simmons v. Thomas*, 43

C. AMENDMENTS. — A plea in abatement cannot be amended after the time for filing has expired,<sup>87</sup> except by leave of court.<sup>88</sup> The court will exercise its discretion by allowing an amendment only when the ends of justice will thereby be served,<sup>89</sup> and its action will only be reviewed, on appeal, when such discretion has been manifestly abused.<sup>90</sup>

D. PLEADING OVER AFTER ADVERSE RULING. — In jurisdictions where an appeal is permissible from an adverse ruling on a plea in abatement, by pleading the general issue after the overruling of a plea in abatement, defendant waives the objection made in the plea of abatement;<sup>91</sup> but in jurisdictions where an appeal is not so allowed the rule is otherwise.<sup>92</sup>

Miss. 31, 5 Am. Rep. 470. Pa. — *Stoeber v. Gloninger*, 6 Serg. & R. 63. Tenn. — *Yancey v. Marriott*, 1 Sneed 28, citing 1 Chit. Pl. 441. Va. — *May v. Bank*, 2 Rob. 60. W. Va. — *Empire Coal & Coke Co. v. Hull Coal & Coke Co.*, 51 W. Va. 474, 41 S. E. 917.

87. Del. — *Lycoming Fire Ins. Co. v. Bush*, 1 Marv. 181, 40 Atl. 947. Ill. — *Bacon v. Schepfin*, 185 Ill. 122, 56 N. E. 1123. Neb. — *Baker v. Union S. Y. Nat. Bank*, 63 Neb. 801, 89 N. W. 269. Wis. — *Newman v. State*, 14 Wis. 393. Eng. — *King v. Cook*, 2 B. & C. 871, 9 E. C. L. 263.

Under the statute in Texas providing that pleas in abatement shall be determined during the term of court at which filed, a party is only entitled to one hearing upon a plea of this character, and, when the court has heard and determined the matter adversely to him, he is not entitled to reopen the matter after the expiration of the term at which it was heard, and by an amended plea again invoke the ruling of the court upon the same question and then complain on appeal of a decision adversely to him. *Ft. Worth, etc. R. Co. v. Harlan* (Tex. Civ. App.), 62 S. W. 971.

88. Conn. — *Mitchell v. Smith*, 74 Conn. 125, 49 Atl. 909. Ill. — *Grand Lodge v. Randolph*, 186 Ill. 89, 57 N. E. 882, general leave to plead given while a plea in abatement is undisposed of does not authorize the filing of an amended plea in abatement setting up the same matter already on file. *N. J.* — *Robert v. Moore*, 62 N. J. L. 618, 43 Atl. 582, holding that the court may grant leave to amend a plea of pendency of former action by filing a new plea with an affidavit of the truth thereof as required by law. S. D. —

*Drake v. Great Northern R. Co.*, 123 N. W. 82, holding that a plea in abatement cannot be interposed by amended answer without leave of court, after trial had and a new trial granted, no such plea having been contained in the original answer.

In Alabama a plea in abatement in substance amendatory of former pleas filed within time, to which demurrers have been sustained, may be interposed with leave, and the rule of court requiring a plea in abatement to be filed within the time allowed for pleading has no application. *Abraham Bros. v. Southern R. Co.*, 149 Ala. 547, 42 So. 837.

89. *Bernheim Distill. Co. v. Elmore* (Cal. App.), 106 Pac. 720; *Mitchell v. Smith*, 74 Conn. 125, 49 Atl. 909 (instances are few where the court can properly allow an amendment to a plea in abatement unless matter is so pleaded that might also be pleaded in bar).

Plea Alleging Harmless Informality and Clerical Error Not Amendable. — *Mitchell v. Smith*, 74 Conn. 125, 49 Atl. 909.

90. *Taylor v. Brown*, 49 Ore. 423, 90 Pac. 673.

91. Conn. — *Prosser v. Chapman*, 29 Conn. 515. Mich. — *Frohlich v. Independent Glass Co.*, 144 Mich. 278, 107 N. W. 889; *Steel v. Clinton Circuit Judge*, 133 Mich. 695, 95 N. W. 993. Tenn. — *Simpson v. East Tenn. R. Co.*, 89 Tenn. 304, 15 S. W. 735.

92. U. S. — *Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237. Ill. — *Grand Lodge etc. v. Cramer*, 164 Ill. 9, 45 N. E. 165, citing many Illinois cases. Mass. — *Cleveland v. Welsh*, 4 Mass. 591. See also *Ames v. Winsor*, 19 Pick. 247. Mo. — *Norvell v. Porter*, 62 Mo.

**E. STIPULATIONS. — 1. Waiving Abatable Matter.** — Defendant may waive his right to interpose a plea in abatement, by stipulation,<sup>93</sup> as to matter expressly specified.<sup>94</sup>

**2. Reserving Abatable Matter.** — Rights under a plea in abatement may be reserved by stipulation so as to obviate a waiver which would otherwise occur by pleading to the merits.<sup>95</sup>

**F. WAIVER OF PLEA BY ABANDONMENT.** — A plea in abatement may

309. **Tex.** — *Borrah v. McKay* (Tex. Civ. App.), 56 S. W. 611, rule applicable in justice courts. **Wash.** — *Knoff v. Puget Sound Co-op. Col.*, 1 Wash. 57, 24 Pac. 27.

93. **Fla.** — *E. O. Painter Fertilizer Co. v. DuPont*, 54 Fla. 288, 45 So. 507. **Ill.** — *Morgan v. Corlies*, 81 Ill. 72, a stipulation to plead the merits in consideration of an extension of time to plead is a waiver of matter in abatement. **Tenn.** — *Ward v. Crenshaw*, 4 Yerg. 197.

Thus where suit is begun, and prior suits in another county are pending on the same cause of action, and the parties stipulate that the prior suits shall rest in abeyance during the pendency and until the final disposition of the suit last begun, and that thereupon the same judgment and decree shall be rendered as is rendered in the action tried, such stipulation is a waiver of any right to file a plea in abatement because of the pendency of prior actions. *First Nat. Bank v. Grosshans*, 61 Neb. 575, 85 N. W. 542.

**Stipulation Waived.** — By several continuances without reference to prior stipulation to the effect that a continuance should not constitute a waiver of matter in abatement, the same is waived. *Atchison, etc. R. Co. v. Reilly* (Tex. Civ. App.), 30 S. W. 491.

94. Stipulation in no way relating to venue is no implied waiver of privilege to be sued in another county. *E. O. Painter Fertilizer Co. v. Du Pont*, 54 Fla. 288, 45 So. 507.

95. *Emmons v. Lexington, etc. Min. Co.*, 112 Ky. 91, 65 S. W. 593. See also *Murray v. Spencer*, 46 La. Ann. 452, 15 So. 25.

Thus, where a plea to the merits has been filed after a plea to the jurisdiction has been held insufficient, if it appears that plaintiff's counsel had signed an agreement that an entry of judg-

ment should not affect defendant's right to take proper steps to perfect an appeal from the order sustaining a demurrer to defendant's plea to the jurisdiction, there is no waiver of defendant's right to review the question of jurisdiction. *Emmons v. Lexington, etc. Min. Co.*, 112 Ky. 91, 65 S. W. 593.

And where a defendant files an answer to the merits after having entered a plea of privilege, if plaintiff's supplemented petition avers that defendant's attorney, in having the case set, "requested, agreed, and consented that the case be set down for trial on the merits as well as on said plea to the jurisdiction," defendant cannot be said to have waived his right to be heard upon the plea to the jurisdiction, notwithstanding testimony of plaintiff's counsel that he had told defendant's counsel over the telephone that he would insist upon the latter's appearance as a waiver of his plea to the jurisdiction. *Bennett v. Stratton*, 25 Tex. Civ. App. 510, 61 S. W. 949.

And where a defendant pleads in his answer a jurisdictional defense as well as matter in bar, and provides in stipulations against waiver of this defense, and consents to a trial by the court with the reservation that it should be determined; though evidence is introduced both on the merits and the plea in abatement, if the court passes on the latter only, and then declares it would be improper to decide anything upon the merits, there is not such a general appearance by defendant as confers jurisdiction. *Barnett v. Colonial Hotel Bldg. Co.*, 137 Mo. App. 636, 119 S. W. 471.

The practice of submitting two distinct issues in a criminal case together is irregular, but where a plea in bar and one in abatement are filed contemporaneously by consent of parties, there is no waiver of the latter. *Davis v. State*, 136 Ala. 129, 33 So. 818.



be waived by abandonment or by defendant's causing the same to be stricken out on his own motion.<sup>96</sup>

## VII. OBJECTIONS TO PLEA — HOW MADE. — A. *In General.*

As a rule it is necessary to traverse a plea in abatement and thus form an issue thereon.<sup>97</sup> It has been held, however, that in a plain case, where little more than an inspection is required, the court may of its own motion or upon insufficient application, pass upon the sufficiency of a plea.<sup>98</sup>

B. By DEMURRER. — The general rule is that all objections to pleas in abatement, whether of form or substance, can and should be raised by a general demurrer<sup>99</sup> even in criminal cases, though not so declared

96. *E. O. Painter Fertilizer Co. v. Du Pont*, 54 Fla. 288, 45 So. 507; *Kiddell v. Bristow*, 67 S. C. 175, 45 S. E. 174.

Thus failure to raise any question by motion or objection indicating a reliance upon a plea in abatement which has been interposed, and basing a motion for dismissal upon a distinct ground, constitutes a waiver of such plea. *Hirsch v. Manhattan R. Co.*, 84 App. Div. 374, 82 N. Y. Supp. 754.

And where after confession of a plea in abatement and leave obtained to amend the complaint, the trial proceeds without further objection, and subsequent pleadings are filed on both sides, the actual amendment not being insisted upon, the defendant will be held to have waived the irregularity and to have consented to treat the complaint as amended to conform to his plea. *Carter v. Fischer*, 127 Ala. 52, 28 So. 376.

97. *Wells v. State*, 118 Ga. 556, 45 S. E. 443.

**Withdrawal of Plea as Curing Failure To Traverse.** — *Wells v. State*, 118 Ga. 556, 45 S. E. 443.

98. *O'Brien v. State*, 55 Fla. 146, 47 So. 11. See also *Benedict Pineapple Co. v. Atlantic Coast Line R. Co.*, 55 Fla. 514, 46 So. 732, 20 L. R. A. (N. S.) 92.

99. The following are a few of the cases that support the text: **U. S.** — *Lowdon v. United States*, 149 Fed. 673, 79 C. C. A. 361. **Ala.** — *Brown v. State*, 157 Ala. 15, 47 So. 1024; *Abraham Bros. v. Southern R. Co.*, 149 Ala. 547, 42 So. 837; *Seaboard Air Line R. v. Hubbard*, 142 Ala. 546, 38 So. 750; *Ruffin v. State*, 124 Ala. 91, 27 So. 307; *McLeroy v. State*, 120 Ala. 274, 25 So.

247; *Rooks v. State*, 83 Ala. 79, 3 So. 720. See *Smith v. State*, 142 Ala. 14, 39 So. 329. **Conn.** — *Mitchell v. Smith*, 74 Conn. 125, 49 Atl. 909; *Levy v. Metropolis Mfg. Co.*, 73 Conn. 559, 48 Atl. 429. **Fla.** — *Thomas v. State*, 51 So. 410; *Easterlin v. State*, 43 Fla. 565, 31 So. 350; *Miller v. State*, 42 Fla. 266, 28 So. 208; *Knight v. State*, 42 Fla. 546, 28 So. 759; *Waldron v. State*, 41 Fla. 265, 26 So. 701. **Ga.** — *Wellman v. State*, 100 Ga. 576, 28 S. E. 605; *Jester v. Bainbridge State Bank*, 4 Ga. App. 469, 61 S. E. 926. **Ill.** — *Quartier v. Dowiat*, 219 Ill. 326, 76 N. E. 371; *Willard v. Zehr*, 215 Ill. 148, 74 N. E. 107; *Dauids v. People*, 192 Ill. 176, 61 N. E. 537; *Finch v. Galigher*, 181 Ill. 625, 54 N. E. 611 (*citing* 1 Chit. Pl. 465; 1 Tidd. Prac. 638, 695). **Ind.** — *State v. Roberts*, 166 Ind. 585, 77 N. E. 1093; *Chicago, etc. R. Co. v. Grant-ham*, 165 Ind. 279, 75 N. E. 265; *State v. Katzman*, 161 Ind. 504, 69 N. E. 157 (a demurrer is proper though not expressly authorized by statute); *Klein v. State*, 157 Ind. 146, 60 N. E. 1036; *State v. Wilson*, 156 Ind. 343, 59 N. E. 932; *Hauk v. State*, 148 Ind. 238, 46 N. E. 127 (petition for rehearing overruled, 47 N. E. 465); *Combs v. Union Tr. Co.*, 146 Ind. 688, 46 N. E. 16 (impliedly overrules *Bryan v. Scholl*, 109 Ind. 367, 10 N. E. 107); *Elder v. State*, 96 Ind. 162; *State v. Barrett*, 54 Ind. 434; *Sloan v. Lowder*, 23 Ind. App. 118, 54 N. E. 135. **Me.** — *Hibbard v. Newman*, 101 Me. 410, 64 Atl. 720; *Bellamy v. Oliver*, 65 Me. 108; *Getchell v. Boyd*, 44 Me. 482. **Mass.** — *Com. v. Lannan*, 13 Allen 563. **Neb.** — *Steiner v. State*, 78 Neb. 147, 110 N. W. 723. **N. M.** — *Ter. v. Smith*, 12 N. M. 229, 78 Pac. 42. **N. Y.** — *Shaw v. Dutcher*, 19

by any statute, although a special demurrer is necessary in certain instances.<sup>1</sup>

A demurrer admits the facts alleged in the plea, and evidence as to their truth is inadmissible.<sup>2</sup>

A demurrer to a plea in abatement does not search the record and cannot be carried back and sustained to the declaration or complaint.<sup>3</sup>

C. BY REPLICATION. — A replication to a plea in abatement in jurisdictions where it is authorized, is proper where it is sought to raise

Wend. 216. **Ohio.** — *Lindsey v. State*, 69 Ohio 215, 69 N. E. 126. **R. I.** — *Capwell v. Sipe*, 17 R. I. 475, 23 Atl. 14, 33 Am. St. Rep. 890. **Vt.** — *State v. Waterman*, 78 Vt. 379, 62 Atl. 1016; *State v. Emery*, 59 Vt. 84, 7 Atl. 129. **Va.** — *Hortons v. Towne*, 6 Leigh 47; *Mantz v. Hendley*, 2 Hen. & M. 308. **W. Va.** — *Bradford v. State*, 4 W. Va. 763. **Wis.** — *Guenther v. State*, 137 Wis. 183, 118 N. W. 640; *Newman v. State*, 14 Wis. 393. **Wyo.** — *Nicholson v. State*, 106 Pac. 929. **Eng.** — *Rex v. Clark, D. & R.* 43, 16 E. C. L. 17; *Rex v. Cooke*, 2 B. & C. 618, 9 E. C. L. 201; *Esdaille v. Lund*, 12 Mees. & W. 607.

**Grounds for Demurrer Should Be Stated.** — A demurrer stating that "the facts stated are not sufficient to constitute a plea in abatement" is properly overruled because failing to state any statutory ground of objection, since it is never proper to allege that a pleading does not state facts sufficient to constitute such pleading. *State v. Katzman*, 161 Ind. 504, 69 N. E. 157.

A plea in abatement after a general imparance being unauthorized may be taken advantage of by general demurrer. *Buddle v. Willson*, 6 T. R. 369, 101 Eng. Reprint 600.

**Duplicity** in a plea in abatement is properly taken advantage of by demurrer. *State v. McNay*, 100 Md. 622, 60 Atl. 273; *Hoppin v. Jenckes*, 9 R. I. 102.

A demurrer for want of facts constituting a defense is properly overruled, since a plea in abatement need only state facts sufficient to abate the action. *Combs v. Union Tr. Co.*, 146 Ind. 688, 46 N. E. 16; *State v. Lannoy*, 30 Ind. App. 335, 65 N. E. 1052.

**Approved Form in Criminal Case.** "Comes the state, by its solicitor, and demurs to the plea in abatement filed to the indictment in the above-en-

titled cause, and assigns the following grounds:" etc. *Simmons v. State (Ala.)*, 48 So. 606.

**Approved Form in Civil Case.** — See *Whiton v. Balch*, 203 Mass. 576, 89 N. E. 1045.

1. If a plea in abatement on the ground of dismissal of a former identical action is defective for failure to annex a copy of the dismissed action, the deficiency should be shown by appropriate special demurrer. *Dougherty v. Dougherty*, 126 Ga. 33, 54 S. E. 811.

2. *Guenther v. State*, 137 Wis. 183, 118 N. W. 640.

**Facts Well Pleaded Only Admitted.** *State v. McNay*, 100 Md. 622, 60 Atl. 273.

3. **Ala.** — *Crawford v. Slade*, 9 Ala. 887, 44 Am. Dec. 463; *Rogers v. Smiley*, 2 Port. 249. **Ark.** — *Wade v. Bridges*, 24 Ark. 569; *Vaden v. Ellis*, 18 Ark. 355; *Knott v. Clements*, 13 Ark. 335. **Conn.** — *State v. Hamlin*, 47 Conn. 95, 36 Am. Rep. 54. **Ill.** — *Finch v. Galigher*, 181 Ill. 625, 54 N. E. 611; *Ryan v. May*, 14 Ill. 49. **Ind.** — *Darnell v. State*, 90 N. E. 769; *State v. Roberts*, 166 Ind. 585, 77 N. E. 1093; *Goldsmith v. Chipps*, 154 Ind. 28, 55 N. E. 855; *Indiana, B. & W. R. Co. v. Foster*, 107 Ind. 430, 8 N. E. 264; *Anderson Bldg. L. F. & Sav. Assn. v. Thompson*, 88 Ind. 405; *Price v. Grand Rapids & I. R. Co.*, 18 Ind. 137; *Rush v. Foos Mfg. Co.*, 20 Ind. App. 515, 51 N. E. 143. **Ky.** — *Dean v. Boyd*, 9 Dana 169. **Mass.** — *Clifford v. Cony*, 1 Mass. 495. **N. J.** — *Birch v. King*, 71 N. J. L. 392, 59 Atl. 11. **N. Y.** — *Shaw v. Dutcher*, 19 Wend. 216. **Ohio.** — *Myers v. Erwin*, 20 Ohio 382. **R. I.** — *Ellis v. Ellis*, 4 R. I. 110. **Vt.** — *Bent v. Bent*, 43 Vt. 42. But see *United States v. Lawrence*, 13 Blatchf. 295, 26 Fed. Cas. No. 15,573.

**Rationale.** — A plea in abatement is not addressed to the complaint and

an issue of fact.<sup>4</sup> To a plea in abatement alleging misnomer in an indictment, a replication averring that defendant was known as well by one name as the other is good.<sup>5</sup>

There is no reversible error in permitting a special replication in addition to a general replication to a plea in abatement, when the special replication puts in issue the sole material issue raised by the plea.<sup>6</sup>

A defect in the form of the conclusion to a replication is immaterial after verdict.<sup>7</sup>

In some cases a plaintiff is allowed to practically defeat a plea in abatement without any replication by showing on the trial facts which render it nugatory.<sup>8</sup>

Defects in the form of the plea are waived by failing to demur and interposing a replication.<sup>9</sup>

D. BY MOTION TO STRIKE OUT.—Where a plea in abatement is plainly frivolous and trifling, it may be stricken out on motion. A demurrer is not necessary to dispose of such a plea.<sup>10</sup> Thus double pleas,<sup>11</sup> and successive pleas improperly filed,<sup>12</sup> may be stricken out on motion. So also a motion to strike out is proper where a plea in abatement has been filed with one in bar,<sup>13</sup> or where such plea has been filed after the time within which they may be pleaded has elapsed.<sup>14</sup>

Where a statute requires a plea of pendency of a former action to

this is reason enough why a demurrer to it cannot be carried back to the complaint. *Indiana, etc. R. Co. v. Foster*, 107 Ind. 430, 8 N. E. 264; *Price v. Grand Rapids, etc. R. Co.*, 18 Ind. 137; *Rush v. Foos Mfg. Co.*, 20 Ind. App. 515, 51 N. E. 143.

4. *Ala.*—*Brooke v. State*, 155 Ala. 78, 46 So. 491. *Ind.*—*Long v. State*, 56 Ind. 182, 26 Am. Rep. 19. *Me.*—*State v. Malia*, 79 Me. 540, 11 Atl. 602. *Wis.*—*Baker v. State*, 80 Wis. 416, 50 N. W. 518.

After overruling of a demurrer a replication may be interposed. *People v. O'Neill*, 107 Mich. 556, 65 N. W. 540.

5. *Springfield Consol. R. Co. v. Hoeffner*, 175 Ill. 634, 51 N. E. 884; *State v. Narcarm*, 69 N. H. 237, 45 Atl. 744.

6. *Taylor v. State*, 49 Fla. 69, 38 So. 380.

7. *McCue v. Com.*, 103 Va. 870, 49 S. E. 623.

8. *Dauids v. People*, 192 Ill. 176, 61 N. E. 537.

9. *State v. Ligon*, 7 Port. (Ala.) 167.

10. *Strobhar v. State*, 55 Fla. 167, 47 So. 4; *O'Brien v. State*, 55 Fla. 146, 47 So. 11.

**No Reversible Error in Striking Plea.**—Although the proper practice is to demur to a defective plea of misnomer, if the plea is so defective as to be clearly demurrable, the fact that the court struck the same from the files on motion is not reversible error, if it appears that no injury accrued to defendant. *Rooks v. State*, 83 Ala. 79, 3 So. 720.

11. *Trabue v. Higden*, 4 Coldw. (Tenn.) 620.

12. *Grand Lodge v. Randolph*, 186 Ill. 89, 57 N. E. 882; *Bacon v. Schepflin*, 185 Ill. 122, 56 N. E. 1123.

13. *Carmien v. Cornell*, 148 Ind. 83, 47 N. E. 216; *Voluntary Relief Department v. Spencer*, 17 Ind. App. 123, 46 N. E. 477; *Bldg. & Loan Assn. v. Fire Ins. Co.*, 23 Pa. Super. 88.

14. **U. S.**—*Lee v. United States*, 156 Fed. 948, 84 C. C. A. 448. *Ala.*—*Smith v. State*, 142 Ala. 14, 39 So. 329. *Ga.*—*Adams v. Branan*, 120 Ga. 530, 48 S. E. 128. *Ind.*—*Johnson v. Staley*, 32 Ind. App. 628, 70 N. E. 541.



have annexed thereto an affidavit proving its truth, a plea having annexed to it an affidavit of merits only may be stricken on motion.<sup>15</sup>

It seems that the action of the court in passing an order striking out a plea on the ground that no evidence was offered in its support, is not reversible error.<sup>16</sup> But where a plea in abatement is relevant and not improper and does not tend to hinder or delay justice, a motion to strike out is properly denied.<sup>17</sup>

**VIII. DEMURRER TO REPLICATION TO PLEA IN ABATEMENT.** — A demurrer to a replication interposed to a plea in abatement, reaches back to the plea in abatement,<sup>18</sup> but not beyond.<sup>19</sup>

**IX. TRIAL AND DETERMINATION.** — **A. ISSUES** — **WHERE TRIABLE.** — Where a cause is transferred from one court to another, the issues raised by a plea in abatement should be tried in the latter unless the record of the former is involved.<sup>20</sup>

**B. WHEN TRIABLE.** — Under rules of court, a plea in abatement is often required to be entertained at the same term of court at which filed,<sup>21</sup> unless failure to do so is shown to be the result of unavoidable cause,<sup>22</sup> or because of the court's failure to try the issue promptly.<sup>23</sup>

**C. WHAT FACTS MUST BE SUBMITTED.** — The facts in contemplation of law which are to be submitted to a jury upon the trial of a plea in

15. *Robert v. Moore*, 62 N. J. L. 618, 43 Atl. 582.

16. *Wells v. State*, 118 Ga. 556, 45 S. E. 443. It was said that the proper practice would have been for the state to have traversed the plea, but it failed to do so and because of this the defendant declined to introduce evidence in its support. This court held that while the trial court committed a technical error in striking out the plea, instead of entering a judgment overruling it, which would have been the proper practice, as the judge, who was hearing the case without a jury, should have passed upon the merits of the plea; finding that it was unsupported by evidence, yet, as the same practical result was reached by the course pursued, the mere technical error committed was not cause for a reversal of the judgment.

17. *D. O. Painter Fertilizer Co. v. Du Pont*, 54 Fla. 288, 45 So. 507.

18. *Fla.* — *Reeves v. State*, 29 Fla. 527, 10 So. 901. *Ill.* — *Finch v. Galigher*, 181 Ill. 625, 54 N. E. 611. *Neb.* — *State v. Bailey*, 57 Neb. 204, 77 N. W. 654.

Though replication defective the rule is still applicable. *Finch v. Galigher*, 181 Ill. 625, 54 N. E. 611.

19. *Finch v. Galigher*, 181 Ill. 625, 54 N. E. 611, citing 1 Chit. Pl. 466, Steph. Pl. 145.

20. Thus the questions made by a plea in abatement to an indictment which has been transferred from a superior to a city court are triable in the latter court, unless some issue arises thereunder which involves the correctness of the minutes of the superior court. *Wells v. State*, 118 Ga. 556, 45 S. E. 443.

21. *Abraham Bros. v. Southern R. Co.*, 149 Ala. 547, 42 So. 837; *Eagle Iron Co. v. Baugh*, 147 Ala. 613, 41 So. 663.

*In Texas.* — By statute and rule of court a party relying on a plea in abatement is required to call it to the attention of the court during the term of the court at which the same is filed, if business will permit. *Ft. Worth, etc. R. Co. v. Harlan* (Tex. Civ. App.), 62 S. W. 871; *Watson v. Mirike*, 25 Tex. Civ. App. 527, 61 S. W. 538.

22. *Adams v. Branan*, 120 Ga. 530, 48 S. E. 128.

23. *Behrens Drug Co. v. Hamilton*, 92 Tex. 284, 48 S. W. 5.

*In Hartford Fire Ins. Co. v. Shook* (Tex. Civ. App.), 35 S. W. 737, defendant seasonably presented a plea of

abatement, are such a state of facts, if found to exist, that the court must, by proper order, abate the information or indictment.<sup>24</sup>

D. BURDEN OF PROOF. — The burden of proof is on the defendant.<sup>25</sup>

E. SEPARATE TRIAL OF ISSUES. — Ordinarily the issues raised by a plea in abatement must be tried and determined before those raised by a plea to the merits.<sup>26</sup> Some courts have pointed out, however, that

privilege. The court refused to consider it, announcing that it would not take the case up "by piecemeal" and would not hear the plea until the whole case was ready for trial. Such plea was not waived by waiting until after the selection of the jury and the reading by the plaintiff of his petition before again presenting his plea.

24. In *State v. Barrington*, 198 Mo. 23, 95 S. W. 235, it was alleged in the plea that the prosecuting attorney at the time of the return of the indictment and prior thereto, had knowledge of the names of material witnesses, which he intentionally refrained from indorsing on the indictment for the purpose of springing such witnesses at the trial as a surprise on the defendant. The court said that there was no issue of fact herein, as contemplated by the statute, to be submitted to a jury. The question involved was one for the court to determine whether or not the indictment should be quashed, or the prosecuting attorney required to indorse the names of such witnesses upon the indictment and give the defendant reasonable time in which to prepare for his trial with such new witnesses so indorsed.

25. **U. S.** — *Gilmer v. Grand Rapids*, 16 Fed. 708. **La.** — *Buckner v. Beaird*, 32 La. Ann. 226. **Neb.** — *Everson v. State*, 93 N. W. 394. **N. H.** — *Jewett v. Davis*, 6 N. H. 518. **Ohio.** — *Davenport v. James*, 1 Ohio. Dec. (Reprint) 18. **Pa.** — *Daley v. Iselin*, 212 Pa. 279, 61 Atl. 919. **S. D.** — *Woodward v. Stark*, 4 S. D. 588, 57 N. W. 496. **Tex.** — *Hopson v. Caswell*, 13 Tex. Civ. App. 492, 36 S. W. 312, *citing* other Texas cases.

For other evidentiary matters, see *ENCYCLOPÆDIA OF EVIDENCE*, Vol. I, title "Abatement."

26. **U. S.** — *Roberts v. Langenbach*, 119 Fed. 349, 56 C. C. A. 253. **Ala.** — *Tucker v. State*, 152 Ala. 1, 44 So. 587; *Eagle Iron Co. v. Malone*, 149 Ala. 367, 42 So. 734; *Thayer v. State*, 138

Ala. 39, 35 So. 406. **Ga.** — *Bray v. Peace*, 131 Ga. 637, 62 S. E. 1025. **Ill.** — *White v. Thompson*, 1 Ill. 72. **Ind.** — *Carmien v. Cornell*, 148 Ind. 83, 47 N. E. 216. **Kan.** — *Wells v. Patton*, 50 Kan. 732, 33 Pac. 15. **Ky.** — *Foster v. Foster*, 24 Ky. L. Rep. 1396, 71 S. W. 524. **La.** — *Flournoy v. Flournoy*, 29 La. Ann. 737. **Me.** — *Stewart v. Smith*, 98 Me. 104, 56 Atl. 401. **Md.** — *Tyler v. Murray*, 57 Md. 418. **Mo.** — *Coombs & Bro. Com. Co. v. Block*, 130 Mo. 668, 32 S. W. 1139. **Mont.** — *Clark v. Oregon Short Line R. Co.*, 29 Mont. 317, 449, 74 Pac. 734. **Tex.** — *Garza v. Cotton* (Tex. Civ. App.), 120 S. W. 212, holding traverse unnecessary until decision of issue as to venue. **W. Va.** — *Maupin v. Scottish U. & N. Ins. Co.*, 53 W. Va. 557, 45 S. E. 1003. **Wis.** — *Brown Co. v. Van Stralen*, 45 Wis. 675.

**Issues Affected.** — In some cases the determination of issues raised by a plea in abatement, may change the issues on the merits. (*Elliot v. Kuzek*, 2 Alaska 587), and may end the case without more. *Maupin v. Scottish U. & N. Ins. Co.*, 53 W. Va. 557, 45 S. E. 1003.

**Saving Costs.** — Dilatory defenses if heard first may prevent unnecessary costs and delay. *Stewart v. Smith*, 98 Me. 104, 56 Atl. 401.

An injunction was issued in *Freemont v. Merced Min. Co.*, 1 McAll. 267, 9 Fed. Cas. No. 5,095 to preserve *status quo* while plea in abatement was being disposed of.

**Waiver of Irregularity.** — In a prosecution for a felony defendant's failure to object to a trial of both issues at the same time made by a plea of not guilty and another in abatement is not a waiver of the irregularity, and advantage of it may be taken in arrest of judgment or on error. *Tucker v. State*, 152 Ala. 1, 44 So. 587, *citing* other Alabama cases.

The rule as to waiver of the irregularity in misdemeanor cases is differ-

the question whether an issue of fact on a plea in abatement, and one upon the merits, shall be submitted separately to the jury must be left in a great measure to judicial discretion.<sup>27</sup> If not tried separately, separate verdicts should be rendered.<sup>28</sup>

**F. PROVINCE OF COURT AND JURY.**—An issue of fact under a plea in abatement, is triable by a jury.<sup>29</sup> The rule is applicable in criminal cases, apparently upon the theory, generally, that to deny a jury trial of such a plea deprives defendant of a constitutional right.<sup>30</sup> In some

ent. *Dominick v. State*, 40 Ala. 680, 91 Am. Dec. 496.

In *Tennessee* in reference to joint pleas in abatement and to the merits, the statute provides that "both pleas shall be heard at the same time and judgment rendered on each plea." Nothing is said about a verdict, but it must follow that the act contemplated there should be a verdict on both pleas, even though the plea in abatement, which should be first considered and acted upon, were determined in favor of defendant. *Cincinnati, etc. R. Co. v. McCollum*, 105 Tenn. 623, 59 S. W. 136.

27. *Tynburg v. Cohen*, 67 Tex. 220, 2 S. W. 734; *Robertson v. Ephraim*, 18 Tex. 118.

In *Alabama* the court has disapproved the practice of submitting issues on plea in abatement and to the merits contemporaneously in a criminal case. *Davis v. State*, 136 Ala. 20, 33 So. 817.

As to judicial discretion as to time and order of filing pleas see *supra*, VI, A, 3, "Court's Discretion."

28. *Tucker v. State*, 152 Ala. 1, 44 So. 587; *Davis v. State*, 136 Ala. 20, 33 So. 817 (citing earlier Alabama cases); *Cincinnati, etc. R. Co. v. McCollum*, 105 Tenn. 623, 59 S. W. 136.

**Separate Verdict Necessary Only When Issue on Plea Important.** Where the court reaches a determination that an issue on a plea in abatement is not of sufficient importance to require a separate trial, the jury after hearing all the evidence, can find on both issues by separate verdicts, if that be deemed of necessity or importance. *Robertson v. Ephraim*, 18 Tex. 118.

29. **U. S.**—*Roberts v. Langenbach*, 119 Fed. 349, 56 C. C. A. 253. **Ia.**—*McCormick v. Blossom*, 40 Iowa 256. **Md.**—*Tyler v. Murray*, 57 Md. 418.

**Tex.**—*Robertson v. Ephraim*, 18 Tex. 118.

#### Effect of Submitting Issue of Fact.

When an issue of fact is submitted to a jury for decision on a mere issue of the abatement of the writ, the effect is that the defendant admits the merits of plaintiff's claim, and if the issue of fact in abatement is decided for plaintiff, the jury, by the same verdict, should assess the damages of the plaintiff. Hence, it is proper to allow plaintiff to submit to the jury the evidence necessary to enable the jury to make the return an assessment of his damages in case they should find the issues in abatement for him. *Italian-Swiss Agr. Colony v. Pease*, 194 Ill. 98, 62 N. E. 317.

30. **Ala.**—*Tucker v. State*, 152 Ala. 1, 44 So. 587; *Daniel v. State*, 149 Ala. 443, 43 So. 22 (where it was held on an issue of misnomer, the evidence being conflicting, that the question was properly submitted to the jury); *Thayer v. State*, 138 Ala. 39, 35 So. 406; *Bean v. State*, 126 Ala. 1, 28 So. 578. **Ark.**—*Cooper v. State*, 21 Ark. 228. **Ill.**—*Schram v. People*, 29 Ill. 162, holding that when several are indicted jointly, if one interposes a plea in abatement and others pleas of not guilty, there is no objection to submitting the issues made by all to the jury at one time. **Me.**—*State v. Malia*, 79 Me. 540, 11 Atl. 602; *State v. Sweetsir*, 53 Me. 438. **Miss.**—*Stokes v. State*, 24 Miss. 621. **Mo.**—*State v. Goddard*, 162 Mo. 198, 62 S. W. 697. **Neb.**—*Bohanan v. State*, 15 Neb. 209, 18 N. W. 129. **Va.**—*McCue v. Com.*, 103 Va. 870, 49 S. E. 623 (a question as to the disqualification of a grand juror); *Day v. Com.*, 2 Gratt. 563. **W. Va.**—*State v. Clark*, 64 W. Va. 625, 63 S. W. 402, a question as to the competency and sufficiency of the evidence upon which the indictment was found.



cases the point turns upon a statutory provision for the submission to a jury of issues of fact joined upon an indictment or information.<sup>31</sup> It has been held, however, that aside from any constitutional question and in the absence of express statutory procedure, the accused is entitled to have the issue of fact raised by a plea in abatement tried and determined by a jury as are other questions of fact,<sup>32</sup> but where a question of law only is presented, it is proper for the court to determine the same without the intervention of a jury.<sup>33</sup> And it has been held to be within the province of the court to try an issue of fact where determinable from an inspection of the record.<sup>34</sup> And at all times an issue of fact may be tried by the court on consent of parties,<sup>35</sup> or by consent of the accused in a criminal case.<sup>36</sup> And there is no reversible error in denying a jury trial upon an issue of fact in a criminal case, where the record fails to show that the prisoner is in any way prejudiced.<sup>37</sup>

G. FORM AND SUFFICIENCY OF JUDGMENT OR VERDICT. — Unless the defendant prays a particular and proper judgment in abatement, the court is not bound to give the proper judgment upon the whole record, as it would be in the case of pleas in bar.<sup>38</sup>

Where the defendant succeeds on a plea in abatement, whether the issue be one of law or of fact, the judgment should not merely abate the suit, but should quash the writ or declaration.<sup>39</sup> If the issue has

31. *Jackson v. State*, 91 Wis. 253, 64 N. W. 838; *Baker v. State*, 80 Wis. 416, 50 N. W. 518.

32. *State v. Dunn*, 75 Kan. 799, 90 Pac. 231.

33. *Ark.* — *Dickinson v. Noland*, 7 Ark. 25. *Kan.* — *State v. Nield*, 4 Kan. App. 626, 45 Pac. 623. *Mo.* — *State v. Goddard*, 162 Mo. 198, 62 S. W. 697, 705. *Neb.* — *Stetter v. State*, 77 Neb. 777, 110 N. W. 761, where the accused denied waiver of preliminary examination and alleged unconstitutionality of the statute on which the prosecution was based. *Wash.* — *State v. Roller*, 30 Wash. 692, 71 Pac. 718, where it was held to be a question of law for the court to determine whether the accused was placed on trial for the crime for which he was extradited, and that the record was properly withheld from the jury. *Wis.* — *Campbell v. State*, 111 Wis. 152, 86 N. W. 855 (where the only dispute is as to sufficiency of evidence upon which prosecution is based, the court may decide); *Jackson v. State*, 91 Wis. 253, 64 N. W. 838, 842.

34. *Chase v. State*, 46 Miss. 683; *Hoover v. State*, 48 Neb. 184, 66 N. W. 1117. See also *Jackson v. State*, 91

Wis. 253, 64 N. W. 838, 842.

35. *Anderson v. Garrett*, 9 Gill (Md.) 120.

36. *Thayer v. State*, 138 Ala. 39, 35 So. 406. See also *State v. Ferguson*, 8 Kan. App. 810, 57 Pac. 555, a misdemeanor.

37. *Bolln v. State*, 51 Neb. 581, 71 N. W. 444.

38. *Wade v. Bridges*, 24 Ark. 569; *King v. Shakespeare*, 10 East 83, 103 Eng. Reprint 707.

39. *Ala.* — *McCutchen v. McCutchen*, 8 Port. 151. *Ark.* — *Clark v. Latham*, 25 Ark. 16. *Cal.* — *Larco v. Clements*, 36 Cal. 132. *Fla.* — *E. O. Painter Fertilizing Co. v. Du Pont*, 54 Fla. 288, 45 So. 507, citing *Tyler's Stephens' Pleading* 134; 1 *Tidd's Practice* 642; 4 *Minor's Inst.* 955. *Ill.* — *Eddy v. Brady*, 16 Ill. 306. *Mich.* — *Campbell v. Hudson*, 106 Mich. 523, 64 N. W. 483, citing, *inter alia*, *Puter. Pl. & Prac.* 150; *Gould's Pl.* 277, (*Will's Gould*, 472.) *Pa.* — *Blackburn v. Watson*, 85 Pa. 241. *Eng.* — *Tompson v. Colier*, *Yelv.* 112.

If, in a criminal case, the issue made by a plea in abatement has been tried by the court without a jury and if the evidence offered fully sustains the plea,

been tried before a jury, defendant is entitled to the general charge, to find for the defendant on the issue joined on his plea.<sup>40</sup>

If matter in abatement is properly pleaded, and issue is joined thereon, and there are no other pleas, on a finding for plaintiff the appropriate judgment is *quod recuperet* — that the plaintiff recover.<sup>41</sup> and the same jury which tries the issue should assess the plaintiff's damages.<sup>42</sup>

When a plea in abatement is adjudged bad upon demurrer,<sup>43</sup> or motion,<sup>44</sup> the judgment is always *quod respondeat ouster* — that the defendant answer over.

the judgment should be entered sustaining the plea and abating the indictment. *Thayer v. State* (Ala.), 35 So. 406.

40. *Thayer v. State*, 138 Ala. 39, 35 So. 406.

41. **U. S.** — *National Acc. Soc. v. Spiro*, 78 Fed. 747, 24 C. C. A. 334, under prevailing practice in Tennessee. **Fla.** — *E. O. Painter Fertilizer Co. v. Du Pont*, 54 Fla. 288, 45 So. 507. **Ill.** — *Greer v. Young*, 120 Ill. 184, 11 N. E. 167. **Ind.** — *Atkinson v. Bank*, 5 Blackf. 84, citing *Steph. Pl.* 105, and *Gould's Pl.* 300. **Me.** — *Frye v. Hinkley*, 18 Me. 320. **Mass.** — *Boston Glass Mfg. v. Langdon*, 24 Pick. 49, 35 Am. Dec. 292, citing *Gould's Pl.* 300; *Howe's Pr.* 215. **N. H.** — *Chase v. Deming*, 42 N. H. 274. **N. M.** — Texas, etc. R. Co. v. Saxton, 3 N. M. 282, 6 Pac. 206. **N. Y.** — *McCartree v. Chambers*, 6 Wend. 649; *Haight v. Holley*, 3 Wend. 258. **Ohio.** — *Myers & Waterson v. Erwin & Co.*, 20 Ohio 382 (leading case). **Tenn.** — *Simpson v. Railway Co.*, 89 Tenn. 304, 15 S. W. 735. **Vt.** — *Town of Jericho v. Underhill*, 67 Vt. 85, 30 Atl. 690. **Eng.** — *Bowen v. Shapcott*, 1 East 542, 102 Eng. Reprint 209; *Tompson v. Colier*, Yelv. 112.

In Connecticut the form of the judgment depends upon whether an issue of fact raised by a plea in abatement has been determined by a court or jury. When the court determines the plea to be insufficient, the judgment is, that the defendant shall answer over to the action; but if the issue is joined to the jury, and they find against the defendant, they must assess damages for the plaintiff. *Alling v. Shelton*, 16 Conn. 436, "a distinction for which it seems difficult to assign any satisfactory reason." *Gould on Pleading*, p. 300.

In Massachusetts, by statute, it is within the court's discretion to allow defendant to plead over. *Fisher v. Fraprie*, 125 Mass. 472; *Young v. Gilles*, 113 Mass. 34.

42. **U. S.** — *Hollingsworth v. Duane*, Wall. Sr. 51, 12 Fed. Cas. No. 6,615. **Ill.** — *Italian Swiss Agri. Col. v. Pease*, 194 Ill. 98, 62 N. E. 317. **Ind.** — *Neal v. Mills*, 5 Blackf. 208. **N. H.** — *Chase v. Deming*, 42 N. H. 274; *Dodge v. Morse*, 3 N. H. 232. **N. Y.** — *McCartee v. Chambers*, 6 Wend. 649, 22 Am. Dec. 556. **Tenn.** — *Straus v. Weil*, 5 Coldw. 120.

Another Jury May Assess Damages. — *Jones & Co. v. Donnell*, 9 Ala. 695.

43. **Fla.** — *E. O. Painter Fertilizer Co. v. DuPont*, 54 Fla. 288, 45 So. 507. **Me.** — *Waterman v. Merrow*, 94 Me. 237, 47 Atl. 157 (citing 1 Chit. Pl. [16th ed.] 483); *Copeland v. Hewett*, 93 Me. 554, 45 Atl. 824; *State v. Allen*, 91 Me. 258, 39 Atl. 994. **Mass.** — *Fisher v. Fraprie*, 125 Mass. 472. **Mich.** — *People v. Holmes*, 41 Mich. 417, 49 N. W. 926. **N. J.** — *Birch v. King*, 71 N. J. L. 392, 59 Atl. 11. **N. Y.** — *Haight v. Holley*, 3 Wend. 258, 262. **Tenn.** — *Straus v. Weil*, 5 Coldw. 120. **Wis.** — *Arndt v. Allard*, 1 Pinn. 76. **Eng.** — *Bowen v. Shapcott*, 1 East 542, 102 Eng. Reprint 209; *Tompson v. Colier*, Yelv. 112.

The reason assigned is that "every man shall not be presumed to know the matter of law, which he leaves to the judgment of the court." *Bowen v. Shapcott*, 1 East 542, 102 Eng. Reprint 209.

Rule applies in capital criminal cases but not in criminal cases not capital, in which cases final judgment will be rendered. *Rex v. Gibson*, 8 East 107, 103 Eng. Reprint 284, per Lawrence, J.

44. *Gibson v. Laughlin*, Minor (Ala.)

**H. PLEADING OVER.** — Defendant may plead to the merits after the overruling of a plea in abatement upon an issue as to its merits,<sup>45</sup> or after the sustaining of a demurrer thereto.<sup>46</sup>

182 (judgment should be that defendant immediately answer over after plea stricken as frivolous); *Straus v. Weil*, 5 Coldw. (Tenn.) 120.

45. *State v. Reiman*, 3 Penne. (Del.) 73, 50 Atl. 268; *Thach v. Continental Mut. Acc. Assn.*, 114 Tenn. 271, 87 S. W. 255.

**When Same Matter May Be Plead.** — After pleading matter in abatement and having the question decided against him, defendant may safely plead the same matter with defenses to the merits, under code permission to state all defenses, if the objection is not evident on the face of the record. *Stull Bros. v. Powell*, 70 Neb. 152, 97 N. W. 249. See also *Barry v. Wachosky*, 57 Neb. 534, 77 N. W. 1080.

**Subject to Judicial Discretion.** — *Saylor v. Com. Inv. & Bkg. Co.*, 38 Ore. 204, 62 Pac. 652.

**At common law in misdemeanor cases the rule was otherwise.** *Guess v. State*, 6 Ark. 147, citing 1 Chit. Cr. Law 451; *Rex v. Gibson*, 8 East 107, 103 Eng. Reprint 284. But the rule of the text applied in felony cases. *Rex v. Gibson*, 8 East 107, 103 Eng. Reprint 284, 2 Hale P. C. 256.

46. *Harding v. State*, 22 Ark. 210; *Waterman v. Merrow*, 94 Me. 237, 47 Atl. 157. But see *Shaw v. Dutcher*, 19 Wend. (N. Y.) 216.

**Same Question May Be Raised.** — Where defendants described as members of a voluntary association plead in abatement for non-joinder of other defendants, they are not thereby estopped from pleading and showing the truth in regard to their membership after the sustaining of a demurrer to their former plea. *Waterman v. Merrow*, 94 Me. 237, 47 Atl. 157.



# ABBREVIATIONS

## I. ABBREVIATIONS IN COMMON USE, 73

- A. *General Rule*, 73
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### CROSS-REFERENCES:

Attachment;	Parties;
Indictment and Information;	Process;
Judgment;	Taxation;
Names;	Verdict.

### I. ABBREVIATIONS IN COMMON USE. — A. GENERAL RULE.

Generally speaking it is proper to employ in pleadings such abbreviations as are commonly used in English writing.<sup>1</sup>

B. NAMES OF PLACES. — Courts will take judicial notice of customary and well-known abbreviations of geographical names.<sup>2</sup>

1. This provision is found in the codes. See *Estate of Lakemeyer*, 135 Cal. 28, 66 Pac. 961, 87 Am. St. Rep. 96.

Sec. 22, N. Y. Code Civ. Proc. Provides: "Each writ, process, record, pleading or other proceeding in a court or before an officer must be in the English language, and unless it is oral, made out on paper or parchment in a fair legible character, in words at length, and not abbreviated. But the proper and known names of process and technical words, may be expressed in appropriate language as now is, and heretofore has been customary; such abbreviations as are now commonly employed in the English language may be used."

2. *Ind.* — *Locke v. Merchants' Nat. Bank*, 66 Ind. 353. *Mo.* — *Bank of State of Mo. v. Vaughan*, 36 Mo. 90, 94. *Tex.* — *Russell v. Martin*, 15 Tex. 238.

A variance cannot be predicated on the abbreviation "U. States" used to designate the United States. *Lewis v. Few*, 5 Johns. (N. Y.) 1, 15.

*Burroughs v. Wilson*, 59 Ind. 536, 539, was a suit on a promissory note, alleged to be payable at Citizens Bank, Noblesville, Indiana. The note appeared payable on its face "at Citizens' Bank, Noblesville, Ind." It was held that courts and juries of Indiana may well know from their general information that the abbreviation "Ind." as applied to a place means Indiana.

C. TIME. — Figures and abbreviations may be used in pleadings and indictments to designate time.<sup>3</sup>

D. MONEY. — Arabic figures or numerals in connection with dollar and cent abbreviations or marks, may be used in pleadings to denote money of the United States.<sup>4</sup>

## II. LEGAL, OFFICIAL AND TRADE ABBREVIATIONS. — A.

LEGAL TERMS. — The term “vs.” or “versus” may be used in giving title to actions instead of the word “against.”<sup>5</sup> “L. S.” or a scroll, properly placed upon an instrument, may represent a seal;<sup>6</sup> the mark “&” may be used for “and;”<sup>7</sup> and the abbreviation “etc.” or “&c.”

3. *United States v. Reichert*, 32 Fed. 142, 147; *Diggs v. State*, 49 Ala. 311, 319.

“A.M.” and “P.M.” — In a statute prohibiting the sale of intoxicating liquor between certain hours, the phrase “between the hours of eleven P.M. and five o’clock A.M.” mean the period intervening between eleven o’clock night and five o’clock morning of the succeeding day. Courts judicially know the meaning of the abbreviations employed, and know also the usual method of reckoning time. *Hedderich v. State*, 101 Ind. 564, 571, 51 Am. Rep. 768.

Name of Month. — The use of the abbreviation “Feb’y” for February in the date of a note is unimportant, and will not support an objection of variance between pleadings and proof. *Cutting Impl. v. Conklin*, 28 Ill. 506.

“A. D.” — In a complaint before a magistrate for a criminal charge, the letters A. D. preceding the words expressing the year, are sufficiently certain, having an established use in the English language. *Com. v. Clark*, 4 Cush. (Mass.) 596.

Degrees and Minutes. — But the signs of degrees and minutes, viz., “°” “’,” connected with figures, are not part of the English language within the meaning of a statute requiring declarations and other pleadings to be drawn in the English language, and when used in an indictment, render it insufficient on demurrer. *State v. Jericho*, 40 Vt. 121, 94 Am. Dec. 387.

4. Ill. — *Lawrence v. Fast*, 20 Ill.

339; *Peter v. Hill*, 13 Ill. App. 36. Minn. — *Tidd v. Rines*, 26 Minn. 201, 209, 2 N. W. 497. Mo. — *Fulenwider v. Fulenwider*, 53 Mo. 439, 443.

In *State v. Bryant*, 17 N. H. 323, 326, the court said respecting an indictment for forgery: “In general figures must not be used in an indictment, yet it is so necessary to set forth a *fac simile* of the instrument forged, that this rule is dispensed with, and the recital should in all respects correspond with the writing charged as a forgery.”

Decimal Mark. — In order that numerals in a pleading or judgment may represent money in dollars and cents, it is necessary that there should be a line or decimal mark separating the two right hand figures from the others. *Gutzwiller v. Crowe*, 32 Minn. 70.

A judgment entered “for the sum of 383.18 debt, and 2.39 costs,” without any mark or character designating that said figures represented dollars and cents, was held invalid for uncertainty. *Avery v. Babcock*, 35 Ill. 175, 178. And see *Lane v. Bommelmann*, 21 Ill. 142, 146, a case of similar facts.

The abbreviation \$ connected with figures, in a declaration on a promissory note, not being part of the English language, render it insufficient on demurrer. *Clark v. Stoughton*, 18 Vt. 50, 44 Am. Dec. 361.

5. *Smith v. Butler*, 25 N. H. 521, 523.

6. *Holbrook v. Nichol*, 36 Ill. 161, 165.

7. *Com. v. Clark*, 4 Cush. (Mass.) 596

may be used in a proper connection.<sup>8</sup> But "judg." cannot be used for judgment.<sup>9</sup>

**B. OFFICIAL DESIGNATIONS.** — "N. P." may be used for notary public;<sup>10</sup> "J. P." for justice of the peace;<sup>11</sup> "Supt." for superintendent.<sup>12</sup>

**C. TRADE ABBREVIATIONS.** — In some jurisdictions courts will take judicial notice that the letters "C. O. D." marked on a package for transportation, and used in a complaint, mean "collect on delivery" from the consignee.<sup>13</sup> Other courts have held that the meaning of these letters is not judicially settled, but may be explained by parol evidence.<sup>14</sup>

8. *Bryan v. Bates*, 15 Ill. 87, 89, was an action of trespass for assault, battery and imprisonment. The introductory part of the defendant's plea professing to answer the declaration, was in this form: "As to the assaulting, etc. the said plaintiff, and imprisoning." It was held that the abbreviation "etc." was broad enough to answer the battery charged.

The abbreviation "&c." though borrowed from the Latin, has been naturalized in English for ages, and the use of it will not vitiate a plea in a civil action, on the ground that it is expressive of Latin words. *Berry v. Osborn*, 28 N. H. 279, 288.

9. In *Cassidy v. Holbrook*, 81 Me. 589, 591, 18 Atl. 290, there was a plea in abatement to a writ of replevin brought in the wrong county. At the close of the plea there was a prayer for Judg.— of said writ. The plea was held bad, the court saying: "This abbreviated expression 'Judg.—' cannot be accepted for the word 'Judgment.'"

10. The letters N. P. added to the name of a person subscribing to the jurat of a paper, are an abbreviation of the term notary public, and clearly indicate that office. *Rowley v. Berrian*, 12 Ill. 198.

11. The abbreviation "J. P." is a sufficient designation of the office of justice of the peace, in the jurat or certificate of an affidavit. *Seudder v. Coryell*, 10 N. J. L. 340, 345. See also *Rowley v. Berrian*, 12 Ill. 198.

**Officers of Court.** — In *Buell v. State*, 72 Ind. 523, the signature affixed to the jurat in the affidavit upon which the information was based was, "Rufus P. Wells, C. P. C. C." It was objected that this did not show that Rufus P. Wells was the clerk of the Porter cir-

cuit court, and that the letters C. P. C. C. appended to his name were without meaning. The court said: "Courts take judicial knowledge of the signatures of their officers, and we may well presume that the Porter circuit court knew the signature of Rufus P. Wells to be that of its clerk."

12. The court knows judicially that the abbreviation "Supt." when used in affidavits, bonds or pleadings in legal proceedings stands for the word superintendent and that a superintendent is a managing agent. *So. Mo. Land Co. v. Jeffries*, 40 Mo. App. 360.

13. *Am. Express Co. v. Lesem*, 39 Ill. 312, 333.

*U. S. Express Co. v. Keefer*, 59 Ind. 263, 267, was an action for damages against the express company for failing to deliver or account for goods marked "C. O. D." and delivered to it for transportation. The complaint alleged that the goods were marked "C. O. D." but failed to aver the meaning of said letters. The court held the allegation good as against a motion in arrest of judgment, saying: "These letters are by no means cabalistical. They have no occult or mysterious meaning as used in appellees' complaint. In the ordinary commerce of the country, these letters have acquired such a fixed and determinate meaning, that courts and juries from their general information will readily understand what is meant thereby, when they are used as the appellees have used them in their complaint." Language of similar import was used by the court in *State v. Intoxicating Liquors*, 73 Me. 278.

14. *American Merchants Union Express Co. v. Wolf*, 79 Ill. 430; *McNichol v. Pacific Exp. Co.*, 12 Mo. App. 401, 407.



It has been held that the contractions "Com." and "Co." are judicially known to mean "company."<sup>15</sup>

Where letters or characters have a particular trade meaning, which has not acquired a legal significance, it is necessary to aver their meaning in pleadings where they are used.<sup>16</sup> The want of such an averment in a complaint is a defect that is cured by verdict.<sup>17</sup>

**III. DESCRIPTION OF LANDS.**—In civil actions, lands are sufficiently described by abbreviations such as S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , Sec. 18, T. 21 N., R. 7 E., 40 acres, as such abbreviations are well understood.<sup>18</sup> But they are insufficient in criminal prosecutions.<sup>19</sup>

In *Collender v. Dinsmore*, 55 N. Y. 200, 204, 14 Am. Rep. 224, the court said: "The letters C. O. D. followed by an amount in dollars, have come to be well understood in the community, and by the public, but perhaps could not without the aid of extrinsic evidence be read and interpreted by the courts; that is their meaning may not be considered as judicially settled."

15. "Com." and "Co."—Keith v. Sturges, 51 Ill. 142, was an action by the endorsee, on a promissory note. The declaration alleged that the defendants made and delivered their note to "Sturges & Com." and that "Sturges & Com." endorsed it to plaintiff. The note offered in evidence was payable to "Sturges & Com." and was endorsed "Sturges & Co." This was held no variance, the court saying, "Com. and Co. are both well understood abbreviations of the word 'company' when used as a part of the name of a commercial firm."

16. *Am. Express Co. v. Lesem*, 39 Ill. 312, 333.

17. *United States Exp. Co. v. Keefer*, 59 Ind. 263, 267, where it was also held that the proper way to reach such a defect was by motion to make more specific.

18. *Frazer v. State*, 106 Ind. 471, 7 N. E. 203; *Jordon Ditching & D. Assn. v. Wagoner*, 33 Ind. 50. See also *Olcott v. State*, 10 Ill. 481 (a tax judgment, where, however, the description was incomplete); *Sibley v. Smith*, 2 Mich. 487 (E.  $\frac{1}{2}$  S.W.  $\frac{1}{4}$  Sec. 24, Town. 3 South of Range 7 West, 80 acres).

In *Washington T. & L. Co. v. Smith* (Wash.), 76 Pac. 268, the use of such abbreviations in process was upheld.

The use of 2 for  $\frac{1}{2}$ , or 4 for  $\frac{1}{4}$  in a tax judgment, is ineffective as description. *Keith v. Hayden*, 26 Minn. 212, 2 N. W. 495; *Power v. Bowdle*, 3 N. D. 107, 54 N. W. 404, 21 L. R. A. 328, 44 Am. St. Rep. 511.

19. *United States v. Reichert*, 32 Fed. 142, 147, was a prosecution on indictment for combining and conspiring to make a fraudulent claim against the United States by means of false, fictitious, and fraudulent surveys of public lands, marking and establishing the exterior boundary lines of lands described in the indictment as follows: Tp. 1 S., R. 1 W.; Tp. 1 S., R. 16 W.; Tp. 1 S., R. 17; Tp. 1 N., R. 16 W.; Tp. 1 N., R. 17 W.; Tp. 2 N., R. 16 W.; Tp. 2 N., R. 17 W., S. B. M. It was held that the indictment was defective, the court saying: "Abbreviations of words employed by men of science or in the arts, will not answer without full explanation of their meaning in ordinary language. The use of the letters A. D. to indicate the year of our Lord is an exception because of its universality. Arabic figures and Roman letters have also become indicative of numbers as fully as words written out could be. They therefore may be employed in indictments. But the initials here have reference to the public lands as marked on the public surveys. They are signs used in a particular department of public business, and are not matters of general and universal knowledge by all speakers of the English language."

# ABDUCTION

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OF EVIDENCE.

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## CROSS-REFERENCES:

Apprentices;	Master and Servant;
Guardian and Ward;	Parent and Child;
Husband and Wife;	Seduction;

**I. DEFINITION.**—In its most comprehensive sense abduction signifies the taking and carrying away of a child, a ward, a wife, etc., either by force, persuasion, or open violence.<sup>1</sup> In the sense in which it is used in modern criminal statutes it means usually the taking or enticing away of a female under a specified age for a forbidden purpose.<sup>2</sup>

Consent of the child obtained by means of persuasion is no defense, since the result of such persuasion is just as great an evil as if it had been accomplished by other means.<sup>3</sup> This is not an offense by common law, but depends for its criminal character entirely upon statutory enactment.<sup>4</sup>

1. Cal. — *Humphrey v. Pope*, 122 Cal. 253, 54 Pac. 847. N. Y. — *Carpen-ter v. People*, 8 Barb. 603. N. C. — *State v. Chisenhall*, 106 N. C. 676, 11 S. E. 518; *State v. George*, 93 N. C. 567. N. D. — *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085.

2. The word "abduction" is generally used as the equivalent of the words "taking away." *Humphrey v. Pope*, 122 Cal. 253, 257, 54 Pac. 847.

In some statutes the words "taking away" are substituted for the word abduction. Under such statutes a physical carrying away is not requisite to constitute the taking. *People v. Demoussot*, 71 Cal. 611, 12 Pac. 788; *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085.

3. *State v. Chisenhall*, 106 N. C. 676, 11 S. E. 518. See to the same effect, *People v. Seeley*, 37 Hun (N. Y.) 190.

A taking by force is not necessary. It is sufficient if such moral force was used as to create a willingness on the girl's part to leave her father's home. *Rex v. Handley*, 1 F. & F. (Eng.) 648.

4. This was expressly held in *State v. Sullivan*, 85 N. C. 506, where the indictment charged that the defendant did unlawfully take an unmarried female of the age of fifteen years out of the possession of her father and against his will, with intent to defile her, whereas the statute of North Carolina defined abduction as the taking of children under the age of fourteen years. The court declared inaccurate the statement in 2 Arch. Crim. Prac. 301, that abduction was an indictable offense at common law, saying: "As authority for the position, reference is made to 1 East P. C., 458, and 1 Russell on Crimes, 569. But upon looking to

East, we find no sort of sanction given to such a position. On the contrary, it is there said that by virtue of the general prohibitory clause of the statute of 4 and 5 Phil. & M., ch. 8, an indictment for the abduction of a child will lie by the rule of the common law, which rule, as explained, is that where a thing is prohibited to be done by a statute and a penalty is affixed to it by a separate and distinct clause, the prosecutor is not bound to pursue the latter remedy, but may proceed under the prior general clause by indictment for a misdemeanor. Not a single suggestion however is made that such indictment, in the absence of all statutory provision, can be maintained by force of the common law alone. And still less support is given to the proposition by Russell. He says that the only reported case of a prosecution at common law for such an offence, is that against Lord Gray, to be found in 9 (3) State Trials, 127. Upon examining into that case, we find it to be, not an indictment for abduction at all, but an information lodged against that lord and five others, by which they were charged with a conspiracy, the unlawful purpose of which was to entice the Lady Henrietta Berkley to quit her father's house and custody and live in secret adultery. And even in that case the court never proceeded to judgment, but a *nolle prosequi* was entered after a verdict of guilty, as to all the defendants."

To the same effect is *Anderson v. Com.*, 5 Rand. (Va.) 627, 16 Am. Dec. 776. The court commented on the cause of *The King v. Lord Gray*, 9 State Trials (Cobbet's ed.), p. 127,



**II. CRIMINAL PROSECUTION.**—A. THE INDICTMENT OR INFORMATION. — 1. **Charging Offense in the Language of the Statute.**—As a general rule, an indictment or information which charges the offense of abduction, in the language of the statute creating the crime, is sufficient to support a conviction.<sup>5</sup> But it is not necessary, though it

pointing out that conspiracy was emphatically charged in the information; "and as it was to do a wrongful act, for which certainly, if done, an action lay to the father of the maid, the conspiracy, if proved, clearly amounted to a common law misdemeanor." The court further referred to the case of *Sir Francis Blake Delaval*, 3 Burr. (Eng.) 1432, which was a motion for an information against the defendants for a conspiracy to put a young girl into the hands of one for the purpose of prostitution. Dade, J., said: "Although Lord Mansfield, in allowing the motion, intimates an opinion that the Court of King's Bench might have jurisdiction of the case, as one *contra bonos mores*, yet he decides it on the ground that there was in that case, 'a conspiracy and confederacy,' which, says he, 'are clearly and indisputably within the proper jurisdiction of this Court.' Without doubt in these cases, the Court having jurisdiction of them, on undeniable common law principles, the punishment in case of conviction, might well be aggravated by the baseness, perfidy, or malignity, which was the motive and end of the conspiracy. In like manner, as in trespass, circumstances may aggravate the damages, which would not of themselves alone support the action. But clearly, neither of these cases does maintain the position, that as a common law misdemeanor, an indictment or information will lie, either for simple incontinence, or for incontinence produced by means of deception, inveiglement or enticement."

**The Purpose of the Statute.**—The law was originally framed for the protection of parents. *Rex v. Markleton*, 1 Dears. C. C. R. 159. But the statutes are now based on a more comprehensive view. As was said by Judge Cooley in *People v. Carrier*, 46 Mich. 442, 9 N. W. 487: "It is the actual state of things and not the existence of a legal relation that the statute contemplates; and an orphan adopted

into a family without legal guardianship, or a girl abandoned by her parents and given a home by charitable persons, is as much within the reason and intent of the statute as any other female. The protection was meant to be general."

In England it may be said generally that the statutes condemning this offense are aimed particularly at fortune hunters. See 4 and 5 Ph. & M., c. 8; 9 Geo. IV, c. 31; 24 and 25 Vict., c. 100, § 53; *Reg. v. Barratt*, 9 C. & P. 387, 38 E. C. L. 167; *Reg. v. Burrell*, 9 Cox. C. C. 368.

So in *State v. Tidwell*, 5 Strobb. (S. C.) 1, where it was held that the English statute, 4 and 5 Ph. & M., c. 8, was then (in 1850) in force in South Carolina, the court of appeals of that state said, by Withers, J.: "Our ancestors perceived that there were property and dignity here also to protect, as well as the tender sympathies of the family circle, the peace of society, the happiness of parents."

5. Minn.—*State v. Sager*, 99 Minn. 54, 108 N. W. 812. Mo.—*State v. Stone*, 106 Mo. 1, 16 S. W. 890. N. C.—*State v. Chisenhall*, 106 N. C. 676, 11 S. E. 518; *State v. George*, 93 N. C. 367. Tenn.—*Griffin v. State*, 109 Tenn. 17, 70 S. W. 61.

If the offense is charged in the indictment in the terms and language of the code, and so plainly that the nature of the offense can be easily understood by the jury, it is all that the law requires. *Dowda v. State*, 74 Ga. 12.

Reference must be had to the statutes of the various jurisdictions. See also the cases cited herein, and amongst others the following: U. S.—*United States v. Zes Cloya*, 35 Fed. 493, Alabama statute. Ala.—*Haygood v. State*, 98 Ala. 61, 13 So. 325. Ill.—*Henderson v. People*, 124 Ill. 607, 17 N. E. 68. Ia.—*State v. Terrill*, 76 Iowa 149, 40 N. W. 128. Ky.—*Malone v. Com.*, 91 Ky. 307, 15 S. W. 856. Minn.—*State v. McCrum*, 38 Minn.

is advisable, to use the exact words of the statute. It is sufficient if equivalent words are used — words having a like meaning, force and effect.<sup>6</sup>

**Manner of Abduction.**— So where the statute in describing the offense uses the term “abduct” or “take away,” without more, it is sufficient so to charge in the indictment without specifying the means adopted.<sup>7</sup> In like manner where a statute makes it an offense to detain a woman against her will with intent to have carnal knowledge of her, it is sufficient so to charge in the indictment without alleging the means adopted to carry out the purpose,<sup>8</sup> or the manner of the detention.<sup>9</sup>

**Place From Which Abducted.**— It is not necessary to state from what place the female was taken if that is not made a material ingredient of the statutory definition.<sup>10</sup>

**2. Must State All Facts Necessary To Constitute the Crime.**— In setting out the offense of abduction in an indictment or information, the defendant must be brought within the material words of the statute creating the offense. All the acts and facts which the legislature has said shall constitute the crime must be alleged in a direct and certain manner, both as to the party charged, and as to the particular offense charged. Nothing can be taken by intendment.<sup>11</sup> So where the offense as described by the statute consists in taking a woman to

154, 36 N. W. 102. **Mo.**—*State v. Baldwin*, 214 Mo. 290, 113 S. W. 1123. **N. Y.**—*Beyer v. People*, 86 N. Y. 369. **N. C.**—*State v. Burnett*, 142 N. C. 577. 55 S. E. 72; *State v. Chisenhall*, 106 N. C. 676, 11 S. E. 518. **Tenn.**—*South v. State*, 97 Tenn. 496, 37 S. W. 210.

6. **Ind.**—*Nichols v. State*, 127 Ind. 406, 26 N. E. 839. **Ia.**—*State v. Dickerhoff*, 127 Iowa 404, 103 N. W. 350. **Minn.**—*State v. Sager*, 99 Minn. 54, 108 N. W. 812.

7. *State v. Keith*, 47 Minn. 559, 50 N. W. 691; *State v. Chisenhall*, 106 N. C. 676, 11 S. E. 518; *State v. George*, 93 N. C. 567.

8. **Ky.**—*Payner v. Com.*, 19 S. W. 927; *Cargill v. Com.*, 13 S. W. 916. **Minn.**—*State v. Sager*, 99 Minn. 54, 108 N. W. 812; *State v. Keith*, 47 Minn. 559, 50 N. W. 691. **N. Y.**—*Beyer v. People*, 86 N. Y. 369. **N. C.**—*State v. Chisenhall*, 106 N. C. 676, 11 S. E. 518; *State v. George*, 93 N. C. 567.

It is not necessary to allege in the indictment that the taking away was without the consent and against the will of the parent or guardian, if the statutory description of the offense does not embrace these elements. *State v. George*, 93 N. C. 567.

9. *Cargill v. Com.* (Ky.), 13 S. W. 916; *State v. Keith*, 47 Minn. 559, 50 N. W. 691.

The word “detain” is descriptive of the offense, and means that the defendant held or kept the woman in custody, and with the further allegation— “for the purpose of having carnal knowledge of her against her consent” — makes the offense complete. *Everheart v. Com.*, 7 Ky. L. Rep. 218.

10. *State v. Keith*, 47 Minn. 559, 50 N. W. 691.

11. **Cal.**—*People v. Fowler*, 88 Cal. 136, 25 Pac. 1110. **Ind.**—*Miller v. State*, 121 Ind. 294, 23 N. E. 94; *Osborn v. State*, 52 Ind. 526. **Ky.**—*Cargill v. Com.*, 13 S. W. 916. **S. C.**—*State v. O'Bannon*, 1 Bailey 144. **Tenn.**—*Jones, Williams & Taylor v. State*, 16 Lea 466.

In *Wilder v. Com.*, 81 Ky. 591, the indictment alleged that the defendant unlawfully and forcibly, for the purpose, or with the intent of having carnal knowledge of her, detained Mary McGriffin, but it was not averred anywhere that the detention was against her will. The indictment was held insufficient, the court saying: “Detention against her will is the main in-

a house of ill-fame or of assignation for certain condemned purposes, the indictment must allege that the place to which the woman was enticed was a house of ill-fame or of assignation, or some other place used for similar purposes.<sup>12</sup>

**Knowledge of Female's Age.**—If the statute condemns the taking of a female under a designated age, the indictment or information must show that she was under that age. But unless knowledge of the age is an element of the statutory definition<sup>13</sup> it is not necessary to allege that the defendant knew that the female was under age.<sup>14</sup>

**3. Certainty of Allegations.**—The allegations of an indictment or information for abduction must be direct and certain as to the party accused, and as to all the acts and facts which constitute the offense charged.<sup>15</sup>

**4. From Whom Female Must Be Taken.**—It is generally necessary to allege in the indictment or information, that the female, if a minor, was taken away from her father, mother or guardian, or from some other person having the legal custody or control of her, and against the consent of such person.<sup>16</sup> But in some states all of these

gradient of the offense denounced by the statute. It does not require that the carnal knowledge shall be against her will, or that the intent to have carnal knowledge with her shall be coupled with the purpose of doing so against her will. Before any person can be lawfully convicted under the statute, which is subject to easy perversion or misuse, it must be alleged and proved that the female was taken or detained against her will. . . . The rule which requires that allegations be construed more strongly against the pleader should be strictly adhered to in construing the language of indictments under it. No doubts or inferences will be resolved in favor of an indictment containing them. . . . Nor is this defect cured by the averment that the accused forcibly detained her."

12. *Miller v. State*, 121 Ind. 294, 23 N. E. 94 (where it was held insufficient to charge that the woman was taken to a room in the house of the defendant, which room was occupied by the defendant); *State v. McCrum*, 38 Minn. 154, 36 N. W. 102.

Where the indictment charged that the woman was enticed "to the city of Indianapolis," it was held that this did not sufficiently specify the "house of ill-fame or elsewhere" designated in the statute, if a motion to quash

had been made at the trial. *Nichols v. State*, 127 Ind. 406, 26 N. E. 839.

Under such a statute it has been held sufficient to name one place. *State v. Savant*, 115 La. 226, 38 So. 974.

13. See *Hermann v. State*, 73 Wis. 248, 41 N. W. 171.

14. *People v. Fowler*, 88 Cal. 136, 138, 25 Pac. 1110; *Reg. v. Prince*, 13 Cox C. C. (Eng.) 138.

15. **Cal.**—*People v. Fowler*, 88 Cal. 136, 25 Pac. 1110. **Ga.**—*Dowda v. State*, 74 Ga. 12. **Kan.**—*State v. Overstreet*, 43 Kan. 299, 23 Pac. 572; *State v. Goodwin*, 33 Kan. 538, 6 Pac. 899. **Ky.**—*Cargill v. Com.*, 13 S. W. 916; *Porter v. Com.*, 7 Ky. L. Rep. 365. **La.**—*State v. Savant*, 115 La. 226, 38 So. 974. **N. Y.**—*People v. Brandt*, 14 N. Y. St. 419; *People v. Powell*, 4 N. Y. Crim. 585. **S. C.**—*State v. O'Bannon*, 1 Bailey 144.

16. *People v. Dolan*, 96 Cal. 315, 31 Pac. 107; *Ex parte Estrado*, 88 Cal. 316, 26 Pac. 209; *People v. Fowler*, 88 Cal. 136, 25 Pac. 1110; *Jones v. State*, 16 Lea (Tenn.) 466.

An indictment charged that the prisoner wilfully, unlawfully and feloniously did entice and procure Agnes Lester, a female under the age of fifteen years, theretofore reputed to be a virtuous female, to leave the house of her parents, and resort to places and houses for the purpose of prostitution.



allegations are not required.<sup>17</sup> Where it is charged that the girl was taken from her father, or mother, or guardian, it is not necessary to aver that they had legal charge of her person, for the reason that when such relationship is stated, the law attaches the right of custody.<sup>18</sup>

**5. Taking Against Consent of Female.**—Under the statutes generally, an indictment or information for abduction must allege that the taking or detention of the woman was unlawful, and against her will.<sup>19</sup>

**6. Character of Female.**—Under a statute which declares the crime of abduction to consist in taking or detaining a female of previous chaste character for an immoral purpose, the indictment or information must allege that the female taken or detained, was of previous chaste character.<sup>20</sup> Such an allegation is not requisite, however, where the chastity of the female is not a statutory element of the offense.<sup>21</sup>

**7. Purpose of Taking or Detention.**—Where the statute condemns a taking for a certain purpose, it must be alleged in the indictment

The court held the indictment bad, saying: "It fails to charge that said female, Agnes Lester, was taken from her father or other person having the legal charge of her, or that it was without his or her consent, the language of the indictment being, did entice, etc., *to leave the house of her parents, without any averment as to who her parents were, or that she was under their legal custody or control, or that the same was against their will or consent.* Prosecutions can not be sustained by intendment, but everything necessary to constitute the offense must be averred." Jones, Williams & Taylor v. State, 16 Lea (Tenn.) 466.

17. State v. Jamison, 38 Minn. 21, 35 N. W. 712; State v. Chisenhall, 106 N. C. 676, 11 S. E. 518.

In State v. George, 93 N. C. 567, the indictment did not allege that the child was abducted without the consent and against the will of her father from whom she was taken. The court held the indictment sufficient, saying: "It is not a part of the description of the offense, that the child should be abducted without the consent or against the will of the father." To the same effect see, State v. Kebler (Mo.), 128 S. W. 721.

18. State v. Sager, 99 Minn. 54, 108 N. W. 812.

Under a law declaring that every person who takes away any female,

under the age of eighteen years, from her father, mother or guardian, or other person having the legal charge of her person, without her consent, for the purpose of prostitution, is punishable, an order of commitment did not show that the father of the girl from whom she was taken had the legal care of her person. This was held good, because a father, mother, or guardian necessarily has the legal charge of a minor child or ward, and an averment of legal custody is only required when the child is taken from some other person. *Ex parte Estrado*, 88 Cal. 316, 26 Pac. 209.

19. State v. Hromadko, 123 Iowa 665, 99 N. W. 560; Wilder v. Com., 81 Ky. 591; Porter v. Com., 7 Ky. L. Rep. 365; Hoskins v. Com., 7 Ky. L. Rep. 41.

In Krambeil v. Com., 8 Ky. L. Rep. 605, 2 S. W. 555, the indictment charged the accused with having carnal knowledge of a woman against her will, but failed to aver that she was taken or detained against her will. It was held that no case was made out by the pleadings authorizing a conviction.

20. People v. Roderigas, 49 Cal. 9; Miller v. State, 121 Ind. 294, 23 N. E. 94; Osborn v. State, 52 Ind. 526. And see Com. v. Whittaker, 131 Mass. 224; State v. Connor, 142 N. C. 700, 55 S. E. 787.

21. Griffin v. State, 109 Tenn. 17, 70 S. W. 61.

or information that the taking or detention was for the illicit purpose forbidden by the statute.<sup>22</sup> But it is not necessary to aver

22. Cal.—*People v. Fowler*, 88 Cal. 136, 25 Pac. 1110. Ill.—*Henderson v. People*, 124 Ill. 607, 17 N. E. 68. Ky.—*Cargill v. Com.*, 13 S. W. 916. La.—*State v. Savant*, 115 La. 226, 38 So. 974. Minn.—*State v. Jamison*, 38 Minn. 21, 35 N. W. 712. Mo.—*State v. Knost*, 207 Mo. 18, 105 S. W. 616. N. Y.—*People v. Powell*, 4 N. Y. Crim. 585. Tenn.—*Griffin v. State*, 109 Tenn. 17, 70 S. W. 61.

Under a statute which provided punishment for taking away any female under the age of eighteen years from her father, mother, or other person having the legal charge of her person, either for the purpose of prostitution or concubinage, an information charged that the "defendant, on the 22d of September, 1906, at the city of St. Louis, one Fannie Six, a female under the age of eighteen years, from one Mathias Six, who then and there had the legal charge of the said Fannie Six, feloniously did take away for the purpose of concubinage, against the peace and dignity of the State." It was insisted that the information was fatally defective, because it was silent as to whom the concubinage was to be committed with, and failed to charge that the defendant took her away for the purpose of concubinage with himself, and also that actual concubinage should have been alleged. The court held that the offense was complete when the minor female was taken away from her father or legal custodian for the unlawful purpose designated in the statute, and it was therefore not necessary to allege actual concubinage, or with whom it was to be committed. *State v. Knost*, 207 Mo. 18, 105 S. W. 616.

Under a statute providing that whoever entices or takes away any female of previous chaste character, from wherever she may be to a house of ill-fame or elsewhere, for the purpose of prostitution, shall be imprisoned, an indictment charged substantially that the accused and two other men who were jointly indicted with him, did unlawfully and feloniously entice and take away a certain female, named, sixteen years of age, of previous chaste char-

acter, to a certain room in the house of an individual named, which was occupied by one of the defendants, for the purpose of unlawfully and feloniously prostituting her, and in one of the counts the charge was that the female was enticed and taken as above mentioned for the purpose of prostituting her, and of having carnal intercourse with her. It was held that the indictment was insufficient because it failed to aver that she was taken to such a place for the purpose of prostitution, the court saying: "The averment that she was taken for the purpose of 'prostituting her,' was not the equivalent of an averment that she was so enticed and taken for the purpose of prostitution." *Miller v. State*, 121 Ind. 294, 23 N. E. 94.

A count in an indictment charged three men with abducting a female for the purpose of concubinage by having illicit intercourse with them. This charged no offense known to the law, or in other words an impossible offense, it being plainly impossible that three men could each have the same girl for his concubine. *State v. Gibson*, 111 Mo. 92, 100, 19 S. W. 980.

An indictment which charges that the taking was done for the purpose of prostitution and concubinage, is not bad for duplicity, the court saying: "The act complained of is the abduction, and the two intents are in the nature of character elements or qualities, both of which may be present in the mind of the accused, to be successively put in actual operation, or only one of them may be present, when the act or abduction is committed." *Griffin v. State*, 109 Tenn. 17, 30, 70 S. W. 61.

Under a statute making abduction for the purpose of prostitution or concubinage punishable, etc., the information charged that the purpose of the taking away of the girl was for the purpose of concubinage, by having sexual intercourse with the defendant. The addition of the words, "by having sexual intercourse with him the said defendant" was held not to vitiate the information. *State v. Overstreet*, 43 Kan. 299, 23 Pac. 572.

that the unlawful purpose of the taking or detention was actually accomplished.<sup>23</sup>

**8. Disjunctive Allegations.** — While an indictment or information for abduction must not charge the offense disjunctively,<sup>24</sup> the purposes, as distinguished from the offense, which the statute sets out in the disjunctive may be charged conjunctively in the indictment.<sup>25</sup>

**9. Joinder of Offenses.** — It is not improper to set forth in an indictment or information several counts which contain statements of the same transaction, varied to meet the different phases of proof expected.<sup>26</sup>

Under a statute condemning the enticing or taking away any female of previous chaste character from wherever she may be, to a house of ill-fame or elsewhere, "for the purpose of prostitution," an indictment which charged the purpose of the defendant in enticing away the woman, to be "for the purpose of having illicit sexual intercourse" with her, was held insufficient because the acts charged did not come within the statute. *Osborn v. State*, 52 Ind. 526.

**Concubinage and Prostitution.** — These words in a statute cover all cases of lewd intercourse. *People v. Cummons*, 56 Mich. 544, 23 N. W. 215.

23. *State v. Knost*, 207 Mo. 18, 105 S. W. 616.

Nor need the indictment allege that the defendant did not succeed in his effort, though that be the fact. *Smith v. Com. (Ky.)*, 127 S. W. 790.

Under a statute for unlawfully taking or detaining a woman against her will, it need not be charged in the indictment that the accused acted maliciously, wilfully or feloniously; if he be charged in the language of the statute creating the crime, and in the manner required by it, then the charge is complete, and includes all that is required to be established in order to constitute the guilt of the accused. *Higgins v. Com.*, 94 Ky. 54, 21 S. W. 231.

24. An allegation that the defendant did take and carry away or cause to be taken and carried away, etc., was held bad on motion in arrest of judgment. *State v. O'Bannon*, 1 Bailey (S. C.) 144.

25. The principle stated in *Griffin v. State*, 109 Tenn. 17, 70 S. W. 61, is that where a criminal act is a single thing it may be treated as one crime, although it may be accomplished by

several different means, or in several different modes, or may have been prompted by several different intents, or may have several different direct and immediately connected effects. So in the case before the court, the act complained of is the abduction, and the two intents are in the nature of character elements or qualities, both of which may be present in the mind of the accused, to be successively put in actual operation, or any one of them may be present, where the act of abduction is committed.

Where the statute condemns the taking of a female "for the purpose of prostitution or sexual intercourse," the indictment may allege the taking "for the purposes of prostitution and sexual intercourse," and may be sustained on proof of either. *People v. Powell*, 4 N. Y. Crim. 585.

26. *State v. Tidwell*, 5 Strobb. (S. C.) 1, 14.

In an indictment for abduction, two distinct and separate offenses were charged by different counts thereof, and the jury found the defendant guilty as charged in the indictment by a verdict which did not show what count or counts the jury found to be sustained. It was held that a motion in arrest of judgment should have been sustained. *State v. Terrill*, 76 Iowa 149, 40 N. W. 128.

In *State v. Bussey*, 58 Kan. 679, 687, 50 Pac. 891, the information contained two counts, the first charging that the defendant took the girl away for the purpose of prostitution, and the second, that he took her away for the purpose of concubinage. The court refused to require the state to elect upon which count of the information it would rely for conviction, and the jury found the defendant guilty on both counts, but before sentence a *nolle*



But two distinct offenses cannot be joined in the same count.<sup>27</sup>

**10. Provisos.** — If the statute contains provisos and exceptions in distinct clauses and not in the enacting clause, it is not necessary to allege in the indictment that the defendant does not come within them.<sup>28</sup>

**11. Form of Indictment.** — Though an indictment or information for abduction be inartistically drawn, yet if it contains all the averments required by statute it will be held to be sufficient.<sup>29</sup>

*prosequi* was entered by the state as to the first count. It was held that the joinder of the two counts was proper for the purpose of meeting the different phases of the evidence as it was the same transaction which was charged differently in the two counts.

In *State v. Burnett*, 142 N. C. 577, 55 S. E. 72, there were two counts in the indictment — one under a section of law "which makes it a felony to 'abduct or by any means induce any child under the age of fourteen years, who shall reside with the father . . . to leave such person. . . . The second count . . . makes it a misdemeanor to entice any minor to go beyond the limits of the State for the purpose of employment without the consent in writing of the parent, guardian or other person having authority over such minor.' The jury found the defendant guilty on the first count and not guilty on the second. After the indictment was read to the jury, the defendant asked leave to withdraw his plea of not guilty and moved to quash the indictment for misjoinder of two different offenses. This was denied, and defendant excepted." It was held that the motion to quash was not made in apt time, the court further saying: "If the motion had been made in apt time, when the several counts are, as in this case, merely statements of the same transaction varied to meet the different phases of proof, the bill cannot be quashed."

An indictment for abduction containing two counts, one charging the purpose of the abduction to have been prostitution, and the other charging the purpose to have been concubinage was held good, the court saying: "There is no objection to the joinder in different counts of two offenses of like character and punishable alike, in the same indictment." *Tucker v.*

*State*, 8 Lea (Tenn.) 633. See also *Mason v. State*, 29 Tex. App. 24, 14 S. W. 71.

27. An information which charged that the defendant took away a female under the age of eighteen years from her father, without his consent, for the purpose of prostitution and concubinage, contains a joinder of two distinct offenses in one count, and therefore the information is bad for duplicity. *State v. Goodwin*, 33 Kan. 538, 6 Pac. 899. And see *State v. Terrill*, 76 Iowa 149, 40 N. W. 128.

28. *State v. George*, 93 N. C. 567; *State v. Tidwell*, 5 Strobb. (S. C.) 1, 10.

**Otherwise if Definition.** — Where a statute provides that if any male person shall abduct or elope with the wife of another, he shall be guilty of a felony, provided that the woman since her marriage has been an innocent and virtuous woman, the words contained in the proviso are descriptive of the offense, and a part of its definition, and they must be negated in the bill of indictment. *State v. Connor*, 142 N. C. 700, 55 S. E. 787.

29. In *State v. Johnson*, 115 Mo. 480, 486, 22 S. W. 463, after formal parts, the indictment alleged: "That William H. Johnson, late of the county aforesaid, on the — day of —, 1887, at the county of Ralls, state aforesaid, did then and there being one Rosa Price, a female under the age of eighteen years, to-wit, seventeen years, unlawfully and feloniously take from one Lewis Price, her father, he the said Lewis Price then and there having in the legal charge of the person of the said Rosa Price without the consent and against the will of the said Lewis Price for the purpose of concubinage, by having illicit sexual intercourse with him, the said William H. Johnson, against the peace and dignity of the

state." This indictment though inartistically drawn, contained all the averments required by statute, and alleged that defendant took Rosa away from her father, and that he was in legal charge of her. See also *State v. Baldwin*, 214 Mo. 290, 301, 113 S. W. 1123; *State v. Beverly*, 201 Mo. 550, 557, 100 S. W. 463; *State v. Jones*, 191 Mo. 653, 90 S. W. 465 (where an information substantially in the same form was sustained.)

**Forms of Indictment and Information.**—The following forms have been approved by the courts:

Title of Cause, Court and Term.

John R. Smith, prosecuting attorney for the county of Posey, gives the court to understand and be informed that at and in county of Posey and State of Indiana on the — day of —, A. D. 1910, one Henry Brown did then and there unlawfully and feloniously entice and take away from the city of — in the county aforesaid, one Alemeda O. Watters, a female of chaste character, then and there being, to a house numbered —, on Main street, in the city of —, state of Indiana, with the felonious purpose then and there, of causing the said Alemeda O. Watters to become a prostitute.

John R. Smith, Prosecuting Attorney.

See *Nichols v. State*, 127 Ind. 406, 26 N. E. 839.

*Form of Information:*

Title of Cause and Court.

John M. Johnson, county attorney of — county, in the state of Kansas, in the name and by the authority, and on behalf of the state of Kansas, in his own proper person, comes now here into court, and gives the court to be informed and understand, that on the — day of —, A. D. in said county and state, one Robert Wing did then and there feloniously, one Lucy Long a female under the age of eighteen years, to-wit, of the age of sixteen years, take away from Jacob Long, her father, and Mary Long, her mother, they the said Jacob Long and Mary Long then and there having the legal charge of the said Lucy Long, without the consent and against the will of the said Jacob Long and Mary Long, for the purpose of concubinage by having sexual intercourse with him the said Robert Wing, contrary to the form of the statute in

such case made and provided, and against the peace and dignity of the state of Kansas.

John M. Johnson, County Attorney of — County, state of Kansas. *State v. Overstreet*, 43 Kan. 299, 23 Pac. 572.

*Forms of Indictment:*

Title of Cause and Court.

Adam Ball is accused by the grand jury of the county of McLeod, by this indictment, of the crime of abduction, committed as follows, the said Adam Ball at the village of Glencoe in the county of McLeod, state of Minnesota, did wilfully, unlawfully and feloniously take a certain unmarried female named Sarah Brown out of the possession of Julia Brown, her mother and guardian, for the purpose of sexual intercourse, she the said Sarah Brown being then and there an unmarried girl under the age of sixteen years, to-wit, of the age of fifteen years, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Minnesota.

John Jay, County Attorney of McLeod County.

*State v. Jamison*, 38 Minn. 21, 35 N. W. 712.

Title of Cause and Court.

The grand jury of — county by this indictment accuse Daniel Buck of the crime of abduction committed as follows:

The said Daniel Buck on the — day of — A. D. 1910, at the town of — in the said county, did unlawfully and feloniously make an assault upon Jane Otis then and there being, and then and there knowingly, feloniously and unlawfully did take her the said Jane Otis against her will, and with force and arms did compel her by force, menace and duress, to be by some person or persons to the jurors unknown, defiled, against the form of the statute in such case made and provided. William Bryan, District Attorney for the county of —.

*Beyer v. People*, 86 N. Y. 369.

Title of Cause and Court.

The grand jury of — county by this indictment accuse John Doe of the crime of abduction committed as follows:

The said John Doe on the — day of — A. D. 1910, at the town of —, in said county did feloniously take and receive, harbor and use one Clara

**B. TRIAL. — 1. Presumptions and Burden of Proof.** — One accused of this crime is entitled, of course, to the same presumption of innocence as hedges about the defendant accused of any other crime.<sup>30</sup>

Where the chastity of the woman is, under the statute, an essential ingredient of the offense it must be established by affirmative proof.<sup>31</sup> This, however, is not universally the rule.<sup>32</sup> Where the chastity of the woman is not of the gist of the offense, the want of chastity is a matter of defense to be shown by the accused.<sup>33</sup> And a defendant relying for his exculpation upon the consent of a parent or guardian has the burden of showing such consent.<sup>34</sup>

**2. Abusive Language by Prosecutor.** — In a trial for abduction, insulting and abusive language by the prosecuting attorney to the defendant in the presence of the jury may be ground for reversal, in case of conviction.<sup>35</sup>

**3. Instructions.** — An instruction which directs the jury that the defendant must prove his defense by a preponderance of evidence in order to be acquitted, is erroneous.<sup>36</sup>

The court may read the statute to the jury though it describes not only the particular kind of abduction of which the defendant is ac-

Jones, who was then and there a female under the age of sixteen years, to wit, of the age of fifteen years, for the purpose of sexual intercourse; he the said John Doe not being then and there the husband of the said Clara Jones, against the form of the statute in such case made and provided.

Robert Rush, District Attorney of the county of —.

People v. Sheppard, 44 Hun (N. Y.) 565.

30. People v. Platt, 4 N. Y. Crim. 53.

For matters of evidence see *ENCYCLOPEDIA OF EVIDENCE*, title "**Abduction.**"

31. People v. Roderigas, 49 Cal. 9; Com. v. Whittaker, 131 Mass. 224.

In Com. v. Whittaker, *supra*, it was said: "The defendant is presumed to be innocent until every material allegation necessary to constitute the offense charged is proved beyond a reasonable doubt. To allow the proof of such an allegation to rest merely on the legal presumption that the women were chaste, would be to permit the presumption in favor of the defendant's innocence of the offense charged to be overborne by another legal presumption in favor of the innocence of other persons not parties to this proceeding. We are therefore of opinion that the ruling was erroneous, and that, under this statute, the chastity of the women

must be proved by the government in the same manner as any other material allegation in the indictment."

32. Bradshaw v. People, 158 Ill. 156, 38 N. E. 652, where it was said that the presumption was that the woman's previous life and conversation were chaste, and that it was not necessary for the prosecution to offer any evidence on that subject in the first instance, the onus being on the defendant to show otherwise.

33. Griffin v. State, 109 Tenn. 17, 70 S. W. 61.

34. State v. Burnett, 142 N. C. 577, 55 S. E. 72.

35. In State v. Bobbst, 131 Mo. 328, 338, 32 S. W. 1149, the prosecuting attorney in his closing argument to the jury, turned to the prisoner at the bar of the court, and denounced him as "this infamous lecherous scoundrel." The court declined to rebuke the prosecuting attorney, and the defendant excepted. The defendant was convicted. Upon appeal the supreme court reversed the judgment, and remanded the cause for this misconduct.

36. In People v. Marshall, 59 Cal. 386, the defendants were convicted of the crime of taking a girl named Helen Armand, under eighteen years of age, from the custody, and without the consent of her mother, for the purpose of prostitution. There was testimony on



cused, but other kinds of the same offense, where the indictment and the charge make it evident to the jury of what the defendant is accused.<sup>37</sup> And it is not error for the court in speaking of the claim of the people to tell the jury that the prosecutor claimed that the girl was taken for the purpose of prostitution and for the purpose of sexual intercourse with men not her husband when, as a matter of fact, the indictment charged that she was taken for the purpose of prostitution, since this included the other.<sup>38</sup>

### III. CIVIL ACTION FOR DAMAGES — PLEADINGS. — A.

**PLAINTIFF NOT THE PARENT.** — A petition or complaint for damages on account of abduction, is not bad because it shows that the plaintiff is not the parent of the minor child taken, if it also shows that the plaintiff stood *in loco parentis* to her.<sup>39</sup>

behalf of the defendant that the defendant, Cordero, and the girl were engaged to be married, and that he took her from her mother for the purpose of marrying her. In respect to this defense the court instructed the jury as follows: "The defendants in this case justify their actions on the ground that the defendant Cordero and Helen Armand were engaged to be married, and that he took her away to Oakdale for the purpose of marrying her. It devolves upon the defendant to prove by a preponderance of evidence that the defendant Cordero and Helen Armand were engaged to be married, and that the defendant Cordero took her to Oakdale for the purpose of marrying her, and that it was his intention in good faith to marry her. If you so believe from the evidence, it is your duty to acquit the defendants." This was held error, the court saying: "It is a cardinal rule in criminal cases that the burden of proof rests on the prosecution. It would manifestly be shifting this burden from the prosecution to the defendant, to require the latter to establish his defense by a preponderance of evidence, and would deprive him of the doctrine of reasonable doubt, to the benefit of which he is justly, and everywhere held, entitled."

37. *People v. Brandt*, 14 N. Y. St. 419.

38. *People v. Brandt*, 14 N. Y. St. 419.

39. In *Selman v. Barnett*, 4 Ga. App. 375, 61 S. E. 501, the petition alleged that the petitioner was in the possession, custody and control of the minor child, and had clothed, edu-

cated and cared for it, as though she were her own, and that the defendant unlawfully persuaded, enticed and decoyed said child away from the petitioner against the will and consent of the petitioner and deprived petitioner of the solace which the child afforded, and prayed for punitive damages therefor. This was held good against a general demurrer, on the ground that the petitioner stood *in loco parentis*, and that the allegation of damages was sufficient to support general damages, but not for the services of the child. And see *Baumgartner v. Eigenbrot*, 100 Md. 508, 60 Atl. 601, where, however, abduction was not shown.

**Form of Petition.** — The material parts of the petition in *Selman v. Barnett*, *supra*, were as follows:

"That said R. L. Barnett has injured and damaged petitioner in the sum of \$1,000, as will appear from the following paragraphs. . . . That Eli Selman is a minor, eight years old; that the mother of said child was your petitioner's daughter, her name being Rose Selman; that said Rose Selman died three years ago; that the father of said child is unknown; that since the death of said child's mother said child has been in the possession, custody, and control of petitioner; that petitioner has clothed and educated said child, and loved and cared for it as much as if it had been her own; that since the death of the mother of said child and now the custody, possession, and control of said child belongs to your petitioner; that petitioner's husband is dead. (4) That

**B. ABDUCTION AND SEDUCTION.** — A complaint containing allegations which show that both abduction and seduction were committed, is good as against a general demurrer, and sets forth a good cause of action.<sup>40</sup>

**C. MARRIAGE A GOOD DEFENSE.** — In a suit for damages for enticing plaintiff's minor daughter away from him, and thus depriving him of her services, an answer which shows that the defendant was lawfully married to the daughter when he took her away, sets up a good defense.<sup>41</sup>

from said time when petitioner's daughter died, up until the 26th day of August, 1907, said Eli Selman remained in the custody and control of petitioner as aforesaid, but that on said date said R. L. Barnett persuaded, decoyed and enticed said child away from petitioner in the following manner: That petitioner was engaged in cooking for one White in the city of Rome, and on said date had sent child to the shop of said White for the purpose of carrying the said White's dinner; that while said child was in the discharge of his duties said Barnett persuaded and decoyed said child away, as aforesaid, and took and carried it in his wagon to his farm in Everett Springs district, said county, where said child is now. (5) Petitioner shows that for one week after said child was taken from her possession she did not know where he was; that she had all parts of Rome and surrounding country searched; that she did not know, nor could she tell, what had become of said child; that because of said absence of said child petitioner was greatly worried, she could not sleep through the night, she continually worried through the day, she could not know but what said child had been killed by some one or drowned in the river, and she could not tell. Finally she gave up and was compelled to take her bed, where she is now confined, which has been occasioned by the absence of said child. (6) Said child was a great solace and help to petitioner. He was continually with petitioner to do little duties and run errands. Petitioner loved said child, but because of said decoying and enticing away of said child by said defendant petitioner has been deprived of this. Petitioner did not consent to the taking of said child

by the said Barnett, and said act was against the will of petitioner. (7) Petitioner shows that the taking and carrying away of said child by said Barnett was illegal, wrong, and a crime, and entitled petitioner to punitive damages, for which she sues."

40. In *Kreag v. Authes*, 2 Ind. App 482, 28 N. E. 773, the plaintiff alleged in his complaint that the defendant wrongfully and wickedly, intending to deprive the plaintiff of the services of his infant daughter, did entice and persuade her to leave the plaintiff's home and service, without his consent, and did then and there unlawfully abduct such daughter, and take her into his own family, and did then and there live and cohabit, and have unlawful sexual intercourse with her, whereby she became pregnant with, and was delivered of a bastard child, and became permanently disabled from performing services, much to the damage, disgrace and humiliation of the plaintiff. A demurrer to the complaint was overruled, and after verdict for plaintiff, a motion for a new trial was overruled. The court held the complaint sufficient, saying: "There is some controversy between the parties relative to the theory of the complaint, — whether the *gravamen* is the alleged abduction or the seduction. For the purposes of the demurrer we are unable to perceive that it would make any material difference upon which theory it is construed, as it states a good cause of action upon either."

41. *Aldrich v. Bennett*, 63 N. H. 415, 56 Am. Rep. 529, was a civil action for damages, for unlawfully enticing away plaintiff's minor daughter on the 29th day of March, 1879, and depriving him of her services from that time until the 8th day of September,

D. DISSOLUTE CHARACTER. — In an action for damages for abducting and debauching a female child, allegations in the answer setting forth that the parent and the child and other members of her family are of dissolute character, do not constitute a bar to the action.<sup>42</sup>

1882, when she became twenty-one years of age. The defendant pleaded that on said twenty-ninth day of March he was lawfully married to the daughter, and that the plaintiff was not thereafter entitled to her services. The plaintiff demurred to this plea. The legality of the marriage was held to be admitted by the pleadings, and the plea was a sufficient answer to plaintiff's action. The court said: "The new relations created by the marriage, being inconsistent with the enforcement of parental rights, operate as an emancipation from them. The plaintiff's daughter, being above the statutory age of consent, had the legal capacity to form the relation of marriage, and although in strictness of law it should not be formed without parental consent, it is nevertheless sustained on grounds of public policy, and parental rights are made to yield to it."

42. *Dobson v. Cothran*, 34 S. C. 518, 13 S. E. 679.



# ABORTION

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#### CROSS-REFERENCES:

Conspiracy;	Jurisdiction;
Homicide;	Nuisance.
Indictment and Information;	



**I. DEFINITION.**—The word “abortion” in common terminology means the premature delivery of a human fœtus.<sup>1</sup>

**Judicial Definition.**—“By abortion we understand the act of miscarriage, or producing young before the natural time, or before the fœtus is perfectly formed. And to cause or produce an abortion is to cause or produce this premature bringing forth of this fœtus.”<sup>2</sup>

The terms “miscarriage” and “abortion” are generally held to be interchangeable,<sup>3</sup> although in some cases a distinction is made in this, that miscarriage refers to the act of bringing forth the fœtus in the early stages of pregnancy, while abortion denotes the act of delivery after the child has quickened.<sup>4</sup>

The crime of abortion under modern statutes is the unlawful act of causing a woman to miscarry or abort, through the use of artificial means.<sup>5</sup>

1. **Ia.**—*Abrams v. Foshee*, 3 Iowa 273, 66 Am. Dec. 77. **N. Y.**—*Butler v. Wood*, 10 How. Pr. 222. **Pa.**—*Mills v. Com.*, 13 Pa. 631. **Utah.**—*State v. Crook*, 16 Utah 212, 51 Pac. 1091.

2. *Abrams v. Foshee*, 3 Iowa 273. 66 Am. Dec. 77.

**No Crime Imported.**—The term “abortion” does not itself import a crime. It simply means, according to Webster, the act of miscarriage; the expulsion of an immature product of conception; miscarriage; the immature product of an untimely birth. *Belt v. Spaulding*, 17 Ore. 130, 20 Pac. 827, 830.

Abortion is, technically speaking, the expulsion of the ovum or embryo from a female at any time between six weeks or six months after conception. *Smith v. State*, 33 Me. 48, 59, 54 Am. Dec. 607, citing *Chit. Med. Juris*. 410.

An eminent law writer defines it to be the act of bringing forth what is yet imperfect; and particularly the delivery or expulsion of the human fœtus prematurely, or before it is yet capable of sustaining life; also the thing prematurely brought forth, or produced of an untimely process. *Belt v. Spaulding*, 17 Ore. 130, 20 Pac. 827, citing with approval 1 *Abbott's Law Dict.* 3, title Abortion.

3. **Del.**—*State v. Fleetwood*, 65 Atl. 772. **Ia.**—*State v. Crofford*, 133 Iowa 478, 110 N. W. 921. **Neb.**—*Munk v. Frink*, 75 Neb. 172, 106 N.

W. 425. **Ore.**—*Belt v. Spaulding*, 17 Ore. 130, 20 Pac. 827, 830. **Pa.**—*Wells v. New England Mut. L. Ins. Co.*, 191 Pa. 207, 43 Atl. 126, 71 Am. St. Rep. 763, 53 L. R. A. 327. **Utah.**—*State v. Crook*, 16 Utah 212, 51 Pac. 1091. **Vt.**—*State v. Howard*, 32 Vt. 380, 402.

4. **Mich.**—*People v. Aiken*, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512. **N. D.**—*State v. Belyea*, 9 N. D. 353, 83 N. W. 1. **Vt.**—*State v. Howard*, 32 Vt. 380, 402.

See also *Weightnovel v. State*, 46 Fla. 1, 35 So. 856.

5. *State v. Crook*, 16 Utah 212, 51 Pac. 1091.

“Procuring a miscarriage, within the meaning and purpose of this act, is the unlawful destruction, or the bringing or causing to be brought forth prematurely, of the fœtus or unborn offspring of a pregnant woman at any time before birth according to the course of nature.” *State v. Magnell*, 3 Penne. (Del.), 307, 51 Atl. 606.

See the codes and statutes of the various states.

**Attempt Included.**—In New York the term “abortion” in Pen. Code, § 294, providing that any one who advises or causes a woman to use drugs, etc., with intent to produce a miscarriage, shall be guilty of “abortion,” is not to be understood in its ordinary meaning of producing young before the natural time, but also includes the attempt to produce such result. *People v. Phelps*, 61 Hun 115, 15 N. Y. Supp. 440.

"**Fœticide**" is a term sometimes used to describe the crime of abortion.<sup>6</sup>

**Statutory Origin.**—Abortion, as a crime, is to be traced to modern statutes.<sup>7</sup>

**II. CRIMINAL ACTIONS.**—A. JURISDICTION AND VENUE.—1. **General Rule.**—Where the statute makes the material elements of the offense the prescription of a drug or the use of a drug or instrument, together with the bringing about of miscarriage or death, jurisdiction exists in whatever county any one or more of the acts alleged

6. **Ga.**—*Sullivan v. State*, 121 Ga. 183, 48 S. E. 949. **Ohio.**—*Tabler v. State*, 34 Ohio St. 127. **Tex.**—*Moore v. State*, 37 Tex. Crim. 552, 40 S. W. 287.

7. *Lamb v. State*, 67 Md. 524, 10 Atl. 208, 298; *State v. Lilly*, 47 W. Va. 496, 35 S. E. 837 (where it is said that the crime of abortion was unknown among the early Jews.)

**Under the Common Law.**—As the life of an infant was not supposed to begin until it stirred in the mother's womb, it was not regarded as a criminal offense to commit an abortion in the early stages of pregnancy.

**Ia.**—*Abrams v. Foshee*, 3 Iowa 273, 66 Am. Dec. 77, holding that it was not actionable *per se* to charge a woman with procuring an abortion. **Mass.**—*Com. v. Parker*, 9 Metc. 263, 43 Am. Dec. 396; *Com. v. Bangs*, 9 Mass. 387. **Neb.**—*Edwards v. State*, 79 Neb. 251, 112 N. W. 611. **N. J.**—*State v. Cooper*, 22 N. J. L. 52, 51 Am. Dec. 248.

"It was anciently holden that the causing of an abortion by giving a potion to, or striking a woman big with child, was murder; but at this day it is said to be a great misprision only, and not murder, unless the child be born alive, and die thereof. 1 Hawk. B. 1, c. 31, § 16." *State v. Cooper*, 22 N. J. L. 52, 51 Am. Dec. 248 (*citing* 1 Hale's P. C. 433, 1 Bl. Com. 129); *Lamb v. State*, 67 Md. 524, 10 Atl. 208, 298, *quoting* from 3 Co. Inst. 50, to the same effect.

And likewise the mere attempt to commit an abortion upon a woman not "quick with child" was no offense. *State v. Cooper*, 22 N. J. L. 52, 51 Am. Dec. 248.

The use of violence, however, as where it was attempted to procure an abortion without the woman's consent, would be indictable as an assault. See *Com. v. Parker*, 9 Metc. (Mass.) 263,

43 Am. Dec. 396; *State v. Cooper*, *supra*.

Some courts of high character have held, however, that abortion is a crime at common law without regard to the stage of gestation. *State v. Slagle*, 83 N. C. 630; *Mills v. Com.*, 13 Pa. 631.

**Under early legislation** a distinction was recognized between the offense of causing a miscarriage of a woman quick with child, and causing the same before the quickening. 43 Geo. 3. See early statutes of New York, Ohio, and Connecticut. The Roman penal code made this distinction. *State v. Cooper*, 22 N. J. L. 52, 51 Am. Dec. 248, *citing* Male's Jur. Med. 113.

The clause "at any stage of uterogestation," in the Nebraska statute, was inserted, it has been said, "to avoid the perplexing and doubtful questions which might be raised as to the time of 'quickening' under this view of the law." *Edwards v. State*, 79 Neb. 251, 112 N. W. 611.

**In Vermont**, the general form of expression in the statute, "pregnant with child" seems to have been used to escape all questions of this kind and have it clearly apply to every stage of pregnancy, from the earliest conception. *State v. Howard*, 32 Vt. 380, 400.

**In New York**, § 294 of the Penal Code provides as follows: "Abortion defined. A person who, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve the life of the woman, or of the child with which she is pregnant, either (1.) Prescribes, supplies, or administers to a woman, whether pregnant or not, or advises or causes a woman to take any medicine, drug or substance; or (2.) Uses or causes to be used any instruments or other means, is guilty of abortion, and is punishable," etc. *People v. Bliven*, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 701.

are shown to have occurred.<sup>8</sup> On the other hand, where the crime defined by the statute is the use of means for the purpose, and with the intent to procure an abortion, the same is committed in the county where the acts alleged are committed, without reference to where the miscarriage occurred, and jurisdiction is therefore confined to such county.<sup>9</sup>

**2. Offense Complete in Another State.**—Where drugs are sent through the mails from one state to another, for the purpose of producing an abortion, jurisdiction attaches in the latter state.<sup>10</sup>

**3. Change of Venue.**—A change of venue in abortion cases, as in other criminal prosecutions, rests within the sound discretion of the trial court.<sup>11</sup>

**B. STATUTORY LIMITATIONS OF ACTIONS.**—To authorize a conviction in an abortion case, the state must show that the offense charged was committed within the period limited by statute for its prosecution.<sup>12</sup>

**C. INFORMATION OR INDICTMENT.**—**1. Form, Requisites and Sufficiency.**—**a. In General.**—**(I.) Following Language of Statute.**—In accordance with the general rules as to framing indictments,<sup>13</sup> an indictment or information charging abortion is generally sufficient if the offense is described in the language of the statute,<sup>14</sup> or in other

8. *Hauk v. State*, 148 Ind. 238, 46 N. E. 127, petition for rehearing on other points overruled, 47 N. E. 465.

As to jurisdiction generally in prosecutions where all the acts of a defendant are committed in one county and the consummation of the crime occurs in another, see title "**Jurisdiction.**"

9. *State v. Hollenbeck*, 36 Iowa 112; *State v. Wheaton*, 79 Kan. 521, 99 Pac. 1132.

Where a statute gives jurisdiction to the county "in which the offense was committed," if, in an abortion case, the evidence shows that defendant procured drugs and administered the same in one county but that the miscarriage occurred in another, the former is the proper forum in which to bring the action. *Moore v. State*, 37 Tex. Crim. 552, 40 S. W. 287.

10. *State v. Morrow*, 40 S. C. 221, 18 S. E. 853, citing *State v. Williams*, 3 Hill (S. C.), 381; *State v. Borgman*, 2 Nott & McC. (S. C.), 34; *State v. Anone*, 2 Nott & McC. (S. C.), 27.

**Crime Committed Partly in One State and Partly in Another.**—For a discussion of the rules in general for determining jurisdiction in such case, see title "**Jurisdiction.**"

11. *Hauk v. State*, 148 Ind. 238, 46

N. E. 127, petition for rehearing on other points overruled, 47 N. E. 465.

A change of venue is properly refused where defendant in support of his application, on the ground of excitement, bias and prejudice, filed affidavits of but nine persons, and the state in support of its resistance filed affidavits of sixteen persons, all tending to disprove that any excitement, bias, or prejudice existed; some of the latter affiants being particularly well qualified. *Hauk v. State*, 148 Ind. 238, 46 N. E. 127, petition for rehearing on other points overruled, 47 N. E. 465.

12. *State v. Schuerman*, 70 Mo. App. 518. See, generally, title "**Limitation of Actions.**"

13. See the title "**Indictment and Information.**"

14. **Ala.**—*Thomas v. State*, 156 Ala. 166, 47 So. 257. **Fla.**—*Eggart v. State*, 40 Fla. 527, 25 So. 144. **Ind.**—*Montgomery v. State*, 80 Ind. 338, 41 Am. Rep. 815. **Minn.**—See *State v. Bly*, 99 Minn. 74, 108 N. W. 833. **Mo.**—*State v. Schuerman*, 70 Mo. App. 518.

**Approved Form.**—In *Com. v. Wood*, 11 Gray (Mass.) 85, it was held that an indictment was sufficient which averred that defendant on the — of January, —, at —, "with force



words conveying the same meaning.<sup>15</sup> But, as in other cases, if from the nature of the offense the words of the statute do not clearly and

and arms, maliciously and without lawful justification, did force and thrust a certain metallic instrument, which he the said — then and there held in his hand, into the womb and body of a certain woman by the name of — she the said — being then and there pregnant with child, with the wicked and unlawful intent of him the said — then and there thereby to cause and procure the said — to miscarry and prematurely to bring forth the said child with which she was then and there pregnant as aforesaid; and she the said —, at said place and time, 'by means of the said forcing and thrusting of said instrument into the womb and body of the said — in manner aforesaid, did bring forth said child, of which she was so pregnant, dead; against the peace, and contrary to the form of the statute in such case made and provided.' This was not open to an objection, as failing to allege that the defendant used the metallic instrument, nor who the woman was or what was her name, nor that she brought forth the child prematurely, nor brought it forth dead in consequence of what the defendant had done.

For other approved forms, see *Ind.* — *State v. Sherwood*, 75 *Ind.* 15. *Mass.* — *Com. v. Brown*, 121 *Mass.* 69. *Mo.* — *State v. Dean*, 85 *Mo. App.* 473.

15. *Ala.* — *Thomas v. State*, 156 *Ala.* 166, 47 *So.* 257. *Ill.* — *Cochran v. People*, 175 *Ill.* 28, 51 *N. E.* 845. *N. Y.* — *Frazer v. People*, 54 *Barb.* 306; *People v. Stockham*, 1 *Park. Cr.* 424.

The particularity required in homicide cases is not necessary, though death is alleged to have resulted from the abortion charged. *Com. v. Jackson*, 15 *Gray (Mass.)* 187. And see *Rhodes v. State*, 128 *Ind.* 189, 27 *N. E.* 866, 25 *Am. St. Rep.* 429.

**Unnecessary To Charge Overt Act.** — Under a statute denouncing the "advising or procuring" a woman to take drugs "with intent to procure her miscarriage," an indictment is sufficient which substantially follows the language of the statute, and it is unnecessary to charge the overt acts. *State v. Crews* 128 *N. C.* 581, 38 *S. E.* 293.

**"Procuring" Defined.** — An indictment under a statute denouncing the

"advising and procuring" a woman to take drugs "with intent to procure her miscarriage" need not allege that defendant procured the drug for the woman since the "procuring" refers to the act of inducing or prevailing upon the woman to act upon advice to take drugs. *State v. Crews*, 128 *N. C.* 581, 38 *S. E.* 293.

**"Procuring Miscarriage" and "Procuring Abortion" Synonymous.** — In charging the criminal act of destroying the foetus at any time before birth, it is necessary to charge the offense named in the statute which declares the act a crime. Where the terms "procuring a miscarriage" and "procuring an abortion" mean, under a statute, substantially the same thing, in characterizing the crime either term may be used in the information or indictment. *State v. Crook*, 16 *Utah* 212, 51 *Pac.* 1091.

**"Utero-Gestation" Synonymous with "Pregnancy."** — Under a statute making it an offense to administer, or advise to be administered, to any pregnant woman, at any stage of utero-gestation, any medicine, etc., it is sufficient to allege the pregnancy of the woman, and it is not necessary to charge that the abortion was committed during the period of utero-gestation, since the use of the words "at any stage of utero-gestation," means at any stage of pregnancy. *Edwards v. State*, 79 *Neb.* 251, 112 *N. W.* 611.

**Statute Denouncing Counseling "Person" Does Not Refer to Woman.** — Under a statute making it a crime for any one to "aid, assist, or counsel any person so intending to procure a miscarriage," etc., an indictment charging defendants with counseling the woman herself relative to an abortion, is bad, since the word "person" as used in the quotation does not refer to the woman herself but to the person intending to procure a miscarriage of a pregnant woman. *State v. Parm*, 5 *Penne. (Del.)*, 556, 60 *Atl.* 977.

A complaint charging that complainant became criminally intimate with defendant, that she informed defendant that she believed she was pregnant and that defendant gave her a pill and made her swallow the same, telling her that the pill and others

definitely apprise the defendant of the offense charged against him, greater particularity must be used.<sup>16</sup> Thus, in a prosecution under a statute for making public by print and writing information as to where the means for procuring the miscarriage of a pregnant woman could be had, the indictment should allege the manner in which the print and writing were made public or circulated.<sup>17</sup>

(II.) **Surplusage.**—The general rule of criminal pleading that allegations which are in no way relevant to the issues involved, but which do not detract from the sufficiency of the information or indictment, are to be disregarded as surplusage,<sup>18</sup> has frequently found application in abortion cases.<sup>19</sup>

which he had, and which he gave to complainant, would bring on her miscarriage, makes out a *prima facie* case against the defendant. The same strictness is not required in an information as on an indictment. *In re O'Neill*, 69 N. Y. Supp. 617.

In *Washington* one section of the statute provides: "Every person who shall unlawfully kill any human being \* \* \* in the commission of some unlawful act, shall be deemed guilty of manslaughter." Another section makes it an offense for any person to administer to any pregnant woman, or whom he supposes to be pregnant, any medicine, drug, or substance whatever, to use or employ any instrument or other means on her person, "thereby to procure the miscarriage of such woman." An information charging manslaughter as the result of an abortion is not demurrable on the ground that the statute makes the acts alleged to constitute the offense charged a substantive offense, since the statute prescribes a punishment for doing these specific acts, without regard to the effect such acts may have had upon the person operated upon. *State v. Power*, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902.

16. See titles "Conspiracy," "False Pretenses," "Libel and Slander."

17. "It may have been made public by printing in a newspaper, by spreading circulars broadcast through the streets, by nailing it to a telephone pole, by sending it through the mails, by leaving one upon every doorstep in the town, or in one of the many other ways which the ingenuity of the modern advertisers might suggest. Without some allegation of the mode, the respondent may well insist upon his right given him by the organic law of the land, Cons. of Vt., Ch. 1, Art. 10,

"to demand the cause and nature of his accusation." " *State v. Fiske*, 66 Vt 434, 29 Atl. 633.

18. See the title "Indictment and Information."

19. *People v. Lohman*, 2 Barb (N. Y.) 216, *affirmed*, 1 N. Y. 379, 49 Am. Dec. 340; *Hatchard v. State*, 79 Wis. 357, 48 N. W. 380.

**Allegations of Assault Held Surplusage.**—*Com. v. Snow*, 116 Mass. 47.

**Continuing Clause Rejected.**—Where an indictment or count in an indictment for abortion sufficiently charges the crime, but charges it with a *continuendo*, the *continuendo* clause thereof may properly be rejected as surplusage when the offense charged is not a continuing one, and when such rejection leaves the indictment intact and otherwise unobjectionable. *Eggart v. State*, 40 Fla. 527, 25 So. 144.

"Noxious" Substance.—In an indictment charging the administering of a certain noxious substance to one S, she being pregnant, with intent to cause a miscarriage, the word "noxious" is merely descriptive of the substance, like that of a weapon or wound in charges of murder, and may be treated as surplusage, since the intent is the chief element in the offense. *State v. Stafford* (Iowa), 123 N. W. 167. To the same effect, see *State v. Crews*, 128 N. C. 581, 38 S. E. 293.

**An averment of violence by the hand of defendant in an abortion case,** alleging the use of instruments, the administration of drugs and the thrusting of the hand into the womb after the child's removal, with intent to procure miscarriage, is immaterial and superfluous matter, since pregnancy ceases after the removal of the child from the body of the mother, and the averment of such violence is no part of the

(III.) Joinder of Good Count with Defective Count. — Though one count in an indictment charges the use of means unknown to the grand jury, if other counts sufficiently allege the means it is not error to allow the trial to proceed on all counts as a conviction can be referred to any good count.<sup>20</sup>

(IV.) Effect of Verdict. — A defect in an information or indictment charging abortion may be cured by verdict, as in other criminal cases.<sup>21</sup> Thus, a misjoinder of counts in an indictment charging abortion is cured by a verdict of acquittal upon one,<sup>22</sup> and the omission in an indictment for producing abortion containing two counts, of an allegation of the fact that they are different descriptions of the same offense, is cured by a verdict of not guilty and the entry of a *nolle prosequi* upon one.<sup>23</sup>

b. *Duplicity*. — (I.) In General. — A treatment of the subject of duplicity in indictments and informations generally will be found in another part of this work.<sup>24</sup>

(II.) Several Means. — An indictment or count therein is not duplicitous because alleging the use of several means to produce the abortion.<sup>25</sup>

(III.) Miscarriage and Death. — An indictment alleging both miscarriage and death is not bad for duplicity where, under the statute, miscarriage or death constitutes the material part of the offense.<sup>26</sup>

(IV.) Accessory Charged as Principal. — An indictment in an abortion case is not bad for duplicity because an accessory before the fact is charged as principal.<sup>27</sup>

(V.) Count Charging Both as Accessory and Principal. — A count in an indictment charging defendant both as accessory and principal is duplicitous.<sup>28</sup>

(VI.) Alleging Distinct Offenses. — As in all criminal cases an indictment may contain two or more counts alleging distinct offences, if they are of the same general description, and the mode of trial and the nature of the punishment are the same,<sup>29</sup> an information charging in

description of the acts prohibited by the statute. *Com. v. Brown*, 14 Gray (Mass.) 419.

20. *Reum v. State*, 49 Tex. Crim. 125, 90 S. W. 1109.

21. *Verdict as Curing Defects Generally*. — See the title "*Verdict*."

22. *Com. v. Adams*, 127 Mass. 15.

23. *Com. v. Holmes*, 103 Mass. 440.

24. See the title "*Indictment and Information*."

25. *Mass.* — *Com. v. Brown*, 14 Gray 419. *N. Y.* — *People v. Davis*, 56 N. Y. 95. *Tex.* — *Moore v. State*, 37 Tex. Crim. 552, 40 S. W. 287.

A count in an indictment is not duplicitous because charging both use of drugs and "violence then and there internally and externally applied."

*Reum v. State*, 49 Tex. Crim. 125, 90 S. W. 1109.

26. *Hauk v. State*, 148 Ind. 238, 46 N. E. 127, petition for rehearing on other points overruled, 47 N. E. 465; *Rhodes v. State*, 128 Ind. 189, 27 N. E. 866, 25 Am. St. Rep. 429.

27. *Rhodes v. State*, 128 Ind. 189, 27 N. E. 866, 25 Am. St. Rep. 429.

See the title "*Accessories and Accessories*."

28. *Wandell v. State* (Tex. Crim.), 25 S. W. 27.

29. *Ill.* — *Beasley v. People*, 89 Ill. 571. *Mass.* — *Com. v. Leach*, 156 Mass. 99, 30 N. E. 163; *Com. v. Follansbee*, 155 Mass. 274, 29 N. E. 471; *Com. v. Adams*, 127 Mass. 15; *Com. v. Brown*, 121 Mass. 69. *N. C.* — *State v. Slagle*,



different counts two or more attempts to commit the same crime upon the same woman, but upon different dates, will be sustained.<sup>30</sup> And two counts alleging respectively the use of drugs and the use of instruments are properly joined.<sup>31</sup> And a count charging the use of means to produce an abortion and also the woman's death is not bad for duplicity as charging abortion and manslaughter also.<sup>32</sup> But when the clear object and purpose is to prosecute a defendant for separate felonies by means of one information or indictment, the court will not permit it to be done.<sup>33</sup>

In prosecutions for engaging in the business of committing abortions, allegations of particular instances of abortions being allegations of acts done in the performance of the purpose and intent charged, do not charge separate offenses.<sup>34</sup>

An indictment under the federal statute charging a defendant with having deposited in the mails a letter giving information where and how divers articles designed "for the prevention of conception and for the procuring of abortion" may be obtained, does not charge two offenses in one count.<sup>35</sup>

**Consent of Defendant to Trial of Two Indictments.**—If the defendant consents that the same jury shall try two indictments, the one charging the use of instruments, and the other the use of instruments and death, testimony as to the cause of the woman's death is competent since the issue was the same as it would have been if, instead of two indictments, the charges had been embraced in one indictment with two counts.<sup>36</sup>

82 N. C. 653, one count charging an attempt to kill by administering noxious and poisonous drugs, and another attempt to produce an abortion by the same means.

See the title "Indictment and Information."

In Florida under § 2893, Rev. Stat., it is not error to quash an indictment or information upon the ground that it charges several distinct offenses in separate counts thereof, unless such indictment is so vague, indistinct and indefinite as to mislead accused, and embarrass him in the preparation of his defense, or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense. *Eggart v. State*, 40 Fla. 527, 25 So. 144.

30. *Eggart v. State*, 40 Fla. 527, 25 So. 144.

31. Ill.—*Beasley v. People*, 89 Ill. 571. Ind.—*Diehl v. State*, 157 Ind. 549, 62 N. E. 51. Mass.—*Com. v. Thompson*, 159 Mass. 56, 33 N. E. 1111; *Com. v. Follansbee*, 155 Mass. 274, 29 N. E. 471; *Com. v. Adams*, 127 Mass. 15; *Com. v. Brown*, 121 Mass. 69; *Com.*

*v. Brown*, 14 Gray 419. Mich.—*People v. Aiken*, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512; *People v. Sessions*, 58 Mich. 594, 26 N. W. 291 (defendant accused of procuring abortion, one count charging murder and another manslaughter). N. Y.—*People v. Lohman*, 2 Barb. 216, *affirmed*, 1 N. Y. 379, 49 Am. Dec. 340. W. Va.—*State v. Lilly*, 47 W. Va. 496, 35 S. E. 837.

**Misjoinder of Counts Cured.**—See *supra*, II, C, 1, a, (IV), "Effect of Verdict."

32. *Traylor v. State*, 101 Ind. 65.

33. *People v. Aiken*, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512, (attempted joinder of one count charging abortion and another charging criminal neglect of the subject after the date of the alleged abortion); *People v. Spier*, 120 App. Div. 786, 105 N. Y. Supp. 741.

34. *State v. Atwood* (Ore.), 102 Pac. 295, a prosecution under the nuisance statute.

35. *Lee v. United States*, 156 Fed. 948, 84 C. C. A. 448.

36. *Com. v. Keene*, 7 Pa. Super. 293.

**2. Particular Essential Allegations. — a. Intent or Purpose.**

(I.) In General. — While the information or indictment must allege the defendant's intent,<sup>37</sup> it is not essential, generally, that the indictment or information should charge "felonious" intent.<sup>38</sup> Some statutes require that the offense of producing an abortion shall be averred to have been "unlawfully" committed.<sup>39</sup> And where an essential part of the statutory offense is the intent to produce a miscarriage, such intent must be averred.<sup>40</sup> So under some statutes it is necessary to allege an intent to destroy the child.<sup>41</sup>

*Compare* *People v. Spier*, 120 App. Div. 786, 105 N. Y. Supp. 741, holding it error to try defendant on two informations for two separate and distinct offenses, consisting of sales of drugs to two different women upon two different occasions, defendant having by timely and continued motions and objections sought to obtain knowledge of which crime he was being tried.

37. *Com. v. Hersey*, 2 Allen (Mass.) 173.

**Technical Description of Intent Unnecessary.** — Where an indictment charges defendant with having "knowingly" distributed a circular or advertisement giving notice of a place where illegal operations might be performed upon pregnant women, a motion to quash because guilty knowledge of its contents is not specifically averred, is properly denied. A technical description of an evil intent is not necessary under the statute. *Com. v. Hartford*, 193 Mass. 464, 79 N. E. 784.

38. *Hays v. State*, 40 Md. 633.

It is sometimes provided by statute that indictments need not charge that the act was a felony or that it was done feloniously or with felonious intent. *Com. v. Sholes*, 13 Allen (Mass.), 554, where it was held sufficient to allege that the acts were done "unlawfully and with intent," etc.

*Compare* *Holland v. State*, 131 Ind. 568, 31 N. E. 359, where it was charged that the defendant feloniously, unlawfully and wilfully employed an instrument in and upon the body and womb of a pregnant woman, with intent to produce a miscarriage, etc., and it was held that the allegation "feloniously and unlawfully" applied to the intent with which the instrument was used, as well as to the use of the instrument itself.

39. *In Com. v. Thompson*, 108 Mass. 461, under a statute imposing punishment upon whoever "unlawfully" causes miscarriage of a woman, an averment that defendant "maliciously and without any lawful justification" caused a woman to miscarry was held sufficient.

40. *Com. v. Boynton*, 116 Mass. 343. An allegation that defendant used certain instruments in and upon a pregnant woman and thereby attempted to produce the miscarriage, sufficiently alleges an intent to procure an abortion. *Scott v. People*, 141 Ill. 195, 30 N. E. 329.

In Canada an indictment charging accused "with unlawfully using on her own person \* \* \* with intent thereby to procure a miscarriage" (without stating whose miscarriage) is sufficient. *Rex v. Holmes*, 9 Brit. Col. 294.

For approved forms of indictments and informations sufficiently alleging such intent, see **Fla.** — *Eggart v. State*, 40 Fla. 527, 25 So. 144. **Ill.** — *Howard v. People*, 185 Ill. 552, 57 N. E. 441. **Mass.** — *Com. v. Boynton*, 116 Mass. 343. **N. H.** — *State v. Wood*, 53 N. H. 484. **Pa.** — *Mills v. Com.*, 13 Pa. 631.

41. **Ky.** — *Mitchell v. Com.*, 78 Ky. 204, 39 Am. Rep. 227. **Me.** — *Smith v. State*, 33 Me. 48, 54 Am. Dec. 607. **N. Y.** — *Lohman v. People*, 2 Barb. 216, 1 N. Y. 379, 49 Am. Dec. 340.

The allegation that a certain instrument was used upon a pregnant woman, and that the use of that instrument caused her to bring forth the child dead, is not a charge that the one using the instrument intended to destroy the child. The inference of such design, from the use of the instrument, and its effect, is by no means necessary. *Smith v. State*, 33 Me. 48, 54 Am. Dec. 607.

(II.) *Malice*. — In the absence of statutory requirement,<sup>42</sup> an allegation of "malice" in abortion cases is unnecessary.<sup>43</sup>

b. *Time and Place*. — The time and place of the doing of the acts alleged as constituting the offense should be averred.<sup>44</sup>

As to *Date of Offense*. — But it is unnecessary for the jury to find that the alleged offense occurred on the exact day alleged.<sup>45</sup>

c. *Methods or Means Employed*. — (I.) *In General*. — The information or indictment should state with reasonable particularity the manner in which the abortion or the attempted abortion was produced or attempted.<sup>46</sup>

42. *Malice Aforethought Sufficiently Alleged*. — While an indictment for murder must charge that the killing was done with "malice aforethought," under the statute, it is not necessary that these identical words be used, words of the same import being sufficient. And so, where the indictment charges that drugs were administered, and an instrument thrust into the body of deceased, with the specific intent to produce an abortion, this language sufficiently charges malice aforethought. *State v. Thurman*, 66 Iowa 693, 24 N. W. 511.

43. *Johnson v. People*, 33 Colo. 224, 80 Pac. 133; *Com. v. Jackson*, 15 Gray (Mass.) 187. But see *Com. v. Morrison*, 16 Gray (Mass.) 224, decided under an earlier statute.

44. *Eggart v. State*, 40 Fla. 527, 25 So. 144; *Howard v. People*, 185 Ill. 552, 57 N. E. 441.

*Necessity of Phrase "Then and There"*. — Where an indictment charges manslaughter resulting from abortion, and avers in one count that defendant "did thereby unlawfully \* \* \* cause the miscarriage," a contention that the words "then and there" should have followed the word "thereby," on the ground that without the omitted words there was no sufficient charge as to the county or state in which the miscarriage was produced and the death occurred, is without merit, this averment in connection with others sufficiently showing the time and place of causing the abortion and the death of the deceased, in view of the statute providing that every indictment is sufficient which charges the offense so plainly that the nature of the offense may be easily understood by the jury. *Howard v. People*, 185 Ill. 552, 57 N. E. 441. See also *Beasley v. People*, 89 Ill. 571.

45. *Com. v. Snow*, 116 Mass. 47, holding that it was proper to instruct, also that if the jury was satisfied that the government's witnesses were in error as to the date, they might consider this upon the question of the degree of credit to which they were entitled as to other matters.

It is improper to confine the jury to evidence of an abortion committed on a certain day where there is evidence of some acts having been committed on another day. *Thomas v. State*, 156 Ala. 166, 47 So. 257.

46. *State v. Rupe*, 41 Tex. 33, holding it to be insufficient to follow the precise words of the statute. Here the court said: "The manner of committing an offense of this character, involving a liability to imprisonment for life, should at least be stated in the indictment with such reasonable particularity as would furnish the accused with such reasonable information as might enable her to rebut or explain away, if she could, the acts or circumstances likely to be adduced against her on the trial of the cause. This the indictment omitted to state, leaving the accused to discover by some mode not known to the law what the evidence might be that she was required to defend herself against."

With as much particularity as the evidence will warrant the indictment should allege the means or methods employed. *Com. v. Noble*, 165 Mass. 13, 42 N. E. 328.

*Procuring Abortion by Violence*. See *Navarro v. State*, 24 Tex. App. 378, 6 S. W. 542.

*Indictment Charging Means Used Disjunctively*. — *State v. Drake*, 30 N. J. L. 422, the indictment charged that defendant did administer, etc., to the female a certain poison, or drug, or medicine, or noxious thing to the jur-



An indictment averring an unlawful killing while attempting to procure an abortion is sufficient as an indictment for manslaughter, but not for procuring an abortion, since it fails to allege that death was occasioned by the means used to procure abortion.<sup>47</sup>

Where one count charges the use of an instrument and another the administration of a drug, it is improper to charge that there can be no conviction if the destruction of the foetus was the combined effect of both means stated and not caused solely by either.<sup>48</sup> And though the use of powders is alleged, it is proper to instruct that the abortion would be criminal if procured by an instrument with criminal intent.<sup>49</sup>

**No Difference Between Attempts and Actual Abortions.**—As to allegations of means used, there is no difference in principle between the case of an attempt and one of actual abortion.<sup>50</sup>

**(II.) Drugs Administered.**—(A.) DESCRIPTION.—It is not necessary to describe, in the information or indictment, the drug, medicine or substance administered<sup>51</sup> by the defendant, or which he caused the woman

to procure the miscarriage is without merit, in view of a statute providing that an indictment which charges the offense so plainly that the nature of the offense may be easily understood by the jury is sufficient. *Howard v. People*, 185 Ill. 552, 57 N. E. 441.

47. *State v. Barker*, 28 Ohio St. 583.  
48. *Tabler v. State*, 34 Ohio St. 127.  
49. *Railing v. Com.*, 110 Pa. 100, 1 Atl. 314.  
50. *Reum v. State*, 49 Tex. Crim. 125, 90 S. W. 1109.  
51. Ia.—*State v. Moothart*, 109 Iowa 130, 80 N. W. 301. Mo.—*State v. VanHouten*, 37 Mo. 357. N. D.—*State v. Longstreth*, 121 N. W. 1114.

ors unknown. The court said: "This must certainly be bad, for two reasons: first, it charges the defendant with nothing in direct and express terms. It does not charge that he administered the whole of the prohibited things, nor any one of them, but charges that he did one thing or another, which can mean nothing; secondly, it does not apprise the defendant against what he is to defend himself. The inference from the language, as used, is not that he employed all the prohibited articles and means, but that he used some one of them, but which it was the grand jury did not know, and did not say, consequently they have left the defendant in as much doubt as they were themselves."

*Compare Smartt v. State*, 112 Tenn. 539, 80 S. W. 586. Under a statute providing that where an offense may have been committed by different means, "the means may be alleged in the same count in the alternative," a charge in one count of an indictment of the use of a "certain instrument or instruments" is not defective on the ground of uncertainty whether one or more instruments were used. And in this connection see also *State v. Owens*, 22 Minn. 238.

Where an indictment charges manslaughter resulting from an abortion, and alleges that defendant used a certain instrument "with intent then and there to produce the miscarriage," a contention that the charge should have been with intent, etc., "thereby" to

In Texas it is made an offense, by statute, to attempt to commit an abortion by use of means calculated to produce same. An indictment drawn thereunder charging use of drugs need not state what drugs were used. It is sufficient to allege use of drug "calculated to produce abortion." *Watson v. State*, 9 Tex. App. 237. This decision was followed in *Cave v. State*, 33 Tex. Crim. 335, 26 S. W. 503, which was a similar indictment, the court, however, questioning its sufficiency, on principle, and stating that the indictment should name the means or aver that they were unknown.

The above cases were followed in *Reum v. State*, 49 Tex. Crim. 125, 90 S. W. 1109, which was an indictment charging the administering to a pregnant woman, a certain drug and medi-

to take, or to aver its name,<sup>52</sup> its noxious or destructive qualities,<sup>53</sup> or the quantity used,<sup>54</sup> or to allege that it was such as would tend to produce the effect intended.<sup>55</sup>

(B.) MANNER OF ADMINISTERING. — An information or indictment charging the offense of procuring, or attempting to procure, an abortion by use of drugs need not specifically describe the manner of their use,<sup>56</sup> or that they were actually taken or swallowed.<sup>57</sup> And under a statute condemning administering to a woman, or directing her to take or swallow a noxious thing, it need not be alleged that the drug was taken or swallowed.<sup>58</sup> But under a statute making it an offense to use, or cause to be used, any means whatsoever for the purpose of procuring an abortion, it is necessary to allege that the drugs were actually taken.<sup>59</sup>

(III.) Instruments Used. — (A.) DESCRIPTION. — It is usually necessary that the information or indictment should describe in at least a superficial manner the instrument alleged to have been used,<sup>60</sup> or that it

cine "calculated to produce an abortion," and it was held not defective as failing to name or describe the medicine.

52. Ala. — *Thomas v. State*, 156 Ala. 166, 47 So. 257. Ark. — *State v. Reed*, 45 Ark. 333. Colo. — *Dougherty v. People*, 1 Colo. 514. Ind. — *Carter v. State*, 2 Ind. 617; *State v. Vawter*, 7 Blackf. 592. Ia. — *State v. Stafford*, 123 N. W. 167. Mass. — *Com. v. Sinclair*, 195 Mass. 100, 80 N. E. 799; *Com. v. Morrison*, 82 Mass. 224. Mo. — *State v. VanHouten*, 37 Mo. 357. Tex. — *Watson v. State*, 9 Tex. App. 237. Eng. — *Rex v. Phillips*, 3 Campb. 73.

53. Ind. — *State v. Vawter*, 7 Blackf. 592. Mass. — *Com. v. Morrison*, 82 Mass. 224. Tex. — *Watson v. State*, 9 Tex. App. 237. Eng. — *Rex v. Phillips*, 3 Campb. (Eng.) 73.

54. *State v. VanHouten*, 37 Mo. 357; *Watson v. State*, 9 Tex. App. 237.

55. *Com. v. Sinclair*, 195 Mass. 100, 80 N. E. 799. But see Texas case cited in note 51, *ante*.

56. Ala. — *Thomas v. State*, 156 Ala. 166, 47 So. 257. Minn. — *State v. Owens*, 22 Minn. 238. N. Y. — *People v. Stockham*, 1 Park. Cr. 424, allegation that defendant advised and procured woman to take a certain medicine, sufficient.

An indictment charging the crime of "attempting to produce miscarriage" by use of drugs is sufficient though not describing the manner of administering, if under the statute the

offense is stated in ordinary and concise language, with such certainty as to enable a person of common understanding to know what is intended, and the court to pronounce judgment upon a conviction. *State v. Moothart*, 109 Iowa 130, 80 N. W. 301.

Approved Form. — See *Mills v. Com.*, 13 Pa. 631.

57. *State v. Moothart*, 109 Iowa 130, 80 N. W. 301, holding that if it were necessary to allege a "taking" it would be sufficient to charge "administering."

58. *State v. Owens*, 22 Minn. 238; *State v. Murphy*, 27 N. J. L. 112.

59. A charge that the defendant solicited a pregnant woman to take certain drugs for the purpose of causing an abortion is insufficient. *Lamb v. State*, 67 Md. 524, 10 Atl. 208, 298.

60. But see *Thomas v. State*, 156 Ala. 166, 47 So. 257; *Baker v. People*, 105 Ill. 452.

**Instrument Suitable for Purpose.**

"Certain instrument or instruments suitable for the purpose of producing abortion," is a sufficient description of the instrument under a statute providing that every person who shall use or employ any instrument with intent to procure a miscarriage shall be punished, etc. *Smartt v. State*, 112 Tenn. 539, 80 S. W. 586.

**Metallic Instrument Calculated to Produce Abortion.** — An indictment charging defendant with having thrust and forced into the womb and private parts of H. a "certain metallic instru-

should state that the name of the instrument is unknown."

(B.) MANNER OF USING. — An information or indictment in a prosecution for an abortion alleged to have been produced by instruments, which fails to aver the manner in which the instrument was used, is defective.<sup>62</sup> Of course if the information or indictment alleges that

ment calculated to produce an abortion" is not objectionable as failing to further describe the instrument. *Reum v. State*, 49 Tex. Crim. 125, 90 S. W. 1109.

"There is a manifest difference between the giving or advising of medicine for the purpose of procuring a miscarriage and the use of an instrument for the same purpose. The former perishes in the using; its name, its composition and its potency to bring about the effect intended are all immaterial. Not only is the latter capable of identification and description, but its character and the mode of its use ordinarily are the best evidence of the effect intended to be produced. Accordingly the name or description of the instrument and the manner of its use generally will be essential to a complete description of the offence charged. The grand jury was required to state the means used to bring about the abortion, with as much certainty as the nature of the evidence before them would warrant." *Com. v. Sinclair*, 195 Mass. 100, 80 N. E. 799.

In Massachusetts it has been held that an indictment charging that defendant, "with intent to procure the miscarriage of one R, did unlawfully use a certain instrument" upon her body, failed to state the nature, kind and description of the instrument which the defendant was charged with having used. A motion to quash was properly overruled, however, since in such case a bill of particulars might have been requested. *Com. v. Sinclair*, 195 Mass. 100, 80 N. E. 799.

61. *Mass.* — *Com. v. Sinclair*, 195 Mass. 100, 80 N. E. 799; *Com. v. Thompson*, 159 Mass. 56, 33 N. E. 1111; *Com. v. Corkin*, 136 Mass. 429; *Com. v. Snow*, 116 Mass. 47; *Com. v. Jackson*, 15 Gray 187. *Minn.* — See *State v. Bly*, 99 Minn. 74, 108 N. W. 833. *N. H.* — *State v. Wood*, 53 N. H. 484. *N. D.* — See *State v. Longstreth*, 121 N. W. 1114.

In Massachusetts the fact that it is not averred that the name of the in-

strument is unknown will not warrant a quashing of the indictment, since in such case it is defendant's duty to demand a bill of particulars to which he is entitled. *Com. v. Sinclair*, 195 Mass. 100, 80 N. E. 799.

**Allegation as Curing Defect in Another Count.** — An allegation in one count of an indictment that the name and character of the instrument used was unknown to the grand jurors cures a possible defect in another count alleging the instrument to have been "a certain metallic instrument calculated to produce an abortion." *Reum v. State*, 49 Tex. Crim. 125, 90 S. W. 1109.

**Approved Form.** — A criminal indictment is sufficient which charges: "The said ——— did, . . . and with the intent to produce the miscarriage of a woman, ———, . . . being then and there pregnant with child, . . . use and employ in and upon the body and person of the said ——— certain instruments and other means, a more particular description of . . . said instruments and other means being to the grand jury unknown, and the said ——— did then and thereby produce the miscarriage of the said ———,' etc." as against the objection that the particular manner of the use of the instrument was not stated. *State v. Bly*, 99 Minn. 74, 108 N. W. 833.

62. *Ind.* — *Rhodes v. State*, 128 Ind. 189, 27 N. E. 866, 25 Am. St. Rep. 429. *Mass.* — *Com. v. Corkin*, 136 Mass. 429. *Tenn.* — *Smartt v. State*, 112 Tenn. 539, 80 S. W. 586.

"The principle underlying the rule is that there must be sufficient facts alleged to reasonably identify the special transaction upon which defendant is being prosecuted, not only in order that he may know whereof he is accused, and may prepare his defense, but also that in case of a subsequent prosecution it may be made to appear whether he is prosecuted twice concerning the same matter. The mark of identification is slight, but it is sub-



the method of use is unknown to the grand jury, it is sufficient.<sup>63</sup>

d. *Allegations Descriptive of the Victim.*—(I.) Naming the Woman. The information or indictment should specify the particular woman, the subject of the alleged abortion,<sup>64</sup> or allege that the offense was committed upon “a woman to the jurors unknown.”<sup>65</sup> But it has been held that an indictment was sufficient though not in terms alleging that the victim was a woman, where the language used necessarily imported this.<sup>66</sup>

(II.) *Pregnancy.*—Whether or not it is necessary to allege the woman’s pregnancy depends upon the wording of particular statutes under which the information or indictment is drawn. Where an averment of pregnancy is necessary<sup>67</sup> it is sufficient to describe the victim as a “pregnant woman,”<sup>68</sup> or as being “big and pregnant,”<sup>69</sup> or as “a woman with child.”<sup>70</sup>

stantial; and, in a class of cases where the allegations of the indictment are necessarily very general, such a means of marking the transaction, which the case easily lends itself to, should not be ignored, but should be insisted upon.” *Smarrt v. State*, 112 Tenn. 539, 80 S. W. 586.

In Illinois under a statute providing that whoever, by means of any instrument, medicine, drug, or other means whatever, causes any pregnant woman to abort, shall be imprisoned, etc., an indictment averring that defendant did administer and use on one R a certain instrument is insufficient for failure to state how or in what manner the instrument was used or “administered.” If the language of a statute creating a new offense does not describe the act or acts constituting such offense, the pleader is bound to set them forth specifically, though a statute declares an indictment sufficient which charges in the terms and language of the statute. *Cochran v. People*, 175 Ill. 28, 51 N. E. 845. The court admitted that the indictment would have been sufficient had the case of *Baker v. People*, 105 Ill. 452, been followed, in which case the particular place of inserting the instrument was stated. The indictment alleged the insertion of the instrument “into the private parts” and this was held sufficient without adding “and womb.”

**Approved Form.**—An indictment alleging that defendant on Nov. —, at —, “feloniously, maliciously, and unlawfully did use a certain instrument, the name of which instrument

is to the jurors aforesaid unknown, which instrument the said — in his hands then and there had and held, by then and there forcing and thrusting the instrument aforesaid into the body and womb of a certain woman whose name is —, with intent thereby then and there to cause and procure the miscarriage of the said —, against the peace of the Commonwealth aforesaid, and contrary to the form of the statute in such case made and provided,” sufficiently describes the manner in which defendant used the instrument. *Com. v. Corkin*, 136 Mass. 429. See also *Com. v. Snow*, 116 Mass. 47; *Com. v. Wood*, 11 Gray (Mass.) 85.

63. *State v. Longstreth* (N. D.), 121 N. W. 1114. See also *Com. v. Sinclair*, 195 Mass. 100, 80 N. E. 799.

64. *Reg. v. O’Callaghan*, 14 Cox C. C. (Eng.) 499.

“A certain woman” is too vague. *Reg. v. Titley*, 14 Cox C. C. (Eng.) 502.

65. *Reg. v. Titley*, 14 Cox C. C. (Eng.) 502.

66. *Weightnovel v. State* (Fla.), 35 So. 856; *Com. v. Boynton*, 116 Mass. 343.

67. *Com. v. Demain*, 6 Pa. L. J. 29, Brightly N. P. 441, 3 Clark 487.

68. *Thomas v. State*, 156 Ala. 166, 47 So. 257.

69. *Com. v. Demain*, 6 Pa. L. J. 29, Brightly N. P. 441, 3 Clark 487.

70. *Eckhardt v. People*, 83 N. Y. 462, 38 Am. Rep. 462.

**Approved forms in which pregnancy has been sufficiently alleged.** *Ind.*—*State v. Sherwood*, 75 Ind. 15.

Under statutes providing that "whoever with intent to procure miscarriage unlawfully administers to her, or advises or prescribes," etc., shall be punished, it is unnecessary to allege that the female was actually enceinte.<sup>71</sup>

(III.) *Life of Child.* — The indictment need not allege that the child of which the woman was pregnant was alive, or that the woman had "quickenened."<sup>72</sup>

(IV.) *The Wound or Disease.* — An indictment charging that an instrument was feloniously introduced into the womb of a pregnant woman with intent to produce an abortion is sufficient without showing what kind of a wound it produced or what disease it caused.<sup>73</sup>

(V.) *Miscarriage.* — An indictment charging the use of an instrument with intent to produce an abortion need not allege a miscarriage.<sup>74</sup>

*Whose Miscarriage.* — An indictment charging accused "with unlawfully using on her own person . . . with intent thereby to procure a miscarriage," is sufficient without alleging whose miscarriage.<sup>75</sup>

(VI.) *Death of Woman or Child.* — Where by statute the measure of punishment is graduated by the fact whether the woman lives or dies, it is unnecessary to allege either that she did<sup>76</sup> or did not die.<sup>77</sup> And likewise under a statute enacted for the protection of the child, fixing the punishment according to whether or not its death occurs as a result of the unlawful acts, it is not necessary to aver either that it did or did not die.<sup>78</sup>

*e. Naming the Offense.* — Whether the defendant is accused as prin-

Mass. — *Com. v. Jackson*, 15 Gray 187. N. Y. — *People v. Stockham*, 1 Park. Cr. 424.

71. *Eggart v. State*, 40 Fla. 527, 25 So. 144; *Com. v. Surles*, 165 Mass. 59, 42 N. E. 502; *Com. v. Noble*, 165 Mass. 13, 42 N. E. 328; *Com. v. Tibbets*, 157 Mass. 519, 32 N. E. 910; *Com. v. Follansbee*, 155 Mass. 274, 29 N. E. 471.

72. Fla. — *Eggart v. State*, 40 Fla. 527, 25 So. 144. Me. — *State v. Smith*, 32 Me. 369, 54 Am. Dec. 578. Mass. — *Com. v. Surles*, 165 Mass. 59, 42 N. E. 502; *Com. v. Wood*, 11 Gray 85. Mo. — *State v. Emerich*, 13 Mo. App. 492. Pa. — *Mills v. Com.*, 13 Pa. 634.

*Rule Otherwise at Common Law.* *Com. v. Bangs*, 9 Mass. 387; *Mitchell v. Com.*, 78 Ky. 204, 39 Am. Rep. 227.

73. *Rhodes v. State*, 128 Ind. 189, 27 N. E. 866, 25 Am. St. Rep. 429.

74. *Rhodes v. State*, 128 Ind. 189, 27 N. E. 866, 25 Am. St. Rep. 429.

75. *Rex v. Holmes*, 9 Brit. Col. 294.

76. *Com. v. Homer*, 153 Mass. 343, 26 N. E. 872; *Com. v. Thompson*, 108

Mass. 461 (in connection with this case, see Mass. Rev. Laws, 1902, § 15); *State v. Dean*, 85 Mo. App. 473 (holding that allegation as to death is no part of the description of the offense). See *Rhodes v. State*, 128 Ind. 189, 27 N. E. 866, 25 Am. St. Rep. 429.

77. *Com. v. Homer*, 153 Mass. 343, 26 N. E. 872; *Com. v. Thompson*, 108 Mass. 461 (in connection with this case, see Mass. Rev. Laws, 1902, § 15); *State v. Dean*, 85 Mo. App. 473.

*Rule Stated and Reason Thereof.* If the acts which constitute the minor offense are charged, unaccompanied by any averment that the aggravating circumstances did not exist, the offense charged is to be deemed the minor offense and punishable as such. *State v. Gedicke*, 43 N. J. L. 86.

*Indictment Not Vitiating by Surplusage.* — It does not invalidate the indictment that in addition to sufficiently setting forth a misdemeanor it also alleges some of the elements of a felony. *Lohman v. People*, 1 N. Y. 379, 49 Am. Dec. 340.

78. *State v. Gedicke*, 43 N. J. L. 86.

cial or as accessory, should be stated in the information or indictment.<sup>79</sup>

f. *Negative Averments.* — (I.) *Necessity of Operation or Procurement.* In prosecutions under criminal statutes, if certain exceptions are made in the description of the offense, such exceptions must be negated in the indictment.<sup>80</sup> And so where a statute provides that the procuring of a miscarriage shall constitute the offense of abortion unless it was necessary to preserve the life of the woman, the information or indictment must include such negative averment.<sup>81</sup> It has been held necessary to negate the necessity for the giving of the drug or

79. *Fixmer v. People*, 153 Ill. 123, 38 N. E. 667.

A defendant is sufficiently charged as accessory in an indictment which after alleging the commission of an abortion by some person unknown, avers that defendant before the abortion was committed "did feloniously and maliciously incite, move and procure, aid, counsel, hire and command the said person as aforesaid unknown the said felony and abortion, in manner and form aforesaid, then and there to do and commit." *Com. v. Adams*, 127 Mass. 15.

One furnishing drugs or instruments to a woman and directing their use is properly charged as a principal and not as an accessory because the woman cannot be a principal. *Moore v. State*, 37 Tex. Crim. 552, 40 S. W. 287.

80. See the title "*Indictment and Information.*"

81. *Ia.* — *State v. Aiken*, 109 Iowa 643, 80 N. W. 1073; *State v. Leeper*, 70 Iowa 748, 30 N. W. 501 (where it was held to allege that the acts were unnecessary to save life). *Mo.* — *State v. Dean*, 85 Mo. App. 473; *State v. Schuerman*, 70 Mo. App. 518. *Utah.* — *State v. Wells*, 100 Pac. 681. *Vt.* — *State v. Stokes*, 54 Vt. 178, where it was held insufficient to allege that the act was done "maliciously and without lawful justification."

An averment as to the want of necessity for the means employed to procure the miscarriage to preserve the life of the woman is not equivalent to an averment that the miscarriage was not necessary to preserve her life, and does not negative the exception. *State v. Stevenson*, 68 Vt. 529, 35 Atl. 470.

In a prosecution for engaging in business of wrongfully and unlawfully

committing and producing abortions, it is not necessary that the indictment should allege that the acts of defendants in producing abortions were done in cases where the operations or procurements were unnecessary, the offense relating to a business or condition and there being no statute authorizing the procuring of abortions in certain cases. *State v. Atwood (Ore.)*, 102 Pac. 295.

*Equivalent of Statutory Words.* — In negating the exception the precise words of the statute need not be employed. "Any equivalent language that includes with the same certainty the exceptions contained in the act defining the crime may with equal propriety be employed." *Beasley v. People*, 89 Ill. 571, 577. In this case the statute "under which the indictment was found makes it a crime of a high grade, and if the death of the mother ensues, it is murder for any one, 'by means of any instrument, medicine, drug or other means whatever, to cause any woman pregnant with child to abort or miscarry, or attempt to produce an abortion or miscarriage, unless the same were done as necessary for the preservation of the mother's life.' The indictment charges in one count, that by means of a certain instrument which defendant used, he produced an abortion on deceased, 'it not being then and there necessary to cause such miscarriage for the preservation of her life, and in another count that defendant administered to deceased 'a noxious and abortifacient drug' with the intent to produce a miscarriage, 'it not being then and there necessary to administer said noxious and abortifacient drug . . . for the preservation of the life' of deceased."



the use of the instrument as well as the necessity for the miscarriage.<sup>82</sup> The necessity for such negative averments is not obviated by the fact that the burden of proof as to the exception or exceptions, from the nature of the exceptions, is cast upon the defendant.<sup>83</sup>

But where the clause of the statute in reference to the exception does not constitute a part of the description of the offense, the necessity for the miscarriage need not be negated.<sup>84</sup>

(II.) Advice of Physician. — Under statutes in some jurisdictions, it is necessary to allege that the administration or procurement of the drug or medicine, or the employment of the instrument, was not advised by one or more physicians to be necessary to preserve the life of the woman.<sup>85</sup>

D. VANANEN. — 1. Means Employed. — An indictment charging the use of several instruments,<sup>86</sup> or of instruments and drugs,<sup>87</sup> is sustained by proof of the use of any one in the first instance, or of either drugs or instruments in the other. And if an indictment charges the use of a specified instrument, it is not necessary to prove that the act was done with that particular instrument, exclusive of any other. It

82. *Willey v. State*, 52 Ind. 246 (averment that procurement of miscarriage was unnecessary is equivalent to an averment that miscarriage was not necessary); *Willey v. State*, 46 Ind. 363; *Bassett v. State*, 41 Ind. 303.

Approved Form. — In Delaware the statute provides that, "Every person who, with the intent to procure the miscarriage of any pregnant woman or women supposed by such person to be pregnant, unless the same be necessary to preserve her life, . . . shall be guilty of a felony." An indictment charging that the prisoner "unlawfully and feloniously with intent to procure miscarriage of one —, she the said —, then and there being a pregnant woman, then and there supposed by the said —, to be pregnant, did administer to her the said —, certain medicine (the same not being necessary to preserve the life of her, the said —,)" sufficiently negatives the necessity for the miscarriage as well as the giving of the medicine. *State v. Jones*, 4 Penne. (Del.) 109, 53 Atl. 858. For a similar form, see *State v. Quinn*, 2 Penne. (Del.) 339, 45 Atl. 544.

83. *State v. Meek*, 70 Mo. 355, 35 Am. Rep. 427.

84. *Johnson v. People*, 33 Colo. 224, 80 Pac. 133, 108 Am. St. Rep. 85 (where it was held that the exceptions

were in the nature of a proviso); *Bradford v. People*, 20 Hun (N. Y.) 309.

85. *State v. McIntyre*, 19 Minn. 93; *State v. Dean*, 85 Mo. App. 473. But see *State v. Rupe*, 41 Tex. 33, holding it to be unnecessary to negative the exception contained in the Code, this being a matter of defense.

Not Sufficient To Negative Necessity for Saving Life. — An indictment is insufficient charging only that abortion was produced when it was unnecessary to save the life of the woman, as it may have been advised by a physician to be necessary to save the mother's life, although in fact it was not so necessary. *State v. Meek*, 70 Mo. 355, 35 Am. Rep. 427.

The statute of jeofails declaring that "no indictment shall be deemed invalid . . . for want of the averment of any matter not necessary to be proved" does not render it unnecessary for the state to allege the negative since the above statute was intended to apply only to immaterial averments, such as are not necessary constituents of the crime charged. *State v. Meek*, 70 Mo. 355, 35 Am. Rep. 427.

86. *Scott v. People*, 141 Ill. 195, 30 N. E. 329.

87. *Com. v. Brown*, 14 Gray (Mass.) 419. See also *supra*, II, C, 2, c.

is sufficient if the proof shows the use of some other instrument instead of the one named, the nature of the violence and the character of the result being the same,<sup>88</sup> or of some additional instrument,<sup>89</sup> if the nature of the act alleged is not changed.

**2. Name of Drug.** — As stated above it is usually unnecessary to name the drug used, and the fact that the proof shows the use of a drug different from that alleged does not constitute a fatal variance.<sup>90</sup>

And where an indictment charges the use of "a certain drug, medicine, and substance to the grand jurors unknown," the fact that it is not affirmatively proved that its composition was unknown, does not constitute a variance.<sup>91</sup>

**3. Death of Woman.** — An averment of the death of the victim, in an indictment charging defendant as an accessory before the fact, need not be sustained by proof, since the allegation of death was in aggravation of the offense charged.<sup>92</sup>

**4. Consent of Woman.** — Though an information charges manslaughter resulting from the use of an instrument in an attempt to cause a miscarriage, and that the act was committed "with force and violence," there is no fatal variance between this and proof that the woman consented, especially as it was not necessary to allege assent, and as the offense was the same under the statute whether she assented or not.<sup>93</sup>

**5. Time.** — A conviction may be had in an abortion case under an indictment charging the commission of the crime on a certain date, though the evidence shows its commission on another day or month prior to the date of the finding of the indictment.<sup>94</sup>

**6. Defendant's Actual Perpetration of Crime.** — Since the enactment of statutes abolishing the distinction between principals and accessories before the fact, an indictment alleging that the defendant inserted an instrument into the body of the prosecutrix, thereby procuring an abortion, is sustained by proof that though absent at the time of the actual commission of the crime, the defendant nevertheless aided in, advised and procured its commission.<sup>95</sup>

**E. DEFENSES. — 1. Non-Pregnancy of Woman.** — Where the infor-

88. *State v. Smith*, 32 Me. 369, 54 Am. Dec. 578.

89. Where an indictment charges an abortion to have been committed by use of a pen staff, there is no variance in evidence showing the use of a metallic instrument as auxiliary to the pen staff in making penetration. *Moore v. State*, 37 Tex. Crim. 552, 40 S. W. 287.

90. *Ala.* — *Thomas v. State*, 156 Ala. 166, 47 So. 257. *Colo.* — *Dougherty v. People*, 1 Colo. 514. *Eng.* — *Rex v. Phillips*, 3 Campb. 73.

91. *Carter v. State* (Ind.), 87 N. E.

1081, where the evidence disclosed that the drug, medicine, or substance taken by the woman was not known, and in the nature of the case could not be known; that some compound having a trade name, but the components of which were unknown, was administered.

92. *Com. v. Adams*, 127 Mass. 15.

93. *People v. Abbott*, 116 Mich. 263, 74 N. W. 529.

94. *State v. Magnell*, 3 Penne. (Del.) 307, 51 Atl. 606. See *Com. v. Snow*, 116 Mass. 47.

95. *People v. Bliven*, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 701.

mation or indictment is drawn under statutes making it an offense to administer drugs to women in general, or to women supposed to be pregnant, the fact that the woman was not actually pregnant is no defense to the prosecution.<sup>96</sup>

**2. Dead Fœtus.**—The fact that the fœtus with which the woman was pregnant had lost its vitality at the time of the operation is a good defense, under a statute condemning such an operation upon a woman "pregnant with child,"<sup>97</sup> but not under a statute prohibiting giving drugs to "any woman."<sup>98</sup>

**3. Harmless Character or Quantity of Drug.**—It is no defense that the drug used would not in fact cause a miscarriage,<sup>99</sup> where the charge is that the defendant administered to a woman or procured her to take a certain drug, "with intent," thereby to produce a miscarriage.

On a charge of attempted abortion it is not error to refuse an instruction as to the improbability of defendant's criminal intention because the small quantity of the drugs administered could not produce an abortion, an actual miscarriage not being essential to the crime charged.<sup>1</sup>

**4. Necessity of Saving Woman's Life.**—A showing that the abortion was necessary to preserve the woman's life is a sufficient defense to the prosecution.<sup>2</sup>

96. *Mass.*—*Com. v. Tibbetts*, 157 Mass. 519, 32 N. E. 910; *Com. v. Taylor*, 132 Mass. 261. *N. J.*—*Powe v. State*, 48 N. J. L. 34, 2 Atl. 662. *Eng.*—*Reg. v. Goodall*, 2 Cox C. C. 40.  
97. *Com. v. Wood*, 11 Gray (Mass.) 85.

Where the word "child," as used in the statute, means a living child, and a defense is that the child was not in fact living at the time the alleged offense was committed, and the case is close and doubtful, the refusal to charge that the child must have been in fact alive, or there could be no conviction, is cause for a new trial, though the court did in general terms charge upon the law relating to this subject. *Taylor v. State* (Ga.), 33 S. E. 190.

98. *Com. v. Surles*, 165 Mass. 59, 42 N. E. 502.

99. *State v. Crews*, 128 N. C. 581, 38 S. E. 293; *State v. Fitzgerald*, 49 Iowa 260, 31 Am. Rep. 148.

1. *State v. Moothart*, 109 Iowa 130, 80 N. W. 301. But see *Williams v. State* (Tex. App.), 19 S. W. 897, which was an indictment charging an attempt to produce an abortion by administering "cotton root tea." The defendant requested an instruction

that if the jury had any reasonable doubt as to whether the cotton root tea was sufficiently strong to produce the abortion they should acquit the defendant. Its refusal was held error. The court said that there was no question that the desire and purpose of the defendant in this case was to produce an abortion, but that the defendant could only be punished under the Penal Code (Art. 538) where it was shown that the attempt was made by such means as were calculated to produce such result, that is to say, the means actually used must be proved beyond a reasonable doubt to have been such as would ordinarily produce such a result. The term "calculated," as used in the statute, means "capable of."

2. *Ill.*—*Beasley v. People*, 89 Ill. 571. *Mo.*—*State v. Fitzporter*, 93 Mo. 390, 6 S. W. 223. *Tex.*—*State v. Rupe*, 41 Tex. 33.

**Advice of Physician.**—That a physician advised abortion as being necessary for the above reason is sufficient in some jurisdictions. *State v. Fitzporter*, 93 Mo. 390, 6 S. W. 223.

In Wisconsin it is necessary that defendant should have obtained advice



**5. Consent or Entreaties of Woman.** — The fact that the woman consented to the abortion,<sup>3</sup> or entreated defendant to perform the same,<sup>4</sup> is not a defense.

**6. Defendant's Reluctance.** — The defendant's reluctance or unwillingness to perform an abortion is not a sufficient or lawful defense, if defendant subsequently actually used the necessary instrument.<sup>5</sup>

**7. Coercion by Defendant's Husband.** — Where a married woman is charged with abortion, it is a sufficient defense to the prosecution that she acted under her husband's coercion.<sup>6</sup>

**8. Woman's Own Use of Means.** — Where defendant in a prosecution for procuring an abortion through the use of instruments, introduces evidence that the female attempted an abortion by using a hat pin, and that she also suffered two severe falls, failure to charge the jury that, if the abortion and blood poisoning was the result of the punctures with the hat pin, they should acquit, is error.<sup>7</sup> But under an indictment following the statute and charging the use of an instrument with intent to procure miscarriage, the fact that the woman by her own use of an instrument, drug or other means, caused the miscarriage, is no defense.<sup>8</sup>

**9. Desire To Avoid Disgrace.** — The desire of defendant to shield either the woman,<sup>9</sup> or himself,<sup>10</sup> from disgrace cannot avail as a defense to the prosecution.

**10. Entrapment.** — In a prosecution for an attempt to commit an abortion, the fact that there was a prearranged plan between the woman and officers to bring about the defendant's arrest is no defense.<sup>11</sup>

**11. Absence of Defendant.** — An instruction is properly refused which requires the jury to find that defendant was actually present

of two physicians to justify himself. *Hatchard v. State*, 79 Wis. 357, 48 N. W. 380.

**Defense Equally Good in Murder or Abortion.** — The defense that the act was necessary to save the woman's life is equally a defense to an indictment for the murder or manslaughter of the woman, and to an indictment, under the statute, for abortion. *Worthington v. State*, 92 Md. 222, 48 Atl. 355, 84 Am. St. Rep. 506, 56 L. R. A. 352, citing 1 Whart. Cr. Law, § 595.

Woman's threat to commit suicide unless relieved from the child of which she was pregnant does not show sufficient necessity for saving the life of the woman. *Hatchard v. State*, 79 Wis. 357, 48 N. W. 380, where it was said that the statute contemplated death from natural causes.

**3. Del.** — *State v. Magnell*, 3 Penne. 307, 51 Atl. 606. **Ga.** — *Barrow v. State*, 121 Ga. 187, 48 S. E. 950. **Mass.** — *Com. v. Snow*, 116 Mass. 47; *Com. v. Wood*, 11 Gray 85.

**4. State v. Magnell**, 3 Penne. (Del.) 307, 51 Atl. 606.

**5. State v. Magnell**, 3 Penne. (Del.) 307, 51 Atl. 606.

**6. Tabler v. State**, 34 Ohio St. 127.

**7. Jackson v. State**, 55 Tex. Crim. 79, 115 S. W. 262.

**8. State v. Magnell**, 3 Penne. (Del.) 307, 51 Atl. 606.

**9. Barrow v. State**, 121 Ga. 187, 48 S. E. 950; *Com. v. Wood*, 11 Gray (Mass.) 85.

**10. Com. v. Wood**, 11 Gray (Mass.) 85.

**11. People v. Conrad**, 102 App. Div. 566, 92 N. Y. Supp. 606, *affirmed*, memo., 74 N. E. 1122.

when the drug was delivered or taken, in order to warrant a conviction.<sup>12</sup>

**12. Former Acquittal.**—As in other criminal cases,<sup>13</sup> former acquittal is a proper defense.<sup>14</sup>

**F. TRIAL.**—**1. Separate Trials.**—The granting of separate trials is within the court's discretion.<sup>15</sup>

**2. Separation and Exclusion of Witnesses.**—This subject as it bears upon the trial of causes generally will be found exhaustively treated elsewhere.<sup>16</sup> As a general rule, in abortion cases, as in other criminal actions, either the prosecution or the accused will be allowed, in the court's discretion, to have witnesses put "under the rule" for obvious reasons, but there are many instances in which witnesses should not be excluded.<sup>17</sup>

**3. Election.**—If the same transaction or offense is charged in different counts, each count alleging a different mode or means of doing the same act constituting the offense, the state will not be required ordinarily to elect upon which count the trial shall proceed.<sup>18</sup>

12. Under an indictment charging defendant with "administering or prescribing" medicine to a certain pregnant woman, an instruction intended to convey the idea that if defendant sent the medicine by another, who knew of the woman's condition and knew what the medicine was for, and that if defendant was not present when the medicine was delivered or taken, defendant would not be guilty, is properly refused. *Burris v. State*, 73 Ark. 453, 84 S. W. 723.

See *Cook v. People*, 177 Ill. 146, 52 N. E. 273, holding proper a modification of instructions given at defendant's request, by including in the hypothesis upon which the jury were directed to find defendant not guilty the fact that he did not aid or assist in the abortion.

13. See the title "Jeopardy."

14. In *State v. Crook*, 16 Utah 212, 51 Pac. 1091, an information was filed against the accused for procuring a miscarriage, and a demurrer thereto was sustained, and the court made no order requiring the case to be submitted to another grand jury, or that another information be filed, but ordered the accused discharged, whereupon another examination was had and another information was filed against the accused for the same offense, to which he interposed a plea of former acquittal. It was held that the plea

being sustained was a bar to another prosecution for the same offense, and that the court should so have instructed the jury.

15. See generally the title "Trial."

No exception lies to the court's refusal to allow separate trials to defendants jointly indicted for causing an abortion on the ground that one had been promised a discharge by the public prosecutor in any event. *Com. v. Thompson*, 108 Mass. 461.

16. See title "Trial." And see *ENCYCLOPEDIA OF EVIDENCE*, title "Witnesses."

17. The prosecuting witness in an abortion case may be permitted to remain in the court room after the rule has been called for, since the state's attorney has the right to such assistance as the prosecutor can give him; but the court should impose as a condition that the state, if it desires to use the prosecutor as a witness, should examine him first. *Smartt v. State*, 112 Tenn. 539, 80 S. W. 586, where, however, no substantial injury was done by declining to pursue this course.

The exclusion of an attorney for the accused is not authorized in an abortion case, though the rule has been invoked by defendant, and though it appears that defendant was ably defended by other counsel. *Jackson v. State*, 55 Tex. Crim. 79, 115 S. W. 262.

18. See the title "Indictment and Information."

Where an indictment charged abortion in one count by the use of drugs, and in another by the use of instruments, and the proof left it uncertain whether the woman aborted from one or the other of the means alleged, or from the combined use of both, the court refused to compel an election.<sup>19</sup>

**4. Right of Defendant To Sit With Counsel.**—The defendant in an abortion case will not be allowed to sit beside his counsel, within the bar, during the trial, but will be required to remain in the prisoners' dock.<sup>20</sup>

**5. The Opening Statement.**—There is no legal rule for the measurement of an opening statement to the jury. Its scope and extent must be controlled by the trial judge. Its purpose, in a criminal action, is to state the charge against the accused, and the evidence to be presented to establish the commission of the crime and the defendant's connection therewith.<sup>21</sup>

**6. Order of Proof.**—The unlawful procurement of the miscarriage constitutes the *corpus delicti* and must be proved before the introduction of evidence tending to implicate defendant.<sup>22</sup>

**7. Argument.**—Counsel are properly allowed, in argument, to bring such matters to the jury's attention as are warranted by the evidence.<sup>23</sup>

19. *Moore v. State*, 37 Tex. Crim. 552, 40 S. W. 287.

**Effect of Charge Submitting Two of Three Counts.**—Where an indictment contains three counts, the first charging the administering of a drug, the second the use of a metallic instrument, and the third the use of a pen staff, a charge submitting only the first and third is tantamount to a dismissal of the second; that is, it was equivalent to an election on the part of the State to only prosecute on the first and third. *Moore v. State*, 37 Tex. Crim. 552, 40 S. W. 287.

**Court's Discretion.**—It is within the sound discretion of the trial court whether it will require the prosecutor to elect upon which of several counts in an indictment or information he will try the accused; and where the various counts in an information for abortion are properly joined, and a conviction can legally be sustained upon any one, or upon all of such counts combined, it is proper to refuse to require such an election. *Eggart v. State*, 40 Fla. 527, 25 So. 144.

20. *State v. Quinn*, 2 Penne. (Del.) 339, 45 Atl. 544.

21. So it is proper in opening to state that the defendant had been jointly indicted with another, and that

upon the latter's trial defendant had become a witness for him, that the indictment on such trial contained but one count charging that the abortion had been committed by means of mechanical appliances, but upon the trial it was disclosed that defendant had given a prescription which was to aid in producing the abortion, and then it became necessary to reindict the defendant; that now the defendant was charged, in two counts, with having brought about the abortion by means of mechanical appliances, and also with giving a prescription for the purpose of bringing about the abortion which was successfully brought about. *People v. Van Zile*, 73 Hun 534, 26 N. Y. Supp. 390. See the title "Open and Close."

22. *Traylor v. State*, 101 Ind. 65.

Testimony of a physician in regard to a post-mortem examination to the effect that miscarriage occurred by reason of foreign interference rather than from natural causes, is not erroneously admitted as preceding proof of the *corpus delicti*, the very purpose being to prove the *corpus delicti*. *Hauk v. State*, 148 Ind. 238, 46 N. E. 127, petition for rehearing on other points overruled in 47 N. E. 465.

23. Where cards found in defendant's possession tended to show that



**8. Questions for Jury.**—It is for the jury to determine whether or not the substance administered was noxious,<sup>24</sup> whether or not the operation was necessary to preserve the life of the woman or child,<sup>25</sup> whether or not a certain person is an accomplice,<sup>26</sup> and the value to be allowed the testimony.<sup>27</sup>

**9. Instructions.**—a. *Must Be Viewed in Toto.*<sup>28</sup>—In abortion cases, as well as in other criminal prosecutions, it is sufficient if the instructions as a whole are not prejudicial.<sup>29</sup>

defendant held himself out as a person whose business it was to procure abortion, the district attorney was properly allowed to argue to the jury as to their meaning. *Com. v. Barrows*, 176 Mass. 17, 56 N. E. 830, 79 Am. St. Rep. 296.

A remark of the Solicitor General in his argument that "the defendant used the knowledge gained by his profession for the purpose of murder," was an unfair comment on the evidence, and was not ground to declare a mistrial. *Barrows v. State*, 121 Ga. 187, 48 S. E. 950. See also the title "Trial."

24. *Dougherty v. People*, 1 Colo. 514.

25. *People v. Meyers*, 5 N. Y. Cr. 120.

26. *Com. v. Follansbee*, 155 Mass. 274, 29 N. E. 471.

**27. Accomplice's Testimony.**—*Maine v. People*, 9 Hun (N. Y.) 113.

**Degree of Credit Allowed Dying Declarations.**—*State v. Pearce*, 56 Minn. 226, 57 N. W. 652, 1065.

**The complicity of the woman by reason of her consent to the operation, as affecting her testimony, is properly left to the jury's consideration.** *Com. v. Brown*, 121 Mass. 69.

If an alibi is satisfactorily proved, in an abortion case, it is for the jury to say what effect it ought to have upon the testimony of the prosecution's witnesses. It might discredit them altogether. *Com. v. Snow*, 116 Mass. 47.

On all questions of evidence in prosecutions for this offense, see 1 *Encyclopedia of Evidence*, title "ABORTION."

28. See the title "Instructions."

29. *Howard v. People*, 185 Ill. 552, 57 N. E. 441, where misleading instructions given at the instance of the people were held not prejudicial as they did not announce in positive terms erroneous rules of law, and as other instructions were given at defendant's request presenting every feature of her

defense, and announcing the rules of law applicable thereto in the most favorable light to her.

An instruction that in considering the credibility of a witness against the defendant who, the court had previously charged, was a technical accomplice of the defendant, the jury might consider their comparative moral guilt, if an expression of an opinion upon the facts was not erroneous, it appearing that the jury was left free in the exercise of their own judgment by other instructions. *Maxey v. United States*, 30 App. Cas. (D. C.), 63.

Where from the whole charge the jury must have understood, as they were plainly informed, that the fact of a criminal abortion was not admitted, and that they must find such criminal abortion by the act or means of the defendant in order to convict, the use of the word "abortion" in another part of the charge as meaning not a criminal act causing an untimely delivery, but a miscarriage from some cause, either criminal or accidental, is not erroneous. *People v. Aiken*, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512.

**Assuming Commission of Offense.**—

An instruction defining the relation of one who, not being present, advises, assists, or encourages the perpetration of a crime is not objectionable as assuming that an abortion operation was performed where it appears that other instructions were given requiring proof beyond a reasonable doubt, of the fact that an abortion was produced. *Cook v. People*, 177 Ill. 146, 52 N. E. 273.

The modification of instructions given at defendant's request, by including in the hypothesis upon which the jury were directed to find defendant not guilty the fact that he did not aid or assist in the abortion, is not erroneous. *Cook v. People*, 177 Ill. 146, 52 N. E. 273.

b. *Following the Statute.*—An instruction correctly quoting or following the statute upon which the prosecution is based is not erroneous.<sup>30</sup>

c. *As to Issues Not Involved.*—Although an instruction upon an issue not involved in the case is improper,<sup>31</sup> yet it is not prejudicial if no evidence was offered on such an issue, and it is apparent that the jury was not misled thereby but rendered its verdict upon issues actually involved.<sup>32</sup> And similarly an instruction authorizing a conviction if an abortion was found to have been committed by defendant is not erroneous because eliminating from consideration the question of necessity for the abortion, the evidence clearly showing the absence of necessity and there being no evidence affirmatively on the proposition.<sup>33</sup>

d. *Withdrawing Evidence.*—An instruction is erroneous which withdraws material evidence from the jury's consideration.<sup>34</sup>

e. *Measure of Evidence.*—An instruction is erroneous which requires an improper measure of proof as to any essential of the crime,<sup>35</sup>

30. *Fretwell v. State*, 43 Tex. Crim. 501, 67 S. W. 1021. To the same effect is *State v. Crews*, 128 N. C. 581, 38 S. E. 293.

Where defendant is charged with abortion under one section of a statute which requires the state to show absence of necessity to save life, an instruction that in order to convict under another section setting forth a lesser offense, the absence of any necessity to preserve the life of the mother or child must be shown, is not erroneous, defendant having been convicted of the lesser offense, it appearing from the court's rulings and from the verdict that defendant was not prejudiced, without considering whether the rule as to necessity is the same under the latter as well as the former section. *State v. Owens*, 22 Minn. 238.

31. As where an instruction is given defining the phrase "nor tend to mitigate, excuse or justify," for if defendant were guilty there could have been no excuse or justification. *Jackson v. State*, 55 Tex. Crim. 79, 115 S. W. 262.

An instruction that if the jury are not satisfied that the abortion was procured by defendant and a physician in the latter's office, the defendant must be acquitted, is uncertain and misleading in that it might be understood as meaning that the miscarriage must have occurred in the physician's office in order to render defendant guilty of the crime charged. *Hauk v. State*,

148 Ind. 238, 46 N. E. 127, petition for rehearing on other points overruled, 47 N. E. 465.

32. A charge submitting an issue of external violence is not prejudicial though there was no evidence of such violence, as the verdict was unquestionably predicated on testimony relating to an operation performed with a metallic instrument. *Reum v. State*, 49 Tex. Crim. 125, 90 S. W. 1109.

33. *Weed v. People*, 56 N. Y. 628.

34. See *Hauk v. State*, 148 Ind. 233, 46 N. E. 127, 132, petition for rehearing on other points overruled, 47 N. E. 465.

**Requested Instructions Rightly Refused.**—In *Scott v. People*, 141 Ill. 195, 30 N. E. 329, for the purpose of showing motive evidence was adduced showing that defendant was the father of the child. An instruction that it need not be determined whether defendant had had sexual intercourse with the woman, or as to whether he was the father of the child, was held to have been properly refused.

35. *State v. Stewart*, 52 Iowa 284, 3 N. W. 99, where an instruction that pregnancy must be "fully and clearly proven," was held not to be cured by a correct instruction as to reasonable doubt.

In *Hatchard v. State*, 79 Wis. 357, an instruction was given to the effect that if the defendant's guilt in other respects was proved, the jury must convict her, unless satis-

or which throws upon the defendant a greater burden than is imposed by the statute.<sup>36</sup>

f. *As to Purpose of Administering Drug.*—Where the evidence shows that defendant advised an abortion, and gave medicine and afterwards inserted a metallic instrument into the womb, and that a miscarriage occurred, an instruction submitting to the jury the purpose of giving the medicine is not erroneous, though there was no proof of such purpose since the medicine was evidently given in aid of the main purpose.<sup>37</sup> And where an indictment charges a defendant with having attempted to procure an abortion with drugs or instruments, a requested charge that if defendant was treating the woman for an illness and not for the purpose of producing an abortion, the verdict should be for defendant, is rightly refused, since drugs might have been used for an innocent purpose and instruments for a criminal one.<sup>38</sup> Where there is evidence of the administration of oil of tansy, as well as ergot, an instruction is not erroneous as to the giving of "any medicine, drug, or substance," not excluding innoxious substances.<sup>39</sup>

g. *Completion of Offense.*—Where either miscarriage or death completes the offense, though the indictment charges both miscarriage and death as the consequences of the criminal acts alleged, an instruction is proper that if the abortion was procured as alleged, the offense was complete without regard to whether the death of the woman resulted

fied from the evidence beyond a reasonable doubt that her co-defendant did have or obtained the advice of two physicians that it was necessary to destroy the child to preserve the mother's life, the court said: "If there was a preponderance of evidence showing he was so advised, obviously the testimony could not possibly prove beyond a reasonable doubt that he was not so advised; hence it was error to require proof of this defensive fact which should satisfy the jury beyond a reasonable doubt that it existed. But for a reason which will now be stated such error is immaterial. The burden of proving such advice is upon the accused. The fact, if it existed, is peculiarly within her knowledge, and may readily be proved by her, while it is practically impossible for the state to prove its non-existence. The law never requires impossibilities. There being no testimony upon the subject, the presumption is conclusive that neither Mrs. Hatchard (defendant) nor her husband (co-defendant) had any such advice. The court might

properly have so instructed the jury. It necessarily follows that the error in what the court said to the jury on the subject could not have harmed Mrs. Hatchard, and hence it is not cause for reversal."

36. *State v. Fitzporter*, 93 Mo. 390, 6 S. W. 223.

**Instruction Requiring Burden of Proving Defense Not Relied on.**—Where a defendant does not plead justification but denies the use of any instrument that could have produced a miscarriage, and testifies that she used only a speculum for the purpose of an examination, an instruction apparently casting upon her the burden of proving facts in justification is not erroneous, because under the testimony no such question should have been submitted to the jury. *Fitch v. People* (Colo.), 100 Pac. 1132.

37. *Reum v. State*, 49 Tex. Crim. 125, 90 S. W. 1109, 1111.

38. *Thomas v. State*, 156 Ala. 166, 47 So. 257.

39. *State v. Watson*, 30 Kan. 281, 1 Pac. 770.



from the abortion or from improper treatment of the attending physician.<sup>40</sup>

h. *Assuming Commission of Act Charged*. — On the trial of a woman for having committed an abortion, and a man for having procured it to be done, an instruction that in case of a failure to find that the woman committed the abortion then there was no offense on the part of the man, and that in the event of a finding that she did commit the abortion then the question arises did he procure her "to do what she did," is not equivalent to a statement that the woman committed the act charged.<sup>41</sup>

i. *As to Defendant's Testimony*. — Where the only evidence as to an alleged abortion is the testimony of the defendant which disproves the same, it is error to refuse a requested instruction that there was "no evidence to justify a finding that any criminal operation was performed or attempted" by defendant.<sup>42</sup>

j. *Accomplice Testimony*. — Where an accomplice testifies, the usual instructions as to corroboration should be given.<sup>43</sup>

**The Woman's Testimony**. — Where, on an abortion trial, the injured female testifies on behalf of the prosecution, the court generally is not required to instruct the jury as to the rule relating to accomplice testimony, though it appears that she willingly submitted to the operation or to the administration of drugs;<sup>44</sup> but an instruction is proper that, although the rule in relation to corroboration of an accomplice does not apply, the fact that she was implicated in the alleged acts may be considered as affecting her credibility and the weight of her testimony.<sup>45</sup>

40. *Hauk v. State*, 148 Ind. 238, 46 N. E. 127, petition for rehearing on other points overruled, 47 N. E. 465.

41. *Maxey v. United States*, 30 App. Cas. (D. C.), 63.

42. *People v. Van Zile*, 143 N. Y. 368, 38 N. E. 380.

43. *Com. v. Drake*, 124 Mass. 21, where the jury were told that they could consider as corroboration the testimony of a hack driver who drove the woman and the accomplice to the defendant's house, and the fact that the accomplice was able to describe accurately the interior of the defendant's house, and the fact, if it were so found, that the woman and the accomplice were taken into the defendant's house.

44. *Willingham v. State*, 33 Tex. Crim. 98, 25 S. W. 424, following *Watson v. State*, 9 Tex. App. 237. But see *Wandell v. State* (Tex. Crim.), 25 S. W. 27, holding that while the woman may not be punishable though consenting to the abortion, yet being a witness she may be an accomplice, within the

meaning of the statute relating to the rule concerning the corroboration of an accomplice's testimony, and it is therefore error to refuse an instruction submitting the rule.

45. *State v. Carey*, 76 Conn. 342, 56 Atl. 632, holding also that an instruction is proper that the woman is not to be considered an accomplice but liable to prosecution for a distinct crime.

In *Com. v. Brown*, 121 Mass. 69, which was an indictment for performing an illegal operation, with intent to procure a miscarriage, it appearing that the woman had applied to defendant to have the operation performed, the defendant requested an instruction in relation to the woman's testimony that though she was not to be considered as an accomplice, the jury were to take her testimony, "with great circumspection and caution and discredit." Though the court refused to so instruct, he did charge that the fact that the woman was implicated in the alleged acts of the defendant might

Where the jury has been fully instructed as to rules for determining the credibility of witnesses and the weight to be given their testimony, an instruction that as the witness was a willing accomplice her evidence was to some extent discredited, is rightly refused.<sup>46</sup>

k. *Accessory's Liability to Prosecution and Punishment.*—In a prosecution of two persons jointly, the evidence tending to show that one performed the operation and that the other procured him to do so, an instruction is proper calling the jury's attention to the fact that an accessory may, under the statute, be prosecuted and punished the same as though the principal offender.<sup>47</sup>

l. *Character Evidence.*—It is generally erroneous to withdraw from the jury the consideration of evidence of the defendant's good character.<sup>48</sup> Where on the trial of a defendant for murder, the indictment

be considered as affecting her credibility and the weight of her testimony. The defendant was held to be without ground for exception.

In a prosecution for producing a criminal abortion resulting in death, it is error to refuse an instruction to the effect that in determining what weight should be given to dying declarations of the victim that defendant furnished a catheter with which to perform the act, the jury might consider the fact that according to her own admission therein the declarant had used the instrument upon her person to produce an abortion. The court said: "The deceased was not strictly an accomplice (*Johnson v. State*, 2 Ind. 652), but the moral quality of the act, and her connection with it, were such as to entitle appellant to have said instruction given to the jury." *Seifert v. State*, 160 Ind. 464, 67 N. E. 100, 98 Am. St. Rep. 340, citing 1 "ENCYCLOPEDIA OF EVIDENCE 60.

A requested instruction that, "upon the statement of the witness —, she was an accomplice in the commission of the crime she describes, and, unless her evidence is corroborated in material matters, it is unsafe for a jury to convict upon it, because of its corrupt and suspicious source; and under such circumstances courts deem it their duty to advise the jury to acquit" is rightly refused, as assuming that witness was an accomplice. But an instruction given was proper that "as the witness — testified that the defendant did the acts complained of at her request and upon her employment, the jury should carefully consider her connection with those acts in refer-

ence to her testimony, and should scrutinize her statements with peculiar care on that account.'" *Com. v. Boynton*, 116 Mass. 343.

On the trial of an indictment for procuring a miscarriage, the judge instructed the jury that the patient was not technically an accomplice, and therefore, strictly speaking, the rule in relation to the corroboration of an accomplice did not apply, but inasmuch as she in a moral point of view was implicated, it would be proper for the jury to consider that circumstance in its bearing upon her credibility; that it was also their duty to consider all the evidence in the case tending to contradict her, as affecting the credit they would give to her, her credibility being entirely a question for them; and declined to instruct them that if she swore falsely upon any material point in the case, it so far discredited her whole testimony that they should place no reliance upon it. It was held that there was no ground for exception. *Com. v. Wood*, 11 Gray (Mass.) 85.

But see *State v. McCoy*, 52 Ohio St. 157, 39 N. E. 316, holding that where the victim appears as a witness for the state on the prosecution of one for administering medicines, etc., if the woman knowingly and willingly took the same her testimony should be received as that of an accomplice, and the jury should be cautioned to regard it accordingly.

46. *State v. Moothart*, 109 Iowa 130, 80 N. W. 301.

47. *State v. Carey*, 76 Conn. 342, 56 Atl. 632.

48. *Holland v. State*, 131 Ind. 568, 31 N. E. 359.

alleging that death was the result of an abortion, character witnesses testify that defendant should not be given full credit on oath, the failure to instruct that this evidence was to be considered only to impeach defendant's testimony is not prejudicial, there being no doubt that defendant had had intercourse with the female and believing her pregnant by him had undertaken to cause an abortion, his only substantial defense being that death resulted from blood poisoning caused by abscesses in the ovaries.<sup>49</sup>

**10. Form and Sufficiency of Verdict.** — *a. General Verdict Usually Sufficient.* — In an abortion case, a general verdict of guilty without specifying any particular offense, either by description, by reference to the indictment or otherwise, is sufficient, it being understood to mean guilty of the offense charged in the indictment.<sup>50</sup>

**General Verdict Good as to Good Counts.** — Where some of the counts in an indictment charging abortion are good and some bad, a general verdict of guilty will be applied to the former, and the conviction will be sustained.<sup>51</sup>

*b. Verdict for Lesser Crime.* — Where the indictment charges an offense which is by statute a felony, the jury may find the defendant guilty of a misdemeanor included therein.<sup>52</sup> And where a complete offense is set out in the indictment without an allegation that the victim of the abortion died in consequence thereof, the jury may properly convict of the offense charged without the aggravation.<sup>53</sup>

*c. Finding as to Commission of Offense on Woman Named.* — Finding the offense to have been committed upon a woman who is not named, does not show that the offense charged has been proved;<sup>54</sup> but it is sufficient if a diminutive form of the name is used in the verdict.<sup>55</sup>

*d. Finding as to Character of Drug.* — In a prosecution under a statute making it an offense to prescribe drugs with intent thereby to produce a miscarriage, it is not necessary that the verdict should find that the thing administered was of such a character as was likely to produce such result, nor the ingredients, kinds, quality, or quantity

49. *Wilson v. Com.*, 22 Ky. L. Rep. 1251, 60 S. W. 400.

50. *Armstrong v. People*, 37 Ill. 459.

**Verdict Not Repugnant.** — Where one count charges the use of instruments and another the use of drugs, a general verdict of guilty is not repugnant, on the ground that there was no evidence tending to show that more than one foetus was destroyed; all the testimony relating to but one. *Tabler v. State*, 34 Ohio St. 127.

51. *State v. Morrow*, 40 S. C. 221, 18 S. E. 853.

52. *State v. Watson*, 30 Kan. 281, 1 Pac. 770. And see *State v. Fleetwood*, 6 Penne. (Del.) 153, 65 Atl. 772.

53. *Com. v. Adams*, 127 Mass. 15.

And where the jury returns into court

and states that they have agreed that the defendant was guilty of being an accessory before the fact to the crime of abortion, but had not agreed whether the death of the victim resulted therefrom, and the district attorney in good faith offers to enter a *nolle prosequi* as to that part of the indictment with the defendant's consent, if the jury acquits as to this matter of aggravation, there is no ground of exception to an order of the court that the verdict should be taken and recorded. *Com. v. Adams*, 127 Mass. 15.

54. *Cobel v. People*, 5 Park. Cr. (N. Y.) 348.

55. *State v. Watson*, 30 Kan. 281, 1 Pac. 770, where the verdict named "Mollie" instead of "Mary" as set out in the information.



of such thing prescribed; and so a statement in the verdict that the drugs and their qualities were unknown does not vitiate a verdict of guilty.<sup>56</sup>

e. *Finding as to Date of Offense*. — Although the indictment alleges the commission of the alleged offense on a certain day, if the facts warrant, the finding may be that it occurred on any other date before the finding of the indictment,<sup>57</sup> if within the required statutory period for bringing the action.<sup>58</sup>

f. *Conviction of But One of Two Joint Principals*. — Where two are jointly indicted for producing an abortion, tried by the same jury, and one is acquitted and the other convicted, the latter's contention, on writ of error, that according to the evidence he was merely an accessory, and that the other having been acquitted he could not be convicted, is without merit, since the party convicted was not indicted or prosecuted as an accessory, but as a principal.<sup>59</sup>

g. *Surplusage*. — A verdict of guilty is not vitiated by the fact that it attempts to fix a term of imprisonment, as this will be rejected as surplusage.<sup>60</sup>

11. *New Trial*. — A new trial will not be granted in an abortion case on the ground of newly discovered evidence, where it appears that defendant had had ample opportunity to obtain the same.<sup>61</sup> And an application for a new trial, on the ground that the verdict was contrary to the evidence is addressed to the sound discretion of the trial court, and its decision thereon cannot be reviewed on appeal.<sup>62</sup>

**III. CIVIL LIABILITY.** — A. SUFFICIENCY OF COMPLAINT. — 1. *In General*. — In an action for damages for producing an abortion, a complaint alleging that several persons — naming them — “entered into collusion with defendant K to cause a criminal operation to be performed upon the body of plaintiff, and to have the said K perform an abortion upon her body” sufficiently charges the entering into of an unlawful combination to injure plaintiff by performing an abortion upon her.<sup>63</sup>

2. *Separate Causes of Action*. — In an action for damages for producing an abortion, a complaint charging pregnancy of plaintiff, that it was the result of a rape committed by one of the defendants, and that all of the defendants entered into an unlawful conspiracy to pro-

56. *State v. Owens*, 22 Minn. 238.

57. *State v. Fleetwood*, 6 Penne. (Del.) 153, 65 Atl. 772; *State v. Magnell*, 3 Penne. (Del.) 307, 51 Atl. 606.

58. *State v. Fleetwood*, 6 Penne. (Del.) 153, 65 Atl. 772.

59. *State v. Lilly*, 47 W. Va. 496, 35 S. E. 837.

60. *Armstrong v. People*, 37 Ill. 459.

61. In a prosecution for manslaughter as the result of an abortion, a motion for a new trial based on the ground of newly discovered evidence consisting of an affidavit of a nurse, to the effect

that deceased, immediately preceding her death, made declarations to the nurse tending to exonerate defendant, is properly refused where it appears that defendant prior to conviction, was at liberty, on bail, knew the whereabouts of the nurse but had never questioned her relative to matters which would at the trial be subject to inquiry. *State v. Power*, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902.

62. *Holliday v. People*, 9 Ill. 111.

63. “‘**Collusion**’ is synonymous with ‘conspiracy.’ It is an agree-

duce the abortion, is not fatally defective on the ground that a separate cause of action is stated as to the one alleged to have committed the rape.<sup>64</sup>

**3. Negating Exception Relating to Necessity.**—In an action to recover damages alleged to have resulted by reason of the production of an abortion, it is not necessary to negative in the complaint the statutory justification on the ground of the necessity of saving the woman's life.<sup>65</sup>

**B. DEFENSES.**—Consent to an abortion operation is not generally allowed to be a defense in an action for damages against the parties performing the same or procuring it to be done,<sup>66</sup> though the contrary has been declared in an action against third parties at whose solicitation the woman consented to have the operation performed.<sup>67</sup> In such a case necessity for saving the life of the plaintiff is a defense.<sup>68</sup>

ment for a wrongful purpose; a secret agreement, by two or more persons to obtain an unlawful object. Standard Dict. It is an agreement to obtain an object forbidden by law. Bouvier Law Dict. 292. It is a secret agreement and co-operation for a fraudulent purpose. Webst. Dict." *Miller v. Bayer*, 94 Wis. 123, 68 N. W. 869.

64. *Miller v. Bayer*, 94 Wis. 123, 68 N. W. 869.

65. *Miller v. Bayer*, 94 Wis. 123, 68 N. W. 869.

**A complaint sufficiently negatives justification** on the ground of necessity, etc., which charges that an unlawful combination was entered into to produce an abortion on plaintiff, to prevent scandal and to save the reputation of one of the defendants, and that what was thereafter done was pursuant to such unlawful combination. *Miller v. Bayer*, 94 Wis. 123, 68 N. W. 869.

**Compare** *Larocque v. Conheim*, 42

Misc. 613, 87 N. Y. Supp. 625, holding a complaint charging defendant with having procured deceased to "submit to a criminal operation . . . from the effects of" which she subsequently died, demurrable in the absence of allegations that defendant bore such a relation to deceased as gave him special opportunity to coerce or overcome her will, on the principle that relief will not be granted to one basing his claim upon his own illegal act.

66. *Miller v. Bayer*, 94 Wis. 123, 68 N. W. 869, citing *Ind.*—*Adams v. Waggoner*, 33 Ind. 531, 5 Am. Rep. 230. *Mass.*—*Com. v. Collberg*, 119 Mass. 350, 20 Am. Rep. 328; *Fitzgerald v. Cavin*, 110 Mass. 153. *Wis.*—*Shay v. Thompson*, 59 Wis. 540, 18 N. W. 473, 48 Am. Rep. 538.

67. *Goldnamer v. O'Brien*, 98 Ky. 569, 33 S. W. 831, 56 Am. St. Rep. 378, 36 L. R. A. 715.

68. *Miller v. Bayer*, 94 Wis. 123, 68 N. W. 869.

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**I. DEFINITIONS AND DISTINCTIONS. — A. ACCOMPLICES.**

The term accomplice is a generic one and includes every *particeps criminis*, whether considered in strict legal propriety as a principal or as an accessory.<sup>1</sup>

**B. ACCESSORIES. — 1. In General.** — An accessory as the term is generally understood is one concerned in the commission of an offense,

1. *State v. Roberts*, 15 Ore. 187, 13 Pac. 896, quoting Webster's definition of an accomplice as an associate in crime; a partner or partaker in guilt.

One who is engaged in procuring and supplying means to assist in the commission of an offense, although not present at the time it occurred, is an accomplice. See *Watson v. State*, 21 Tex. App. 598, 1 S. W. 451, 17 S. W. 550.

The terms "accomplice" and "accessory" are sometimes used interchangeably. *People v. Dunn*, 7 N. Y. Cr. 173, 6 N. Y. Supp. 805; *Miller v. State* (Tex. Crim.), 72 S. W. 996, citing Whart. Cr. Law, Vol. 1, § 242.

In Texas it is said that accomplices under the code would in most of the states, and at common law, be denominated accessories before the fact, and save in cases specially excepted, the rules applicable elsewhere to the latter also apply to the former. *Simms v. State*, 10 Tex. App. 131; *Strong v. State*, 52 Tex. Crim. 133, 185 S. W. 785.

An accomplice is one who has completed his offense before the crime is actually committed and whose liability attaches upon its commission by virtue of his previous acts in bringing it about through the agency of and in connection with third parties. The principal offender acts his part individually, in furtherance of and during the consummation of the crime. *Smith v. State*, 21 Tex. App. 107, 17 S. W. 552, following *Cook v. State*, 14 Tex. App. 96. One who advises another to commit burglary and is at another and different place at the time of its commission, is merely an accomplice. *Holmes v. State*, 49 Tex. Crim. 348, 91 S. W. 588. In *Miller v. State* (Tex. Crim.), 72 S. W. 996 and in *Alford v. State*, 31 Tex. Crim. 299, 20 S. W. 553, the term "accomplice," is, however, apparently used to signify an "accessory after the fact."

A witness is an accomplice if he could be indicted and convicted of the

same crime. Thus a prisoner is not an accomplice of a person who aids him to escape. *Ash v. State*, 81 Ala. 76, 1 So. 558; *State v. Duff* (Iowa), 122 N. W. 829, 24 L. R. A. (N. S.) 625. Nor are fellow prisoners who escape with the one to whom aid is brought. *Veal v. State* (Tex. Crim.), 120 S. W. 173. But the one to whom aid is brought is an accomplice of the prisoners who escape with him. *Hillman v. State*, 50 Ark. 523, 8 S. W. 834.

In abortion cases a woman who procures a defendant to produce an abortion on her is not an accomplice of the defendant in the crime, so as to affect the competency of her testimony. *Com. v. Boynton*, 116 Mass. 343; *Com. v. Wood*, 11 Gray (Mass.) 85. But see *Wandell v. State* (Tex.), 25 S. W. 27.

**Feigned Accomplice.** — A person is not an accessory before the fact who merely encourages or counsels the commission of a crime on the part of those about to commit the same, in order to bring about their detection and punishment. Such a one is merely a feigned accomplice, if it appears that his honest intentions were that the persons encouraged should be discovered and punished. Cal. — *People v. Collins*, 53 Cal. 185. Ohio. — *Backenstoe v. State*, 19 Ohio C. C. 568. Pa. — *Com. v. Hollister*, 157 Pa. 13, 27 Atl. 386; *Campbell v. Com.*, 84 Pa. 187.

And the rule requiring corroboration of the testimony of an accomplice does not apply to a feigned accomplice. *People v. Bolanger*, 71 Cal. 17, 11 Pac. 799; *People v. Barrie*, 49 Cal. Cal. 342; *People v. Farrell*, 30 Cal. 316.

In *Com. v. Baker*, 155 Mass. 287, 29 N. E. 512, it is held that "one who goes to a house alleged to be kept and maintained for purposes of illegal gaming, and engages in such gaming himself for the express purpose of appearing as a witness for the government against the proprietor, is not an accomplice." To the same effect are *Com. v. Graves*, 97 Mass. 114; *Com. v.*

either before or after the act committed, though not the chief actor or present at the time.<sup>2</sup> Under statutory authority the term may have a broader significance.<sup>3</sup>

When a new felony is defined by statute it becomes incorporated in the body of the criminal law, and draws to itself all the general rules applicable to indictment, evidence and procedure incident to other crimes of the same grade; and without being mentioned in the act, the regulations applicable to accessories instantly attach.<sup>4</sup>

**2. Accessory Before the Fact.**—a. *In General.*—An accessory before the fact is one who though absent at the time of the commission of a crime, procures, aids, counsels, or commands another to commit it.<sup>5</sup>

Downing, 4 Gray (Mass.) 29; Com. v. Willard, 22 Pick. (Mass.) 476. See also *People v. Noelke*, 94 N. Y. 137, 46 Am. Rep. 128, where it is held that a person who purchases a lottery ticket solely for the purpose of detecting and punishing the seller for the violation of the lottery law, is not an accomplice.

**2. U. S.**—United States v. Hartwell, 3 Cliff. 221, 26 Fed. Cas. No. 15,318. **Ga.**—Brooks v. State, 103 Ga. 50, 29 S. E. 485. **Ky.**—Able v. Com., 5 Bush 698, citing Blackstone. **Okla.**—Pearce v. Territory, 11 Okla. 438, 68 Pac. 504.

*In Texas*, an accessory is one who knowing that an offense has been committed, conceals the offender or gives him any other aid in order that he may evade arrest, or trial, or the execution of his sentence. *Strong v. State*, 52 Tex. Crim. 133, 105 S. W. 785. It therefore appears that an accessory as herein defined, is one who is usually termed an accessory after the fact. See *infra*, I, B, 3.

**Accessory Defined by Statute.**—Territory v. Conley, 2 Wyo. 331.

**3. In Illinois**, the statute provides that "an accessory is he who stands by and aids, abets or assists, or who not being present aiding, abetting or assisting, has advised, encouraged, aided or abetted in the perpetration of the crime. He who thus aids, abets, assists, advises, or encourages shall be considered as principal and punished accordingly. *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898. To like effect, see *People v. Schwartz*, 32 Cal. 160.

**4.** *Bishop v. State*, 118 Ga. 799, 45 S. E. 614.

**5. U. S.**—United States v. White,

5 Cranch C. C. 38, 28 Fed. Cas. No. 16,675; *United States v. Hartwell*, 3 Cliff. 221, 26 Fed. Cas. No. 15,318. **Ala.**—*Griffith v. State*, 90 Ala. 583, 8 So. 812. **Ark.**—*Williams v. State*, 41 Ark. 173. **Fla.**—*Montague v. State*, 17 Fla. 662, citing *Whart. Cr. Law*, § 134. **Ga.**—*Howard v. State*, 109 Ga. 137, 34 S. E. 330; *Brooks v. State*, 103 Ga. 50, 29 S. E. 485. **Ky.**—*Able v. Com.*, 5 Bush 698, quoting *Blackstone*. **Me.**—*State v. Ricker*, 29 Me. 84, citing 1 Chit. Cr. Law 262. **N. Y.**—See *People v. Lyon*, 99 N. Y. 210, 1 N. E. 673. **Okla.**—*Pearce v. Territory*, 11 Okla. 438, 68 Pac. 504. **S. C.**—*State v. Sims*, 2 Bailey 29, citing with approval 2 Hawk. P. C. ch. 27, § 16. **W. Va.**—*S. v. Roberts*, 50 W. Va. 422, 40 S. E. 484.

One who knowingly invites another to a certain place in order that he may be murdered, if the murder is perpetrated, is an accessory before the fact. *Reg. v. Manning*, 2 C. & K. 887, 61 E. C. L. 886.

"The tradesman who knowingly furnishes implements to a burglar for the purpose of aiding him in a particular burglary cannot escape the penalty of assisting in that crime because he is engaged in selling thousands of the same implements for honest and useful purposes. When he innocently supplies his implements to persons who intend to and do make a bad use of the same, he is in no way responsible for such uses. *State v. Scott*, 80 Conn. 317, 68 Atl. 258.

Both in morals as well as in law, an instigator of a theft is as guilty as those who actually laid hands on the stolen property, although he was seventy-five miles distant from the



To constitute one an accessory before the fact it must appear that a crime was committed,<sup>6</sup> that the accessory was absent at the time of its commission,<sup>7</sup> and that the act was done in consequence of some counsel or procurement of his.<sup>8</sup>

It is not essential that any specific mode of perpetrating the crime should be advised,<sup>9</sup> nor is it necessary that there should be any

place where it was taken, and in another county, and did not know the exact hour when the offense was committed. He is an accessory before the fact, according to all the definitions given of "accessories," because his will contributed intentionally to the felony, while he was himself too far away to take part in the act, and because he procured and counseled others to commit the offense, being himself absent from the scene of the crime. *Pearce v. Territory*, 118 Fed. 425, 55 C. C. A. 550.

**Not Necessary That Encouragement Should Be by Word.**—It is not necessary that the advice or encouragement given by an accessory should be by word. It may be as effectually given by signs or motions or by writing, *Brennan v. People*, 15 Ill. 511.

A wife may be amenable as an accessory before the fact. *Reg. v. Manning*, 2 C. & K. 887, 61 E. C. L. 886. But the mere fact that a woman was the wife of one of the guilty participants to a homicide, and knew that a conspiracy had been entered into between her husband and the defendant to commit a crime and the fact that she subsequently heard the defendant's confession of guilty participancy in the deed, does not constitute her an accomplice. *Elizando v. State*, 31 Tex. Crim. 237, 20 S. W. 560, citing *Smith v. State*, 23 Tex. App. 357, 5 S. W. 219, 59 Am. Rep. 773; *Noftsinger v. State*, 7 Tex. App. 301; *Rucker v. State*, 7 Tex. App. 549. To the same effect, see *State v. Roberts*, 15 Ore. 187, 13 Pac. 896.

**One guilty of subornation of perjury** has been adjudged an accessory before the fact of perjury. *Com. v. Smith*, 11 Allen (Mass.) 243.

**Concealment of knowledge that a felony is to be committed** will not make the party concealing it an accessory before the fact. *Noftsinger v. State*, 7 Tex. App. 301.

**Who Not an Accessory Before the Fact.**—If at the time or before cer-

tain property was stolen one agrees to take care of the family of a felon while disposing of the property, this will not make him an accessory before the fact. *State v. Stanley*, 48 Iowa 221.

6. *Com. v. Asherowski*, 196 Mass. 342, 82 N. E. 13.

A soliciting and inciting a person to commit an offense, where no other act is done except the soliciting and inciting, is a misdemeanor only. *Reg. v. Gregory*, L. R. 1 C. C. (Eng.) 77, 10 Cox C. C. 459.

7. See *Ala.*—*Ex parte Smotherman*, 140 Ala. 168, 37 So. 376. *Ark.*—*Williams v. State*, 41 Ark. 173. *Ky.*—*Com. v. Carnes*, 124 Ky. 340, 98 S. W. 1045; *Able v. Com.*, 5 Bush 698. *Me.*—*State v. Ricker*, 29 Me. 84, citing 1 Chit. Cr. Law 262. *W. Va.*—*State v. Roberts*, 50 W. Va. 422, 40 S. E. 484. *Eng.*—*Reg. v. Brown*, 14 Cox C. C. 144.

But see *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, quoting statute.

8. *Reg. v. Brown*, 14 Cox. C. C. (Eng.) 144; *Reg. v. Taylor*, L. R. 2 C. C. (Eng.) 147, 13 Cox. C. C. 68, 44 L. J. M. C. 67, 32 L. T. (N. S.) 409 (holding that a stakeholder in connection with a prize fight was not an accessory before the fact to a manslaughter, the fight ending in the death of one of the combatants).

**Accessory to Suicide.**—An accessory before the fact to the crime of self murder was not triable at common law, because the principal could not be tried, and this rule has not been abrogated by English statutes. *Reg. v. Leddington*, 9 C. & P. 79, 38 E. C. L. 58; *Rex v. Russell*, 1 Moody C. C. 356.

9. *Griffith v. State*, 90 Ala. 583, 8 So. 812.

It is not necessary to show that an instrument furnished by the accessory to the principal with which to commit the act was actually used by the

direct communication between the accessory and the principal.<sup>10</sup>

b. *For What Acts Accessory Is Responsible.* — Where one procures, counsels, or commands another to commit a felony, the former is liable as an accessory before the fact to all felonies committed in executing or attempting to execute the commission of the crime contemplated.<sup>11</sup> And it is of no importance that the advice or directions were departed from in respect to the time, or place or precise mode or means of committing it, if they were substantially followed.<sup>12</sup> But if the principal totally and substantially departs from the instructions of an accessory, and commits a different offense, or an additional offense from that which he has been solicited to commit, he stands single in such different or additional offense, and the other cannot be held responsible for it as an accessory.<sup>13</sup>

latter. *State v. Tazwell*, 30 La. Ann. 884.

10. *Pearce v. Territory*, 11 Okla. 438, 68 Pac. 504; *Isaacs v. State*, 36 Tex. Crim. 505, 38 S. W. 40.

It is enough if the accessory direct an intermediate agent to procure another to commit the felony; and it will be sufficient, even though the accessory does not name the person to be procured, but merely directs the agent to employ some person. *Rex v. Cooper*, 5 C. & P. 535, 24 E. C. L. 444.

11. *Ky.* — *Powers v. Com.*, 110 Ky. 386, 61 S. W. 735, 63 S. W. 976. *Mo.* — *State v. Hickam*, 95 Mo. 322, 8 S. W. 252. *Okla.* — *Pearce v. Territory*, 11 Okla. 438, 68 Pac. 504.

Thus if A commands B to beat C, and he beats him so that he dies, A is accessory to the murder. If A commands B to burn the house of C, and in doing so the house of D is also burnt, A is accessory to the burning of D's house. If A aids his associates in the robbing of a safe and in furthering that purpose, a fatal assault is made upon the custodian of the safe, A is an accessory to the murder. *State v. Lucas*, 55 Iowa 321, 7 N. W. 583.

And where the defendant procures another to commit a robbery and the latter murders the deceased to conceal the robbery, the defendant is guilty as an accessory to the murder. *State v. Davis*, 87 N. C. 514, *citing Foster's Crown L.* 370.

In California an accessory before the fact to a robbery (or any other of the felonies mentioned in § 198 of the Penal Code), although not present when the felony is perpetrated or attempted, is guilty of a murder committed, in the

perpetration or attempt to perpetrate the felony. This is by reason of the statute, and because the law superadds the intent to kill to the original felonious intent. One who has only advised or encouraged a misdemeanor, however, is not necessarily responsible for a murder committed by his co-conspirator, not in furtherance, but independent of the common design. *People v. Keefer*, 65 Cal. 232, 3 Pac. 818 (*citing I Whart. Cr. Law.* 229, and note).

12. *United States v. Sykes*, 58 Fed. 1000; *Charge to Grand Jury*, 2 Curt. 637, 30 Fed. Cas. No. 18,250; *Griffith v. State*, 90 Ala. 583, 8 So. 812.

13. *Watts v. State*, 5 W. Va. 532; *Reg. v. Henry*, 9 C. & P. 309, 38 E. C. L. 128.

Thus if the accessory orders or advises the principal to burn a house, and instead of that he commits a larceny; or, to commit a crime against A, and instead of so doing he intentionally commits the same crime against B, the accessory will not be answerable. *State v. Lucas*, 55 Iowa 321, 7 N. W. 583.

And a defendant cannot be convicted of a robbery of E, from the mere fact that he abetted his associates in the robbery of a safe in E's custody. *State v. Lucas*, 55 Iowa 321, 7 N. W. 583.

Where a defendant encourages one to follow and tie another, such encouragement does not of itself make defendant an accessory to a killing of the party tied, by the one so encouraged. *People v. Keefer*, 65 Cal. 232, 3 Pac. 818.

If a principal commits rape upon one when solicited to commit an assault upon another, the person so so-

c. *Responsibility of Principals and Agents.* — Where a child without discretion, an idiot, a madman or indeed any other person is induced to commit a crime, the agent being without knowledge of the instigator's intent, the latter alone is guilty, and as a principal — not as an accessory.<sup>14</sup> But where an agent is the guilty actor in the commission of a felony, he is the principal offender, and the one by whom he was employed or instigated, if absent, is but an accessory before the fact.<sup>15</sup>

**3. Accessory After the Fact.** — An accessory after the fact is one who, knowing that a felony has been committed, receives, relieves, comforts, or assists the felon,<sup>16</sup> whether he be a principal or merely an accessory before the fact.<sup>17</sup> The accessory must have had notice, direct or implied at the time he assisted or comforted the felon, that the latter had committed a felony,<sup>18</sup> and he must have rendered to

licited is not an accessory to the rape. *Watts v. State*, 5 W. Va. 532.

14. *Edwards v. State*, 80 Ga. 127, 4 S. E. 268; *People v. Hall*, 57 How. Pr. (N. Y.) 342.

15. *People v. Hall*, 57 How. Pr. (N. Y.) 342.

Thus where goods are feloniously taken and removed in one's absence by his servant, and under his direction, the master is an accessory before the fact. *Norton v. People*, 8 Cow. (N. Y.) 137.

16. **U. S.** — *United States v. Hartwell*, 3 Cliff. 221, 26 Fed. Cas. No. 15,318. **Fla.** — *Montague v. State*, 17 Fla. 662, citing *Whart. Cr. Law* § 146. **Ga.** — *Lloyd v. State*, 42 Ga. 221, citing 1 Hale P. C. 618; 4 Bl. 37; 1 Chit. 264. **Ky.** — *Able v. Com.*, 5 Bush 698, quoting 4 Bl. Com. 35 with approval. **N. Y.** — *People v. Dunn*, 7 N. Y. Cr. 173, 6 N. Y. Supp. 805. **Okla.** — *Pearce v. Territory*, 11 Okla. 438, 68 Pac. 504, citing 4 Black. 37; *Bishop Cr. Law* § 692. **R. I.** — *State v. Davis*, 14 R. I. 281. **Va.** — *Wren v. Com.*, 26 Gratt. 952, citing 1 Hale P. C. 618; 1 Arch. Cr. Pr. 78. **Eng.** — See *Rex v. Lee*, 6 C. & P. 536, 25 E. C. L. 530, 1 Hale P. C. 618.

The reason on which the common law makes an accessory a criminal is that the course of public justice is hindered and justice itself is evaded by facilitating the escape of the felon. *Wren v. Com.*, 26 Gratt. (Va.) 952.

**Prosecutions Not Frequent Under Common Law.** — Prosecution of accessories after the fact, grounded on the common law, have not been frequent,

nor have they had any great effect. *Foster Crown L. (Eng.)* 372.

**In Georgia** although under a statute officers or employees of a corporation cannot be found guilty of embezzlement, another person not connected with the corporation may be guilty of aiding and abetting an officer in secreting and taking and carrying away property alleged to have been misappropriated. *Bishop v. State*, 118 Ga. 799, 45 S. E. 614.

**Within the meaning of the Ohio statute**, the harboring or concealing of a thief who has stolen chattels is not a crime. *Hallett v. State*, 29 Ohio St. 168.

**In Rhode Island** the statute has changed the common law offense of an accessory after the fact in these particulars; *first*, to make it extend to the harboring of others besides felons; *second*, to mitigate or limit the punishment; and *third*, to make the accessory liable to trial and punishment, although the principal offender cannot be taken so as to be prosecuted. *State v. Davis*, 14 R. I. 281.

17. *Montague v. State*, 17 Fla. 662, citing *Whart. Cr. Law*, § 146.

If there be an accessory after the fact, to one who was an accessory before the fact, such accessory before the fact is principal to the party who thus conceals and secretes him. *State v. Payne*, 1 Swan (Tenn.) 383.

18. *Ex parte Goldman* (Cal. App.), 88 Pac. 819; *Wren v. Com.*, 26 Gratt. (Va.) 952, citing 2 Hawk. ch. 29, 332.

**Implied Notice Not Sufficient.** — Although it seemed at one time to be doubted, whether an implied notice of a



the felon some personal assistance,<sup>19</sup> the character of which is immaterial so long as its purpose is to enable the criminal to evade justice.<sup>20</sup>

**Compounding Felony.**—The fact that one compounds a felony does not make such party an accessory to the felony compounded.<sup>21</sup>

felony will not in some cases suffice to constitute one an accessory after the fact, as where a man receives a felon in the same county in which he has been attainted, which is supposed to have been a matter of notoriety, it seems to be the better opinion, that some more particular evidence is requisite to raise the presumption of knowledge. *Wren v. Com.*, 26 Gratt. (Va.) 952, citing 1 Hale 323, 622; 3 P. Wms. (Eng.) 496; 4 Bl. Com. 37. And see *State v. Davis*, 14 R. I. 281, holding that under the Rhode Island statute denouncing the harboring of a criminal, the person harboring must know that the person harbored committed an offense and must intend to shield him from the law. But see *Tully v. Com.*, 13 Bush (Ky.) 142, holding that it is sufficient that the alleged accessory had good reason to believe the person aided by him was guilty of a felony and was fleeing from justice, to render aid or comfort given him unlawful. It is not necessary to prove that the accessory had actual knowledge of the facts connected with the guilt of the perpetrator of the principal crime.

There must have been a completed felony (Ga.—*Edwards v. State*, 80 Ga. 127, 4 S. E. 268. *Miss.*—*Harrel v. State*, 39 Miss. 702, 80 Am. Dec. 95, citing 1 Hale 622; 2 Hawk ch. 29, § 35; 4 Bl. Com. 38; 3 Greenl. Ev., p. 47, sec. 47; *Roscoe Cr. Ev.* 219, 220. *Va.*—*Wren v. Com.*, 26 Gratt. 952), with which the accessory had no connection (*Strong v. State*, 52 Tex. Crim. 133, 105 S. W. 785).

19. *Tex.*—*Schackey v. State*, 41 Tex. Crim. 255, 53 S. W. 877. *Va.*—*Wren v. Com.*, 26 Gratt. 952. *Eng.*—*Reg. v. Chapple*, 9 C. & P. 355, 38 E. C. L. 151.

In construing the Kansas statute in *State v. Doty*, 57 Kan. 835, 48 Pac. 145, the court said: "The character of the aid is indicated by the particular words used in the commencement of the section, and it shows that it must be some substantial act of personal assistance. It will be observed that the concealing of an offender is first men-

tioned, and then there is added the giving of such offender any 'other aid,' and the argument may well be made that the other aid is of a similar character with that particularly specified. It is a familiar rule of interpretation that where particular words are followed by general ones, the latter are to be held as applying to persons and things of the same kind with those which precede."

20. *Ga.*—*Loyd v. State*, 42 Ga. 221. *Tex.*—*Blakely v. State*, 24 Tex. App. 616, 7 S. W. 233, 5 Am. St. Rep. 912. *Eng.*—*The Queen v. Butterfield*, 1 Cox C. C. 39; *Rex v. Greenacre*, 8 C. & P. 35, 34 E. C. L. 280.

Under the Texas penal code an accessory is one who, knowing that an offense has been committed, conceals the offender, or gives him any other aid in order that he may evade an arrest or trial, or the execution of his sentence. *Chitister v. State*, 33 Tex. Crim. 635, 28 S. W. 683. In *Street v. State*, 39 Tex. Crim. 134, 45 S. W. 577, this statute was construed to mean that in order to be guilty of this offense the person charged must give some personal help to the offender in order that he may evade an arrest or trial for the offense committed. The court said: "For instance, B., knowing that A. has committed a felony and that the officers are in pursuit of him, furnishes him with a horse to escape, or furnishes him with money or other means to assist him in evading an arrest or trial." To the same effect, see *Chenault v. State*, 46 Tex. Crim. 351, 81 S. W. 971.

21. *Chenault v. State*, 46 Tex. Crim. 351, 81 S. W. 971 (holding the case of *Gatlin v. State*, 40 Tex. Crim. 116, 49 S. W. 87, to be at variance with other Texas cases and not sound in principle); *Wren v. Com.*, 26 Gratt. (Va.) 952 (citing 1 Bish., § 633; 1 Hale, 371, 618).

**Negotiations With Victim.**—In case of a theft, negotiating with the party from whom the property was taken for the purpose of bringing about a compromise does not constitute one an

**Misprision of Felony.** — Concealing knowledge of, or failing to report to the proper authorities the fact that a felony has been committed, will not constitute the one so doing an accessory after the fact,<sup>22</sup> in the absence of statute to the contrary.<sup>23</sup>

**Receiving Stolen Goods.** — A receiver of stolen property, knowing it to be stolen, is guilty of a substantive offense and is not an accessory after the fact to the theft within the commonly accepted meaning of that term,<sup>24</sup> unless the receiver takes the goods for the purpose of facilitating the thief's escape from justice, or for the purpose of rendering him some other personal benefit,<sup>25</sup> since the act of receiving stolen goods is not necessarily the rendering of personal aid to the thief.<sup>26</sup>

### C. PRINCIPALS AND ACCOMPLICES DISTINGUISHED. — 1. At Common

accomplice. *People v. Dunn*, 7 N. Y. Cr. 173, 6 N. Y. Supp. 805.

22. *Cal.* — *Ex parte Goldman* (Cal. App.), 88 Pac. 819. *N. J.* — *State v. Hann*, 40 N. J. L. 228. *Tex.* — *Shackey v. State*, 41 Tex. Crim. 255, 53 S. W. 877. See *Monroe v. State*, 47 Tex. Crim. 59, 81 S. W. 726. *Va.* — *Wren v. Com.*, 26 Gratt. 952, citing 1 Bish. 3, 633, 1 Hale 371, 618.

*Compare*, *Carroll v. State*, 45 Ark. 539, holding that one who conceals a crime from a magistrate because of anxiety for his own safety and not of a design to shield the guilty party is not an accomplice.

23. *Edmondson v. State*, 51 Ark. 115, 10 S. W. 21.

In California, the Penal Code denounces the concealing of the commission of a felony. The supreme court of this state has pointedly said: "The word conceal, as here used, means more than a simple withholding of knowledge possessed by a party that a felony has been committed. This concealment necessarily includes the element of some affirmative act upon the part of the person tending to or looking toward the concealment of the felony. Mere knowledge of its commission is not sufficient to constitute the party an accessory." *People v. Garnett*, 129 Cal. 364, 61 Pac. 1114. To like effect, see *Ex parte Goldman* (Cal. App.), 88 Pac. 819.

In New Jersey by statute, the concealing of knowledge of the commission of a crime is made a misdemeanor. *State v. Hann*, 40 N. J. L. 228.

24. *Ga.* — *Loyd v. State*, 42 Ga. 221, citing 1 Bishop, § 493. But see *Simmons v. State*, 4 Ga. 465, holding that

a receiver of stolen goods must under the statutes be deemed an accessory after the fact. *N. Y.* — *People v. Dunn*, 7 N. Y. Cr. 173, 6 N. Y. Supp. 805. *Tex.* — *Dent v. State*, 43 Tex. Crim. 126, 65 S. W. 627; *Street v. State*, 39 Tex. Crim. 134, 45 S. W. 577.

But see *Able v. Com.*, 5 Bush (Ky.) 698, citing 4 Black. 35; *Whart. Amer. Cr. Law*, § 134; 3 Greenl. on Ev., § 42.

**Liability of Purchaser From Irresponsible Thief.** — These principles have been generally applied to persons who counsel, procure or incite infants, idiots, and lunatics to commit crimes — but there is no reason why the analogy should not hold good as to persons who take or share the fruits of the crime after it has been committed by an infant, idiot or lunatic. Therefore one charged as an accessory after the fact, in purchasing personal property, knowing it to be stolen, is guilty as principal to the theft if it appears that the person who actually stole the property was of tender years and not amenable for his acts. *Edwards v. State*, 80 Ga. 127, 4 S. E. 268.

25. *Loyd v. State*, 42 Ga. 221. See also *Travis v. Com.*, 96 Ky. 77, 27 S. W. 863.

26. *Loyd v. State*, 42 Ga. 221.

The offense of the receiver does not depend in any sense upon the guilt or conviction of the person guilty of the theft. *Dent v. State*, 43 Tex. Crim. 126, 65 S. W. 627.

A fortiori assisting in disposing of property without the knowledge that it was stolen is not a ground for charging one as an accessory. *State v. Empey*, 79 Iowa 460, 44 N. W. 707.

**Law.**—By the common law, in all cases of felony, except treason,<sup>27</sup> a distinction was recognized between a principal, that is one who actually perpetrated the act or was present, aiding and abetting, and an accomplice, in prosecuting them, although they were punished alike.<sup>28</sup> In misdemeanors there are no accessories either before or after the fact,<sup>29</sup> and in treason, as was true of old, there are no accesso-

27. See notes 30, 31, post.

28. *Ga.*—Pinkard v. State, 30 Ga. 757. *Ind.*—Williams v. State, 47 Ind. 568, citing 1 Bishop's Cr. Law § 648. *Tex.*—Watson v. State, 21 Tex. App. 598, 1 S. W. 451, 17 S. W. 550, citing many Texas cases.

**Judicial Statement of Rule.**—In Bean's Case, 17 Tex. App. 61, the rule is stated as follows: "If the parties acted together in the commission of the offense they are principals. If they agreed to commit the offense together but did not act together in its commission, the one who actually committed it is the principal, while the one who was not present at the commission and who was not in any way aiding therein, as by keeping watch or by securing the safety or concealment of the principal, would be an accomplice. To constitute a principal, the offender must either be present where the crime is committed, or he must do some act during the time when the offense is being committed, which connects him with the acts of commission in some of the ways named in the statute. Where the acts committed occur prior to the commission of the principal offense, or subsequent thereto, and are independent of or disconnected with the actual commission of the principle offense, and no act is done by the party during the commission of the principal offense in aid thereof, such party is not a principal offender, but is an accomplice, or an accessory according to the facts. Followed in Smith v. State, 21 Tex. App. 107, 17 S. W. 552, in which case will be found *in extenso* a review of the authorities on this subject."

**Want of Reason for Distinction.** In State v. Steeves, 29 Ore. 85, 43 Pac. 947, the court quoting Bish. on Cr. Law, § 673, said: "The legal distinction between an accessory before the fact and the principal rests solely on authority, for it is without foundation either in reason or the ordinary

doctrines of the law. The general rule in our jurisprudence, civil and criminal, is that what one does through another's agency he does in point of law himself." In People v. Bliven, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 701, it was remarked that the rule in cases of felony requiring a distinction between a principal and an accessory could scarcely be said to exist simply because of the greater gravity of the offense charged, for as it did not exist in treason, which according to the English law was the highest crime known to it, the gravity of the charge cannot be the reason for its existence in cases of felony. Nor can the smallness of the offense in cases of misdemeanor be the reason for the existence of the rule. For by the common law many cases which are made a felony in this country by statute were but misdemeanors, the punishment, however, in many of them extending to long terms of imprisonment, and also to the infliction of corporal punishment.

**Who Is a Principal?**—Every person who is present at the commission of the crime for the purpose of assisting in its accomplishment either by performing the principal felonious act or by standing watch, or by waiting in reserve ready to render such aid as may be necessary to the success of the criminal purpose, is a principal both at common law and under the statutes even though he took no other part in the unlawful transaction. State v. Berger, 121 Iowa 581, 96 N. W. 1094. And in this connection see also Pinkard v. State, 30 Ga. 757; People v. Baterson, 50 Hun 44, 2 N. Y. Supp. 376.

Where several make distinct parts of a forged instrument, each is a principal, though he does not know by whom the other parts are executed, and though it is finished by one alone, in the absence of the others. Rex v. Kirkwood, 1 Moody C. C. (Eng.) 304.

29. **U. S.**—United States v. Sykes, 58 Fed. 1000; Charge to Grand Jury,



ries either before, or, with one or two minor exceptions,<sup>30</sup> after the fact.<sup>31</sup>

**2. Under Modern Statutes.**—In most jurisdictions the former distinction between accessories both before and after the fact and principals has been abrogated by statute.<sup>32</sup> In some states the procuring of the commission of a felony or of a particular felony is made by statute a "substantive offense," and the crime of the accessory is thereby abolished.<sup>33</sup>

**II. JURISDICTION AND VENUE.**—Under the common law an accessory is only triable in the county where the acts with which he is charged were committed, notwithstanding the fact that the felony

2 Curt. 637, 30 Fed. Cas. No. 18,250; *United States v. Hartwell*, 3 Cliff. 221, 26 Fed. Cas. No. 15,318. **Miss.**—*Kit-trell v. State*, 89 Miss. 666, 42 So. 609. **Neb.**—*Casey v. State*, 49 Neb. 403, 68 N. W. 643. **N. Y.**—See *People v. Bliven*, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 701; *People v. Lyon*, 99 N. Y. 210, 1 N. E. 673. **N. D.**—See *State v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686. **Ore.**—*State v. Steeves*, 29 Ore. 85, 43 Pac. 947, *citing* 4 Bl. Com. 35. **Tex.**—*Strong v. State*, 52 Tex. Crim. 133, 105 S. W. 785. **Eng.**—*Reg. v. Clayton*, 1 C. & K. 128, 47 E. C. L. 127.

In Texas where a man is charged with being principal in a misdemeanor and the evidence showed that he was either a principal or an accomplice, as those terms are defined by the statute, he would be a principal and could be convicted as such. *Strong v. State*, 52 Tex. Crim. 133, 105 S. W. 785, and *Houston v. State*, 13 Tex. App. 595.

30. *People v. Bliven*, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 701, *citing* 1 Hale's P. C. 223; 1 East's P. C. 93, § 35; 1 Bishop's Cr. Law, § 681; 1 Whart. Am. Cr. Law, § 131.

In high treason all concerned in the commission of the crime are treated as principals. *State v. Steeves*, 29 Ore. 85, 43 Pac. 947, *citing* 4 Bl. Com. 35.

31. *United States v. Burr*, 25 Fed. Cas. No. 14,693. See *People v. Bliven*, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 701.

32. **Ala.**—*Griffith v. State*, 90 Ala. 583, 8 So. 812. **Cal.**—*People v. Rozelle*, 78 Cal. 84, 20 Pac. 36; *People v. Outeveras*, 48 Cal. 19; *People v. Bearss*, 10 Cal. 68. **Ill.**—*Coates v. People*, 72 Ill. 303. **Ia.**—*State v. Berger*, 121 Iowa 581, 96 N. W. 1094; *State v. Porter*, 105 Iowa 677, 75 N. W. 519;

*State v. Hessian*, 58 Iowa 68, 12 N. W. 77. **Kan.**—*State v. Clark*, 60 Kan. 450, 56 Pac. 767; *State v. Patterson*, 52 Kan. 335, 34 Pac. 784. **Ky.**—*Stricklin v. Com.*, 83 Ky. 566. **Minn.**—*State v. Briggs*, 84 Minn. 357, 87 N. W. 935. **Mo.**—*State v. Phillips*, 24 Mo. 475, *citing* Chit. Cr. Law, p. 256. **Mont.**—*State v. Gleim*, 17 Mont. 17, 41 Pac. 998, 52 Am. St. Rep. 655, 31 L. R. A. 294. **N. Y.**—*People v. Bliven*, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 701. See *People v. Peckens*, 153 N. Y. 576, 47 N. E. 883. **Ohio.**—*State v. Lingafelter*, 77 Ohio St. 523, 83 N. E. 897. **Pa.**—*Brandt v. Com.*, 94 Pa. 290. **S. D.**—*State v. Phelps*, 5 S. D. 480, 59 N. W. 471. **Wash.**—*State v. Gifford*, 19 Wash. 464, 53 Pac. 709; *State v. Duncan*, 7 Wash. 336, 35 Pac. 117. **Wyo.**—*Territory v. Conley*, 2 Wyo. 331.

In Arkansas the two sections of the statute on the subject taken together constitute persons who being present aid and abet in the commission of a felony, principals; and those who are not present but who advise and encourage the perpetration of the crime, accessories before the fact. *Larimore v. State* (Ark.), 107 S. W. 165.

In Oklahoma, it has been held that all persons who at common law were classed as principals and accessories before the fact, are under the statutes made principals. While those who were classed as accessories after the fact are, by the terms of the statute denominated accessories. *Pearce v. Territory*, 11 Okla. 438, 68 Pac. 504; *Drury v. Territory*, 9 Okla. 398, 60 Pac. 101. See also *Pearce v. Territory*, 118 Fed. 425, in which the Oklahoma statute was under consideration.

33. *Casey v. State*, 49 Neb. 403, 68 N. W. 643.

was committed in another county.<sup>34</sup> In some jurisdictions,<sup>35</sup> especially where by statute the distinction between accessories and principals has

In Maine, the statute provides that every person who shall counsel, hire, or otherwise procure a felony to be committed, which shall be committed in consequence thereof, may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been convicted, or shall or shall not be amenable to justice. *State v. Ricker*, 29 Me. 84.

In Ohio common law crimes have been abolished. In this jurisdiction there are in law no accessories after the fact. Whenever and wherever the legislature has deemed it necessary to penalize the acts of one which are done or performed after the commission of the principal offense, it has enacted statutes to meet the case, and such acts are made a substantive offense as distinguished from the relation of accessory after the fact as recognized at common law. *State v. Lingafelter*, 77 Ohio St. 523, 83 N. E. 897.

And see *infra*, IV, C, "Time of Trial and Conviction With Reference to Principal's—Modern Rule."

34. Cal.—*People v. Stakem*, 40 Cal. 599; *People v. Hodges*, 27 Cal. 340. See also *People v. Trim*, 39 Cal. 75. Ky.—*Tully v. Com.*, 13 Bush 142. Nev.—*State v. Hamilton*, 13 Nev. 386; *State v. Chapman*, 6 Nev. 632. N. J.—*State v. Wyckoff*, 31 N. J. L. 65. N. Y.—*People v. Hall*, 57 How. Pr. 342; *Baron v. People*, 1 Park. Cr. 246, setting forth the statute to this effect.

It was at one time doubted whether at common law an accessory in one county to a felony committed in another could be indicted in either. *Baron v. People*, 1 Park. Cr. (N. Y.) 246, citing *Hawk. P. C. Book 2, c. 25, § 54*; *Keil* 67; *Dyer* 38. On account of the existing doubt in this regard, Lord Hale said: "If a man were accessory before or after, in another county than where the principal felony was committed, at common law it was dispensable." Others, however, were of opinion that "at common law the coroner might, upon view of the body where the fact happened, inquire of all accessories or procurers, though in another county." *Tully v. Com.*, 13 Bush (Ky.) 142, citing 1 East's P. C. 360.

The English statute (sec. 4, ch. 24, 2 and 3 Edward VI) fixed the jurisdiction as to either the offense of an accessory before or after the fact by restricting it to the county in which the substantive accessorial acts were done. *Tully v. Com.*, 13 Bush (Ky.) 142.

In Kentucky the act of 1796 providing that "an accessory to murder or felony committed shall be examined by the court of that county and tried by the court in whose jurisdiction he became accessory," as relates to jurisdiction of the offense, has never been expressly repealed. *Tully v. Com.*, 13 Bush (Ky.) 142.

**Indictment Sufficiently Charging Venue as to Accessory.**—Where two are charged in an indictment as principals, in the commission of a homicide, one with having committed the homicide and the other with having assisted, if the indictment clearly lays the venue in W. county in charging the one who procured the act and then charges the other defendant as "then and there aiding and abetting in such murder," the indictment sufficiently charges the venue as to the accessory, especially in view of the fact that the venue was established by the margin of the indictment as to both offenses. *State v. Long*, 209 Mo. 366, 108 S. W. 35.

35. *Com. v. Pettes*, 114 Mass. 307; *Carlisle v. State*, 31 Tex. Crim. 537, 21 S. W. 358; *Scales v. State*, 7 Tex. App. 361.

In *State v. Ayers*, 8 Baxt. (Tenn.) 96, 100, the court said: "The offense is compounded of the connivance of the accessory and the actual killing by the principal felon, and the crime of the accessory, though inchoate in the act of counseling, hiring, or commanding, is not consummate until the deed is actually done. The law, in such case, holds the accessory before the fact to be guilty of the murder itself, not as principal, it is true, but as accessory before the fact, for it is the doing of the deed, and not the counseling, hiring, or commanding that makes his crime complete; and it is for the murder that he is indicted, and not for the counseling and procuring. We hold,

been abolished,<sup>36</sup> an accessory may be indicted and tried in the county in which the principal offense was committed. And in others it is held that an accessory may be indicted, convicted and punished in the county in which he became accessory, or in which the principal felon might be indicted.<sup>37</sup>

In the absence of statutes to the contrary,<sup>38</sup> an accessory to a felony committed in another state, through the agency of a guilty party is not triable in the latter jurisdiction.<sup>39</sup>

therefore, that the *locus in quo* of the offense of an accessory before the fact to the crime of murder, is the county in which the murder is done, and that the jurisdiction is there."

36. *People v. Winant*, 24 Misc. 361, 53 N. Y. Supp. 695; *Pearce v. Territory*, 11 Okla. 438, 68 Pac. 504.

37. Mass.—Rev. Laws of Mass. (1902), c. 215, 35, relating to accessories after the fact only. N. H.—*State v. Moore*, 26 N. H. 448, 59 Am. Dec. 359. W. Va.—*State v. Roberts*, 50 W. Va. 422, 40 S. E. 484.

38. Rev. Laws of Mass. (1902), c. 715; *State v. Chapman*, 6 Nev. 632.

In Indiana it is held that the statute providing that persons without the state, committing or consummating an offense by an agent or other means within the state are liable to punishment, etc., does not apply to accessories before the fact but only to principals. In *Johns v. State*, 19 Ind. 421, 428, 81 Am. Dec. 408, the court said: "This language, in our opinion, embraces all persons who may, without the state, commit a crime, which, in legal contemplation, is to be deemed as having been committed within the state, under circumstances that will make the person thus committing it a principal in the crime. Such for instance, as shooting from without the state, thereby killing a person within the same; sending an "infernal machine," through innocent agents, from without the state whereby life is destroyed; and cases of a like character with these, and those mentioned in a former part of this opinion. Also, when a person, though out of the state is *present*, aiding and abetting, so as to make himself a principal in the second degree, as may well be, a state line simply being between such person and the principal in the first degree, who in person perpetrates the offense. This construction seems to be in harmony with

principle, and also with the authorities."

In South Carolina the statute provides that an accessory before the fact, "may be indicted, tried, and punished in the same court and county where the principal felon might be indicted and tried, although the offense of counseling, hiring or procuring the commission of such felony is committed *on the high seas or on land, either within or without the limits of this state.*" The court, in *State v. Burbage*, 51 S. C. 284, 28 S. E. 937, declined to pass upon the constitutionality of the above statute, and remarked that there was no statute of this character in relation to accessories after the fact.

39. Ark.—*State v. Chapin*, 17 Ark. 561, 65 Am. Dec. 452. N. H.—*State v. Moore*, 26 N. H. 448, 59 Am. Dec. 354. N. J.—*State v. Wyckoff*, 31 N. J. L. 65. N. Y.—*People v. Hall*, 57 How. Pr. 342.

But see *State v. Cassady*, 12 Kan. 551.

In *State v. Wyckoff*, 31 N. J. L. 65, the court said: "If, then, the accessory by the common law was answerable only in the county in which he enticed the principal, and that, too, when the criminal act was consummated in the same county, it would seem to follow necessarily in the absence of all statutory provision, that he is wholly punishable when the enticement to the commission of the offense has taken place, out of the state in which the felony has been perpetrated. Under such a condition of affairs it is not easy to see how the accessory has brought himself within the reach of the laws of the offended state. His offense consists in the enticement of crime; and that enticement, and all parts of it, took place in a foreign jurisdiction. As the instrumentality employed was a conscious guilty agent, with free will to act or



In Indiana and New Hampshire the statutes provide for the punishment of accessorial acts committed within the state, in aid of the perpetration of a felony in another state.<sup>40</sup>

Where an accessory acts through an innocent agent, on the other hand, he is to be considered a principal, and if the accessorial acts are committed in a county, or in a state, other than that in which the principal offense is perpetrated, the accessory is triable in the county,<sup>41</sup> and state<sup>42</sup> in which the principal offense was committed.

In misdemeanors, since, as before stated, all are to be regarded as principals who, in any manner, participate in the commission of a crime, if a person in one state procures the commission of a crime of that grade in another state, through even a guilty agent, the procurer is regarded as a principal in the offense and as being present, in contemplation of law, where it is committed, and answerable there for the crime.<sup>43</sup>

**III. INDICTMENTS AND INFORMATION.** — A. WHEN INDICTMENT MAY BE FOUND. — It has always been true that an accessory may be indicted before, as well as after the principal's conviction.<sup>44</sup>

to refrain from acting, there is no room for the doctrine of a constructive presence in the procurer. Applying to the facts of this case the general and recognized principles of law, it would seem to be clear that the offense of which the defendant has been guilty is not such as the laws of this state can take cognizance of. We must be satisfied to redress the wrong which has been done to one of our citizens, and to vindicate the dignity of our laws by the punishment of the wrongdoer who came within our territorial limits. As for the defendant, who has never been, either in fact or by legal intentment, within our jurisdiction, he can be only punished by the authority of the state of New York, to whose sovereignty alone he was subject at the time he perpetrated the crime in question."

40. *State v. Felch*, 58 N. H. 1.

In Indiana the statute reads as follows: "Every person who shall, while in this state aid in and abet the perpetration or attempt to perpetrate an offense in another state which by the laws of this state is a felony, shall be deemed guilty of a felony, and upon conviction thereof shall be punished in the same manner and to the same extent as accessories before the fact to the commission of such a felony are prosecuted and punished by the criminal laws of the state; and it shall not

be essential to the conviction of such person of said felony that the principal be prosecuted for the crime charged." *Cruthers v. State*, 161 Ind. 139, 67 N. E. 930. See also *Johns v. State*, 19 Ind. 421, 81 Am. Dec. 408.

41. *Ala.* — *Bishop v. State*, 30 Ala. 34. *N. Y.* — *People v. Rathbun*, 21 Wend. 509. *Ore.* — *State v. Barnett*, 15 Ore. 77, 14 Pac. 737.

Thus where on the trial of an accessory to murder it appears that the defendant through an innocent agent had the principal released from the penitentiary upon a forged pardon, such pardon having been used in C. county, where the principal was confined in the penitentiary, the venue was properly placed in C. county. *Dent v. State*, 43 Tex. Crim. 126, 65 S. W. 627.

42. *State v. Chapin*, 17 Ark. 561, 65 Am. Dec. 452; *People v. Adams*, 3 Denio (N. Y.) 190.

43. *Ark.* — *State v. Chapin*, 17 Ark. 561, 65 Am. Dec. 452. *Ga.* — *Duckett v. State*, 93 Ga. 415, 21 S. E. 73. *N. Y.* — *People v. Adams*, 3 Denio 190. *Pa.* — *Com. v. Gillespie*, 7 Serg. & R. 469, 10 Am. Rep. 475. *Eng.* — *King v. Johnson*, 6 East 583, 102 Eng. Reprint 1412.

44. *Fla.* — *Doughtrey v. State*, 46 Fla. 109, 35 So. 397, 110 Am. St. Rep. 84. *Ind.* — *Ulmer v. State*, 14 Ind. 52. *Me.* — *State v. Ricker*, 29 Me. 84, citing 1 Russ. on Crimes 38. *Pa.* —

Under the common law, however, an accessory could not be indicted in the event of the principal's death before indictment and trial,<sup>45</sup> or after the trial and acquittal of the principal.<sup>46</sup>

But under statutes abrogating the distinction between a principal and an accessory, the latter may be indicted, although the principal offender may not have been arrested, indicted or tried, or may have been tried and acquitted, or convicted and pardoned or otherwise discharged.<sup>47</sup>

**B. MANNER OF CHARGING ACCESSORY. — 1. In General. — a. At Common Law.** — At common law and in jurisdictions where the common law rule has not been relaxed to the extent of abolishing the distinction between accessories and principals, an accessory must be charged as such, though the acts of an accessory have been made by statute an independent substantive crime, in no wise dependent for its punishment upon the conviction of the principal. A conviction cannot be sustained on an indictment charging an accessory as principal.<sup>48</sup> It is necessary to set forth the specific acts showing the defendant's connection with the principal offense,<sup>49</sup> but generally it is not necessary

Holmes v. Com., 25 Pa. 221. **S. C.** — State v. Sims, 2 Bailey L. 29. **Tenn.** — Whitehead v. State, 4 Humph. 278.

**Even though the principal is unknown** an indictment may be sustained against an accessory. State v. Ricker, 29 Me. 84, citing 1 Russ. on Crimes 38. See also *infra*, III, C, 6, "Naming or Describing Principal."

45. Gallott v. United States, 87 Fed. 446, 31 C. C. A. 44, holding that the Federal statute has changed the rule. (U. S. Rev. Stat., § 5209) Pardee, J., dissented, holding that there was no warrant in the common law, nor in any statute for indicting an accessory when the principal offender dies before indictment and trial.

46. Dent v. State, 43 Tex. Crim. 126, 65 S. W. 627.

Where a man is charged with raping his own wife through the agency of another man, after the acquittal of the man who actually violated the person of the woman there is no legal foundation upon which to rest the prosecution of the husband. State v. Haines, 51 La. Ann. 731, 25 So. 732.

47. **Ark.** — Smith v. State, 37 Ark. 274. **Okla.** — Pearce v. Territory, 11 Okla. 438, 68 Pac. 504. **Wash.** — State v. Gifford, 19 Wash. 464, 53 Pac. 709.

**Purpose of the Statutes.** — In State v. Gifford, 19 Wash. 464, 53 Pac. 709, it was said that the object of the statutes was to do away with some of the technical hindrances which had existed in relation to the trials of accessories

and that it was the intention of the legislature that the defendant might be indicted, even though the principal had been acquitted.

48. **Ark.** — See Smith v. State, 37 Ark. 274. **Neb.** — Casey v. State, 49 Neb. 403, 68 N. W. 643. **N. Y.** — See People v. Lyon, 99 N. Y. 210, 1 N. E. 673. **N. D.** — See State v. Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686. **Va.** — Hatchett v. Com., 75 Va. 925; Thornton v. Com., 24 Gratt. 657. **W. Va.** — State v. Roberts, 50 W. Va. 422, 40 S. E. 484; State v. Lilly, 47 W. Va. 496, 35 S. E. 837.

49. See State v. Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686.

**Form.** — Where it is charged in an indictment in the language of the statute that the accessory did procure, counsel and command the alleged principal to commit the crime, he is charged in terms with that which constitutes the offense, and such an indictment is not open to the objection that there is nothing in this language which charges the alleged accessory before the fact with any act which would make him such. Rawlins v. State, 124 Ga. 31, 52 S. E. 1.

**Reason for Rule.** — "The indictment should contain a statement of the facts and circumstances constituting the offense, that the accused may be apprised of the nature of the particular accusation against him on which he is to be tried, and be prepared for his defense. The facts and circumstances being so

that the word "accessory" should be used in the indictment.<sup>50</sup> If the word is used, it will be treated as surplusage.<sup>51</sup> Nor is it necessary in an indictment charging a defendant as an accessory before the fact to a murder to lay the offense *vi et armis*, since the offense charged tends only to a breach of the peace, and is not, of itself, an actual breach of it.<sup>52</sup>

**Treasons and Misdemeanors.** — When one sustains to an act of treason,<sup>53</sup> or to a misdemeanor,<sup>54</sup> a relation which in felony would make him an accessory before the fact, he is treated as a principal and must be charged as such in the indictment, which need not allege that the act was committed by another.

Those who would be accessories after the fact in felony are in treason regarded as principals, but the indictment must specify the accessorial nature of the offense.<sup>55</sup>

**b. Effect of Modern Legislation.** — (I.) **Usual Method.** — (A.) **STATEMENT OF RULE.** — Under statutes abolishing the distinction between accessories and principals and providing that an accessory may be tried as principal, it is as a rule sufficient to charge the accessory in an indictment or information directly as principal and it is not necessary to set forth the facts which show that the acts of the defendant were those of accessory at common law.<sup>56</sup> But if it is further provided by statute that a statement of the acts constituting the offense must be set forth, it is of course necessary to allege the accessorial

materially different, one who has advised or encouraged the commission of the felony, but who was not actively or constructively present when it was committed, cannot be convicted upon an indictment charging him, not as an accessory before the fact, but as the principal perpetrator of the crime." *Smith v. State*, 37 Ark. 274.

**Not Necessary to State Means Employed.** — See *infra*, III, C, 2, "Means."

50. *Bishop v. State*, 118 Ga. 799, 45 S. E. 614; *State v. Rieker*, 29 Me. 84 (*citing* 1 Chit. Cr. Law 273).

**In Indiana the Statute Provides Otherwise.** — See *infra*, III, C, 2, where the statute is set forth.

51. *Com. v. Chiovaro*, 129 Mass. 489.

52. *State v. Duncan*, 28 N. C. 236.

53. **N. Y.** — *People v. Bliven*, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 701. **N. D.** — *State v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686. **Ore.** — *State v. Steeves*, 29 Ore. 85, 43 Pac. 947, *citing* 1 Bish. Cr. Law, §§ 701, 682.

54. **N. Y.** — *People v. Bliven*, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 701. **N. D.** — *State v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686. **S. C.** —

*State v. Hunter*, 79 S. C. 73, 60 S. E. 240. **Eng.** — *Reg. v. Greenwood*, 5 Cox C. C. 521, *overruling* *Reg. v. Else*, R. & R. 142, and *Reg. v. Page*, 1 Russ. on Crimes 82.

55. *State v. Steeves*, 29 Ore. 85, 43 Pac. 947, *citing* 1 Bish. Cr. Law, §§ 701, 682.

56. **U. S.** — *Rosencranz v. United States*, 155 Fed. 38 (*citing* many cases from various jurisdictions); *Pearce v. Territory*, 118 Fed. 425; *Toledo R. Co. v. Penn. Co.*, 54 Fed. 730, 19 L. R. A. 387; *United States v. Stevens*, 44 Fed. 132; *United States v. Snyder*, 14 Fed. 554. **Ala.** — *Griffith v. State*, 90 Ala. 583, 8 So. 812. **Cal.** — *People v. Nolan*, 144 Cal. 75, 77 Pac. 774 (*overruling* *People v. Campbell*, 40 Cal. 129, which holds that while it is proper to indict, try and punish an accessory as a principal, yet that the particular acts which establish that he aided and abetted the crime, and thus became in law a principal, must be stated in the indictment; and *People v. Trim*, 39 Cal. 75); *People v. Rozelle*, 78 Cal. 84, 20 Pac. 36; *People v. Outeveras*, 48 Cal. 19; *People v. Schwartz*, 32 Cal. 160 (containing argument in favor of charging the facts). But see *People v. Keefer*, 65 Cal. 232,



acts.<sup>57</sup> And in all cases of felony, where, by the statute creating the principal offense, only persons of a certain class, or standing in a certain relation, are competent to commit such principal offense, the indictment against aiders and abettors not belonging to such class, or

3 Pac. 818, holding that if a defendant has done no act which makes him responsible for a murder, the mere fact that he aided in concealing the body would render him liable only as an accessory after the fact—an offense of which he could not be found guilty under an indictment for murder. **Idaho.**—Territory *v. Guthrie*, 2 Idaho 432, 17 Pac. 39. **Ill.**—Hronek *v. People*, 134 Ill. 139, 24 N. E. 861, 8 L. R. A. 837; Dempsey *v. People*, 47 Ill. 323; Baxter *v. People*, 7 Ill. 578. **Ind.**—Rhodes *v. State*, 128 Ind. 189, 27 N. E. 866, 25 Am. St. Rep. 429. **Ia.**—People *v. Heslian*, 58 Iowa 68, 12 N. W. 77. **Kan.**—State *v. Clark*, 60 Kan. 450, 56 Pac. 767; State *v. Mosley*, 31 Kan. 355, 2 Pac. 782. **Minn.**—State *v. Whitman*, 103 Minn. 92, 114 N. W. 363; State *v. Briggs*, 84 Minn. 357, 87 N. W. 935. **Mont.**—State *v. Geddes*, 22 Mont. 68, 55 Pac. 919. **Nev.**—State *v. Jones*, 7 Nev. 1036. **N. Y.**—People *v. Bliven*, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 701. **N. D.**—State *v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686. **Okla.**—Pearce *v. Territory*, 11 Okla. 438, 68 Pac. 504. **Wash.**—State *v. Golden*, 11 Wash. 422, 39 Pac. 646; State *v. Duncan*, 7 Wash. 336, 35 Pac. 117. **Eng.**—Reg. *v. Manning*, 2 C. & K. 887, 61 E. C. L. 886.

**Rationale.**—In Iowa, the 44th session of the act entitled, an act regulating criminal proceedings, Rev. Stat. 153, is as follows: "Accessories before the fact shall be deemed principals, and may be charged in the indictment, with having committed the principal offense." Construing this provision, the court in *Bonsell v. United States*, 1 Greene (Iowa) 111, said: "This enactment of the legislature is couched in terms of plain import, presenting to the mind the intention of the law, free of any doubt whatever. The history of criminal jurisprudence has furnished ample evidence to establish the fact, that the cunning and cautious conceiver of crime often in the use of available appliances, procures its perpetration by the hand of the reckless and desperate. Doubtless, the legislature acted in accordance with sound morality and rea-

son, by providing that offenders equally guilty of crime shall be indicted, tried, convicted, and punished in the same manner."

**Application of Rule to Accessory After the Fact.**—In *State v. Empey*, 79 Iowa 460, 44 N. W. 707, the court said that an accessory before the fact might be indicted, as the principal (*citing* code, § 4314), and that probably the language of this provision included also accessories after the fact.

57. Thus although the Kentucky criminal code requires that an indictment must contain a statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended, and with such reasonable degree of certainty as to enable the court to pronounce judgment on the conviction, it is not a departure from the rules of pleading prescribed by the code to denominate the offense with which a defendant is charged in an indictment, as murder, although the principal circumstances of the offense as set forth constituted the defendant as an accessory before the fact and not as principal, since the code provides that in the commission of the offense of murder, there may be an accessory before the fact as well as a principal, but that both are, in law, guilty of the offense and their punishment is made the same. *Stricklin v. Com.*, 83 Ky. 566.

**Charge Not Vitiating by Obscurity in Word or Phrase.**—The indictment for the crime of being an accessory before the fact to the murder of G., which notified defendant that he was charged with conspiracy to procure the murder of G., that he procured the murder and that the murder was done by some one who was by him counseled and procured to do the act is good although a particular word or phrase of the indictment may be ambiguous or obscure, there being no doubt as to the charge intended. *Powers v. Com.*, 110 Ky. 386, 61 S. W. 735, 63 S. W. 976.

But see *infra*, III, B, 1, b, (I), (C).

standing in such relation, must set out the aiding and abetting, in which alone the crime consists.<sup>58</sup>

(B.) CONSTITUTIONAL RIGHTS NOT CONTRAVENED. — The charging of one formerly known as an accessory directly as principal is not an invasion of an accused's constitutional right to be informed of the nature and cause of the accusation against him,<sup>59</sup> nor is an accused thereby deprived of life, liberty or property without due process of law within the fourteenth amendment of the Federal Constitution.<sup>60</sup>

(C.) STATUTE PROVIDING FOR CLEAR STATEMENT NOT VIOLATED. — The charging of an accessory as a principal is not a violation of a statute providing that the act or omission charged as a crime must be clearly and definitely set forth in ordinary and concise language, without repetition, in such a manner as to enable a person of common understanding, to know what is intended.<sup>61</sup>

(II.) Optional Method. — In most states notwithstanding statutes, abolishing the distinction between principals and accessories, the accused may be charged either as a principal or as an accessory, according to the common law precedents<sup>62</sup> (charging as accessory being to the

58. Thus to constitute one a principal offender under a statute, denouncing as a crime the offense of exposing a child with intent to abandon, he must sustain towards the child, one of three relationships, namely: he must be the father or mother or the person to whom the child has been confided. Exposing the child by any other person is not rendered criminal by the statute even in a principal, much less an aider or abettor, who is not even mentioned in the statute. And as there can be no accessory as a common law incident of a statutory felony, since that incident has been abolished by statute, it follows that no person not sustaining one of these relations to the child can be convicted for counseling, aiding or abetting in the commission of the offense, either as principal or as an accessory under the statute, or as accessory at common law. Although another statute provides that an accessory may be tried and punished as a principal, to bring such a person within this statute, he must be indicted under it since it is the only law which renders him a criminal; and as the offense in such a case consisted wholly in aiding and abetting, these circumstances must be alleged in the indictment or the offense does not appear. *Shannon v. People*, 5 Mich. 71.

59. *Minn.* — *State v. Whitman*, 103 Minn. 92, 114 N. W. 363. *Ore.* — *State v. Steeves*, 29 Ore. 85, 43 Pac. 947.

*Wash.* — *State v. Duncan*, 7 Wash. 336, 35 Pac. 117.

The sixth amendment of the federal constitution, providing among other things that in all prosecutions the accused shall be informed of the nature and cause of the accusation against him, has no application to proceedings in the state courts of the several states, and was never intended to have any such application. *People v. Nolan*, 144 Cal. 75, 77 Pac. 774; *State v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686.

60. "Since the state has the right to establish the forms of pleadings to be observed in their own courts, subject only to the provision of the Federal Constitution involving the protection of life, liberty and property in all the states of the Union, one charged as a principal in the commission of an offense, has sufficient notice of the accusation against him to satisfy every requirement of the much invoked fourteenth amendment." *People v. Nolan*, 144 Cal. 75, 77 Pac. 774.

61. *State v. Steeves*, 29 Ore. 85, 43 Pac. 947; *State v. Duncan*, 7 Wash. 336, 35 Pac. 117.

62. *Cal.* — *People v. Rozelle*, 78 Cal. 84, 20 Pac. 36. *Kan.* — *State v. Clark*, 60 Kan. 450, 56 Pac. 767. *Minn.* — *State v. Briggs*, 84 Minn. 357, 87 N. W. 935. *Mo.* — *State v. Schuchmann*, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842; *State v. Payton*, 90 Mo. 220, 2 S. W.

advantage of the defendant), or both,<sup>63</sup> at the option of the pleader.

**2. Separate Indictment or Joint Indictment With Principal.**—An accessory may be separately indicted,<sup>64</sup> or he may be jointly indicted

394; *State v. Anderson*, 89 Mo. 312, 1 S. W. 135. **Mont.**—*State v. Gleim*, 17 Mont. 17, 41 Pac. 998, 52 Am. St. Rep. 655, 31 L. R. A. 294. **N. Y.**—See *People v. Seldner*, 62 App. Div. 357, 71 N. Y. Supp. 35.

**Accused Not Prejudiced by Allegations of Facts.**—Although the Idaho statute makes an accessory before the fact a principal, and although it provides that it is entirely unnecessary to charge the accused in any other form than as principal, yet if the grand jury charges one who is in fact an accessory before the fact as such, the effect is simply to inform him more clearly of what he must defend against and therefore it is not a defect of which he can be heard to complain. In *Territory v. Guthrie*, 2 Idaho 432, 17 Pac. 39, the supreme court said that it must give judgment without record of technical errors or defects which did not affect the substantial rights and that it did not mean to assert that this was the better course, but only that the defendant was not prejudiced by this form of charging the offense. Indeed, it was said that when a statute clearly provided what shall be a sufficient pleading, that it was always better that the statutes should be closely followed.

The court in *State v. Briggs*, 84 Minn. 357, 87 N. W. 935, said "The pleader in drafting this indictment adopted the fair and more truthful course and directly charged the defendant with doing the acts which the law declares made him a principal if he is directly charged with enticing and procuring another to commit the crime. The indictment charged the defendant with the commission of a public offense."

**Charging Facts Advantageous to Accused.**—In *State v. Gleim*, 17 Mont. 17, 41 Pac. 998, 52 Am. St. Rep. 655, 31 L. R. A. 294, it was said: "To so charge is to the advantage of a defendant, because it notifies him of the attitude which the state will assume when the case is brought to trial, by setting out the facts constituting the offense with greater certainty than is requisite where an accessory is indicted as principal." To like effect see *Shannon v. People*, 5 Mich. 71.

**Under the Illinois statutes** accessories at or before the fact must be indicted as principals and not otherwise. It might be advisable as was said in *Baxter v. People*, 8 Ill. 368, to describe the circumstances of the offense as they actually occurred, but this is not indispensable. *Coates v. People*, 72 Ill. 303. An indictment of one as an accessory before the fact as at common law will not support a verdict of guilty of the principal offense. *Usselson v. People*, 149 Ill. 612, 36 N. E. 952.

**In New York** while it is not necessary to allege the facts showing that the crime was committed through the agency of another, yet it is plainly to be implied from the language of the statute that they may be alleged, and when charged are equivalent to an allegation that the act was that of the defendant. *People v. Peckens*, 153 N. Y. 576, 47 N. E. 883.

**In Pennsylvania** under the statute abolishing the distinction between principals and accessories in all cases of felony, the accessory may be indicted either as principal, that is, he may be charged in the indictment with having actually committed the offense as principal in the first degree or he may be indicted as for a substantive felony, or he may be indicted as accessory with the principal at the option of the prosecutor. *Brandt v. Com.*, 94 Pa. 290.

**63. Cal.**—*People v. Davidson*, 5 Cal. 133. **Conn.**—*State v. Hamlin*, 47 Conn. 95, 36 Am. Rep. 54. **Ind.**—*Rhodes v. State*, 128 Ind. 189, 27 N. E. 866, 25 Am. St. Rep. 429. **Neb.**—See *Casey v. State*, 49 Neb. 403, 406, 68 N. W. 643.

**Surplusage.**—It is held, however, that where an accused is charged in one count as principal and in another as accessory, the latter will be treated as surplusage, it being unnecessary under the statute to charge an accessory as such. *People v. Ah Hop*, 1 Idaho 698.

See also III, D, "Joinder of Counts."

**64. Cal.**—*People v. Bearss*, 10 Cal. 68. **Conn.**—*State v. Hamlin*, 47 Conn. 95, 36 Am. Rep. 54. **Ky.**—*Begley v. Com.*, 26 Ky. L. Rep. 598, 82 S. W. 285. **Me.**—*State v. Ricker*, 29 Me. 84. **Mass.**—*Com. v. Glover*, 111 Mass. 395.



with the principal, in separate counts,<sup>65</sup> or even in the same count.<sup>66</sup>

C. ESSENTIAL ALLEGATIONS. — 1. **Time and Place.** — In accordance with the familiar rule that an indictment for any offense must contain an allegation of the time when, and the place where, the alleged offense

Mo. — *State v. Umble*, 115 Mo. 452, 22 S. W. 378. Pa. — *Com. v. Bradley*, 16 Pa. Super. 561. Va. — *Hatchett v. Com.*, 75 Va. 925. W. Va. — *State v. Roberts*, 50 W. Va. 422, 40 S. E. 484.

65. Ala. — *State v. Jones*, 5 Ala. 666. Ark. — *Jones v. State*, 58 Ark. 390, 24 S. W. 1073. Cal. — *People v. Valencia*, 43 Cal. 552; *People v. Bearss*, 10 Cal. 68. Conn. — *State v. Hamlin*, 47 Conn. 95. Fla. — *Keech v. State*, 15 Fla. 591. Ga. — *Rawlins v. State*, 124 Ga. 31, 52 S. E. 1; *Bulloch v. State*, 10 Ga. 647, 54 Am. Dec. 369. Idaho. — *Territory v. Guthrie*, 2 Idaho 432, 17 Pac. 39. Ky. — *Mulligan v. Com.*, 84 Ky. 229, 1 S. W. 417; *Begley v. Com.*, 26 Ky. L. Rep. 598, 82 S. W. 285. La. — *State v. Travis*, 39 La. Ann. 356, 1 So. 817. Me. — *State v. Carver*, 49 Me. 588, 77 Am. Dec. 275; *State v. Rieker*, 29 Me. 84. Mass. — *Com. v. Devine*, 155 Mass. 224, 29 N. E. 515; *Com. v. Glover*, 111 Mass. 395. Mont. — *State v. King*, 9 Mont. 445, 24 Pac. 265. N. H. — *State v. York*, 37 N. H. 175. Ohio. — *Hartsborn v. State*, 29 Ohio St. 635. Pa. — *Holmes v. Com.*, 25 Pa. 221; *Com. v. Bradley*, 16 Pa. Super. 561. S. C. — *State v. Atkinson*, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877. Vt. — *State v. Butler*, 17 Vt. 145. Va. — *Hatchett v. Com.*, 75 Va. 925. W. Va. — *State v. Roberts*, 50 W. Va. 422, 40 S. E. 484.

The fact that an accessory cannot be tried until after the conviction of the principal, does not prevent the indictment of the principal and the accessory before the fact at the same term of the grand jury and in the same bill. *Rawlins v. State*, 124 Ga. 31, 52 S. E. 1.

**Form for Indictment Charging Defendant as Accessory After the Fact.** — In *Blakely v. State*, 24 Tex. App. 616, 7 S. W. 233, 5 Am. St. Rep. 912, the charge against the defendant was that "after the commission of the aforesaid offense of murder by the said Erasmus May, as aforesaid, and well knowing the said Erasmus May to have committed said offense, Steve Blakely (the defendant) did then and there unlawfully, wilfully and feloniously, conceal and give aid to the said Erasmus May, in order that he, the

said Erasmus May, might evade an arrest and trial for said offense; and so the grand jurors aforesaid, upon their oath aforesaid, do say that he, the said Steve Blakely, did then and there become and make himself an accessory to the murder and killing of the said Derush Daffin by the said Erasmus May, in the manner and form as aforesaid, contrary," etc.

66. Ark. — *Jones v. State*, 58 Ark. 390, 24 S. W. 1073. Ga. — *Rawlins v. State*, 124 Ga. 31, 52 S. E. 1; *Bishop v. State*, 118 Ga. 799, 45 S. E. 614; *Bulloch v. State*, 10 Ga. 647, 54 Am. Dec. 369. Mass. — *Pettes v. Com.*, 123 Mass. 242 (*citing precedents in Chit. Cr. Law and Archibald's Cr. Pl.*); *Com. v. Cohen*, 120 Mass. 198. Vt. — *State v. Butler*, 17 Vt. 145, where this was said to be the most common mode at common law.

A common law form charging one as principal and another as accessory before the fact was held sufficient in *State v. Gleim*, 17 Mont. 17, 41 Pac. 998, 52 Am. St. Rep. 655, 31 L. R. A. 294. The charging parts were as follows: "That one Patrick Mason, late of the county of Missoula, state of Montana, on or about the 13th day of February, A. D. 1894, at the county of Missoula, in the state of Montana, did feloniously, deliberately, premeditatedly, and of his malice aforethought, make an assault in and upon one C. P. Burns, and certain giant powder and other highly explosive substance, a more particular description of which is to said jurors unknown, in, upon, around, and under the house where the said C. P. Burns was then and there present and sleeping, did feloniously, deliberately, premeditatedly, and of his malice aforethought, put and lay, and the same did then and there, feloniously, deliberately, premeditatedly, and of his malice aforethought, explode, and cause to be exploded, with intent in him, the said Patrick Mason, to kill and murder the said C. P. Burns. And that before the commission of the said felony, at the time and place aforesaid, one Mary Gleim and William Reed did feloniously counsel, aid, incite, and pro-

was committed,<sup>67</sup> a count in an indictment charging one as an accessory after the fact is fatally defective which fails to allege the time and place of the commission of the accessorial acts.<sup>68</sup> And where an indictment charging one as an accessory after the fact alleges the commission of the principal offense on a certain date subsequent to the finding of the indictment, this will not be disregarded as surplusage in the absence of another allegation that the principal offense was committed "heretofore" or "before the finding of this indictment," or words of similar import.<sup>69</sup>

**2. Means.**—An indictment charging a statutory offense in the

cure the said Patrick Mason to commit, in manner and form aforesaid, the said felony. All of which is contrary to the form of the statute," etc.

**Approved Form of Indictment.**— "The Grand Jury of Lonoke County, in the name and by the authority of the State of Arkansas, accuse Harriet Jones of the crime of 'accessory before the fact' to murder in the first degree, committed as follows, to-wit: That Millege Mitchell, Green Brewer and William Brooks, in the county and State aforesaid, on the 5th day of December, A. D. 1892, unlawfully, wilfully, feloniously, with malice aforethought, with deliberation and premeditation, did kill and murder one Lafayette Jones, with a gun then and there loaded with gun powder and leaden balls and shot; that the said Harriet Jones, in the County and State aforesaid, on the first day of December, 1892, before the said murder was committed in form aforesaid, unlawfully, wilfully and feloniously did advise and encourage the said Millege Mitchell, Green Brewer and William Brooks, to do and commit the murder, in manner and form aforesaid, against the peace and dignity of the State of Arkansas." The court stated, however, that though this indictment was held good, yet the admonition from the best authorities was to the effect that it was best in all cases to use the more extended form. *Jones v. State*, 58 Ark. 390, 24 S. W. 1073.

**Form of Indictment Sufficiently Charging an Accessory to Murder.**— In *State v. Long*, 209 Mo. 366, the following indictment was held to be sufficient both in form and in substance in charging the defendant and his brother with murder and that the pleader had avoided the point upon which error was predicated in the case of *State v. Burns*, 99 Mo. 471, 12 S. W. 801. The court further stated that this

indictment followed the approved form set out in Kelly's Criminal Law and Practice, section 471. "At the March term, 1905, the grand jury of Wright County returned an indictment against Rankin Long and John Long, the defendant herein, charging that the said Rankin Long on the 9th day of March, 1905, at the county of Wright, State of Missouri, feloniously, wilfully, deliberately, premeditatedly, on purpose and of his malice aforethought did make an assault in and upon one Joseph Buttram, and with a certain deadly weapon, to-wit, a certain knife, which he, the said Rankin Long in his right hand then and there had and held, the said Joseph Buttram feloniously, wilfully, deliberately, premeditatedly on purpose and of his malice aforethought, did strike, stab and thrust in and upon the left side of the body giving to the said Joseph Buttram then and there with the knife aforesaid in and upon the left side of the body of him the said Joseph Buttram one mortal wound of the length of one inch and the breadth of one inch and the depth of five inches, of which said mortal wound, the said Joseph Buttram did on the 9th day of March, 1905, at the county of Wright and State aforesaid of the mortal wound aforesaid instantly die. And the jurors aforesaid, upon their oath aforesaid do further charge and present that one John Long then and there feloniously, wilfully, deliberately, premeditatedly and of his malice aforethought was present, aiding, helping, abetting, assisting, comforting and maintaining the said Rankin Long the felony and murder aforesaid in manner and form aforesaid to do and commit."

67. See title "Indictment and Information."

68. *State v. Burbage*. 51 S. C. 284-28 S. E. 937.

69. *People v. Thrall*, 50 Cal. 415.

language of the statute is sufficient in all cases where that language so particularly describes the offense that the alleged offender has notice of the particular crime charged.<sup>70</sup> This doctrine is applicable to indictments charging accessories to felonies. As a rule, it is not necessary to set forth the means by which an accessory before the fact incited the principal to commit the felony, or by which the accessory after the fact received, concealed or comforted him.<sup>71</sup>

**3. Criminal Intent.**—As in other criminal cases it is necessary to aver the intent of the accessory to commit the crime complained of.<sup>72</sup>

70. See title “**Indictment and Information.**”

71. **U. S.**—United States *v. Simmons*, 96 U. S. 360, 24 L. ed. 819. **Me.**—State *v. Neddo*, 92 Me. 71, 42 Atl. 253. **N. Y.**—People *v. Seldner*, 62 App. Div. 357, 71 N. Y. Supp. 35, citing 1 Chit. Cr. Law, p. 272; Bish. Directions and Forms, pp. 113, 114, 116. **Tex.**—Dent *v. State*, 43 Tex. Crim. 126, 65 S. W. 627; Woods *v. State* (Tex. Crim.), 60 S. W. 244; Gann *v. State*, 42 Tex. Crim. 133, 57 S. W. 837 (*overruling* dicta to the contrary in *Street v. State*, 39 Tex. Crim. 134, 45 S. W. 577). **Eng.**—Holloway *v. Reg.*, 2 Den. C. C. 287, 17 Q. B. 319, 15 Jur. 825.

On an indictment for subornation of perjury, it is not necessary to set forth the particular facts constituting the procurement of one to commit perjury. It is sufficient to allege that defendant did “suborn and procure” a witness to testify falsely in a certain proceeding. *State v. Porter*, 105 Iowa 677, 75 N. W. 519.

**Surplusage.**—Where an indictment charges defendant as an accessory to a theft by concealing the thief and by preventing an officer by force and threats from arresting him, the latter averment will be treated as surplusage, the offense being complete by the concealment, and the allegation as to the force and threats will not vitiate the indictment. *State v. Smith*, 24 Tex. 285.

In California, in an indictment charging the “concealing” of the commission of a felony, an averment that the defendant concealed the commission of an offense is obviously the statement of a mere abstract legal proposition. The indictment must show on its face the acts or facts from which the conclusion flows. The concealment of a crime necessarily includes the element of some affirmative act constituting the offense and must be stated in the indict-

ment, to the end that the court and defendant may know, independently of the conclusion stated, that such act constitutes an offense against the law. *Ex parte Goldman* (Cal. App.), 88 Pac. 819.

In Indiana the Code of Criminal Procedure provides: “Whenever the person accused is to be charged as accessory before the fact, the following (or words of similar import) should be inserted after the statement of the offense committed by the principal: ‘And the said A. B. was accessory, before the fact to the said felony.’ (Here set forth how he aided and abetted the principal.)” An indictment failing to conform to the above form is insufficient, even after verdict, to sustain a judgment as against a motion in arrest. *Sage v. State*, 120 Ind. 201, 22 N. E. 338.

72. *Ex parte Goldman* (Cal. App.), 88 Pac. 819.

Under a statute providing punishment for any person who “aids or assists a prisoner in escaping or attempting to escape from an officer or person who has lawful custody of such prisoner,” an indictment alleging that G. was lawfully arrested by P., a constable, for the crime of drunkenness, and that the defendants “did then and there unlawfully aid and assist the said G. in then and there unlawfully escaping from the said lawful custody of said P.,” is insufficient for failure to allege what acts were done by the defendants and that they knew that G. was in custody, since no unlawful act or criminal intent bringing the case within the terms of the statute is alleged. *Com. v. Filburn*, 119 Mass. 297.

Under a statute providing that every person who shall be convicted of having concealed an offender after the commission of any felony, or having given to such an offender any other aid knowing that he has committed a felony,



**4. Presence or Negating Presence.** — In an indictment charging one as an accessory it is unnecessary to allege the presence of the accused at the time of the commission of the principal offense,<sup>73</sup> nor is it necessary to negative his presence.<sup>74</sup>

**5. Commission of Principal Offense.** — Where an accused is charged as an accessory it is necessary to allege directly and precisely that the

with the intent and in order that he may escape or avoid arrest, etc., shall be punished, etc., an information charging one with having taken the victim of a rape out of the state, and alleging as explanatory of that act that she might give birth to a child away from home, does not charge an offense within the statute, it appearing that the specific acts charged against the defendant were done more to save the reputation of the victim than to assist the guilty party to escape punishment, the immediate result being to protect the victim. *State v. Jett*, 69 Kan. 788, 77 Pac. 546.

**Intent Sufficiently Alleged.** — Where an accessory after the fact and a principal are jointly indicted for the breaking and entering of a dwelling house, if the indictment charges that the accessory did harbor, conceal, maintain and assist the principal felon, with the intent that he, the said principal felon, might escape arrest, trial and punishment, it charges with sufficient exactness that the accessory intended that the principal escape punishment for the crime set forth in the indictment, the crime with which the principal felon was charged being fully set forth in a former part of the indictment. *State v. Neddo*, 92 Me. 71, 42 Atl. 253.

**In Missouri** the statute provides that "Every person not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity, who shall be convicted of having concealed any offender after the commission of any felony, or of having given to such offender any other aid, knowing that he has committed a felony, with the intent and in order that he may escape or avoid arrest, trial, conviction or punishment, and no other, shall be deemed an accessory after the fact." In *State v. Reed*, 85 Mo. 194, the indictment charged the concealment, etc., with the intent and in order that said F might make his escape, etc., but failed to negative any other intent. The court in construing the above sec-

tion said: "What it means is, that no one shall be deemed guilty, under that section, who conceals or aids a felon, not in order that he may escape from justice, but for some other purpose. I concede that the meaning is not very happily expressed, but it is our duty to ascertain as best we may from the language employed, the legislative intent, and not to defeat it because not as artistically expressed as it might have been. The indictment, if we had given the proper construction to the statement, is sufficient."

**Approved Form.** — **Reference to Pleading Clause.** — The indictment of an accessory for murder, which alleges in appropriate terms that the principals committed the murder "unlawfully, wilfully and feloniously, with malice aforethought, with deliberation and premeditation," and charges that the defendant "unlawfully, wilfully and feloniously did advise and encourage the principals to commit the murder in the manner and form aforesaid," is sufficient, without averring that the advising and encouraging was done "with malice aforethought, with deliberation and premeditation." *Jones v. State*, 58 Ark. 390, 24 S. W. 1073, citing *Bishop's Directions and Forms*, § 539, 1 Starkie, Cr. P., 87; 1 Arch. Cr. Pr. & Pl. 16.

**73.** *Bishop v. State*, 118 Ga. 799, 45 S. E. 614.

**74. Ark.** — *Larimore v. State*, 107 S. W. 165. **Ga.** — *Rawlins v. State*, 124 Ga. 31, 52 S. E. 1. **N. Y.** — See also *People v. Peckens*, 153 N. Y. 576, 47 N. E. 883.

And see *United States v. Hartwell*, 3 Cliff. 221, 26 Fed. Cas. No. 15,318.

**Rationale.** — Presence at the perpetration of the crime marks the distinction between principals and accessories before the fact, and it is sufficient in an indictment against an accessory to allege that he advised and encouraged the perpetration of the crime without specifically alleging that he was not present. *Larimore v. State* (Ark.), 107 S. W. 165.

substantive offense in relation to which he is charged was committed.<sup>75</sup>

**6. Naming or Describing Principal.**—Under a statute requiring an "accused" to be named or described, it has been held unnecessary in an indictment charging one as an accomplice, to name or describe the principal offender.<sup>76</sup> But if the principal is known<sup>77</sup> it is the customary practice to name or describe him.<sup>78</sup> But if an indictment against an accessory alleges that the name of the principal is unknown, the fact that another indictment is returned by the same grand jury charging another as principal in the perpetration of the same felony, will not vitiate the former indictment.<sup>79</sup>

**7. Guilt, Conviction, or Absence of Principal.**—Where an accessory is indicted before the principal's conviction, the indictment must aver the latter's guilt,<sup>80</sup> or that he has fled from justice or cannot be found to be put upon his trial.<sup>81</sup> This is true whether indicted sep-

75. *People v. Crenshaw*, 46 Cal. 65 (murder); *Com. v. Dudley*, 6 Leigh (Va.), 613 (fighting a duel.)

**Form Not Objectionable.**—An indictment of an accessory before the fact which alleges that the defendant procured the principal offender to kill and murder deceased with certain guns and pistols, "by shooting her and killing her with said weapons," and then adds "whereby of the wounds and effects thereof" she "instantly then and there died," sufficiently charges the killing. *Givens v. State*, 103 Tenn. 648, 55 S. W. 1107.

76. *Dugger v. State*, 27 Tex. App. 95, 10 S. W. 763.

**77. Form.**—In *Com. v. Glover*, 111 Mass. 395, the indictment, after alleging that the crime was committed by "some person or persons" to the jurors unknown, went on to charge that the defendant did feloniously, etc., incite and procure "said persons" to the jurors unknown, to commit the crime. This was held unobjectionable. The form adopted was equivalent to saying that whoever may have been engaged in it acted under the procurement of the accused. And see *Com. v. Adams*, 127 Mass. 15.

**Burden of proof** in the absence of all evidence on the question as to whether the grand jury knew the name of the principal when finding an indictment against an accessory, their averment that they did not know might be sufficient; but if it should be a question in relation to which there was evidence, the burden of proof would be upon the commonwealth. *Com. v. Glover*, 111 Mass. 395.

**78. Sufficient to Describe Slave by Own Name.**—Where one is indicted as an accessory to a murder committed by a slave, it is sufficient to describe the slave by his own name without setting out that of his master, in conformity with the general rule that it is sufficient in the indictment that the description of persons other than the defendant be certain to a good intent. *State v. Crank*, 2 Bailey L. (S. C.) 66, 23 Am. Dec. 117.

79. *Rex v. Bush*, R. & R. (Eng.), 372. But see *Rex v. Blick*, 4 C. & P. 377, 19 E. C. L. 428.

80. **U. S.**—*United States v. Hartwell*, 3 Cliff. 221, 26 Fed. Cas. No. 15,318. **Cal.**—*People v. Thrall*, 50 Cal. 415; *People v. Crenshaw*, 46 Cal. 65. **Fla.**—*Doughtrey v. State*, 46 Fla. 109, 35 So. 397, 110 Am. St. Rep. 84; *Keech v. State*, 15 Fla. 591. **Ga.**—*Edwards v. State*, 80 Ga. 127, 4 S. E. 268. **Ind.**—*Riley v. State*, 168 Ind. 657, 81 N. E. 726; *Ulmer v. State*, 14 Ind. 52. **Ky.**—*Tully v. Com.*, 11 Bush 154, 161. **Mo.**—*State v. Schuchmann*, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842. **Tex.**—*Poston v. State*, 12 Tex. App. 408. **Va.**—*Hatchett v. Com.*, 75 Va. 925. **Eng.**—*Reg. v. Gregory*, 36 L. J. M. C. 60, L. R. 1 C. C. 77, 1 L. T. 388, 15 W. R. 774, 10 Cox C. C. 459.

The facts constituting the principal offense must be alleged with the same degree of certainty as though the principal were alone indicted. It is not sufficient to charge that the principal committed the felony, naming it. *State v. King*, '88 Minn. 175, 92 N. W. 965.

81. *United States v. New*, 27 Fed. Cas. No. 15,866a. But see *Edwards v.*

arately or jointly, as the offense depends upon the principal's guilt.<sup>82</sup>

If the accessory is indicted after the principal's conviction, the indictment may allege either the guilt of the principal,<sup>83</sup> or that he has been convicted,<sup>84</sup> unless the accessory is indicted for a substantive offense in pursuance of some statutory regulation.<sup>85</sup> It is not necessary, therefore, in any case, to allege the principal's conviction.<sup>86</sup>

Where a principal and an accessory are jointly indicted, it is obviously unnecessary to allege the trial of the principal, or that he is unknown, or for other reasons cannot be tried.<sup>87</sup>

The allegation which charges the conviction of the principal must be broad

State, 80 Ga. 127, 4 S. E. 268, where it was held that an accusation alleging that of two principals to a larceny, one had fled the state and the other had been acquitted on account of his tender years, and further that the defendant had received from the two above mentioned, certain property, naming it, knowing it to have been stolen, was defective in failing to charge that either of the principals stole the property.

82. *United States v. Hartwell*, 3 Cliff. 221, 26 Fed. Cas. No. 15,318.

83. *Doughtrey v. State*, 46 Fla. 109, 35 So. 397, 110 Am. St. Rep. 84.

84. *U. S.*—*United States v. New*, 27 Fed. Cas. No. 15,866a. *Fla.*—*Doughtrey v. State*, 46 Fla. 109, 35 So. 397, 110 Am. St. Rep. 84. *Mass.*—*Com. v. Andrews*, 3 Mass. 126. *Me.*—See *State v. Ricker*, 29 Me. 84. *S. C.*—*State v. Burbage*, 51 S. C. 284, 28 S. E. 937. *Tex.*—*Dent v. State*, 43 Tex. Crim. 126, 65 3. W. 627.

In *State v. Simmons*, 1 Brev. (S. C.), 6, the court held it not to be absolutely necessary to recite the conviction of the principal in an indictment against an accessory since the conviction made no part of the crime. The previous conviction of the principal, though, might guard against the mischief of several indictments for the same offense.

**Origin and Extent of Rule.**—The idea that it was necessary to allege the conviction of the principal originated in the old common law rule that to avoid the inconsistency of the subsequent acquittal of the principal, the accessory could not be arraigned until the principal was attached. Hence it was concluded that that circumstance was necessary to the conviction of the accessory, and ought therefore to be stated in the indictment. But even according to the common law, that rule did not obtain in cases where it was

impossible that the principal could be tried, as in the case of his death; and the statute of 1 Ann. St. 2, c. 9., P. L. 92 provides that the accessory, either before, or after the fact, may be put upon trial in all cases, where the principal felon shall stand mute, or challenge peremptorily more than 20 jurors, or shall be admitted to the benefit of clergy, pardoned, or otherwise delivered before attainder. In all these cases then, the allegations that the principal was convicted and executed are not only unnecessary, but would be inconsistent with the truth. *State v. Sims*, 2 Bailey L. (S. C.) 29. See also *United States v. Hartwell*, 3 Cliff. 221, 26 Fed. Cas. No. 15,318; *State v. Crank*, 2 Bailey L. (S. C.) 66, 23 Am. Dec. 117.

85. *United States v. Hartwell*, 3 Cliff. 221, 26 Fed. Cas. No. 15,318.

In *Maine*, under the statute providing that an accessory before the fact may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been convicted or shall or shall not be amenable to justice, an accessory may be indicted and convicted without reference to the conviction of the principal either in the indictment or on the trial, although the guilt of the principal must be shown in evidence. In the indictment the crime of the accessory is to be alleged in the same manner as if he alone had been concerned, followed by the averment of the acts done by him which make him an accessory before the fact. *State v. Ricker*, 29 Me. 84.

86. *Harty v. State*, 3 Blackf. (Ind.), 286; *State v. Crank*, 2 Bailey L. (S. C.) 66, 23 Am. Dec. 117; *State v. Sims*, 2 Bailey L. (S. C.) 29; *State v. Simmons*, 1 Brev. (S. C.) 6.

87. *Rawlins v. State*, 124 Ga. 31, 52 S. E. 1.



enough to include the judgment or sentence of conviction and not merely the verdict of the jury.<sup>88</sup> It is not sufficient in setting out the indictment under which the principal was convicted, to allege that "it was presented," but it should state the whole caption, including the names of all the grand jury.<sup>89</sup>

**8. Knowledge of Principal's Guilt.** — In charging one as an accessory after the fact, it must be alleged that the accused had notice of the principal's guilt.<sup>90</sup>

**9. Negating Relationship to Principal.** — Where a defendant is indicted as an accessory under a statute, which in the enacting clause exempts persons from liability who are within a certain degree of relationship to the principal offender, the indictment must allege that the defendant does not come within the exempting clause of the statute.<sup>91</sup> But where a defendant is charged as an accessory under a statute exempting from liability persons within a certain degree of relationship to the principal offender if the exception is within a separate section of the statute, or in a proviso or exception distinct from the enacting clause, it has always been esteemed a matter of defense and it need not

88. *Doughtrey v. State*, 46 Fla. 109, 35 So. 397, 110 Am. St. Rep. 84.

Sufficient to State the Fact of Conviction Without Stating the Sentence. — *United States v. Hartwell*, 3 Cliff. 221, 26 Fed. Cas. No. 15,318.

89. *The Queen v. Butterfield*. 1 Cox C. C. (Eng.) 39.

90. Cal. — *Ex parte Goldman* (Cal. App.) 88 Pac. 819. Ia. — *State v. Empey*, 79 Iowa 460, 44 N. W. 707. Ky. — *Tully v. Com.*, 11 Bush 154. R. I. — *State v. Davis*, 14 R. I. 281, quoting with approval, 1 Arch. Cr. Pr. & Pl. 8th ed. 17, N. 2; 75, 76. Eng. — *Rex v. Burridge*, 2 M. & Rob. 296.

**Approved Form.** — In an indictment charging one as an accessory after the fact, and another as principal to the breaking and entering of a dwelling house, an averment that the accessory knew that the principal had committed "the crime aforesaid," is equivalent to an allegation that he knew that the principal had committed the crime fully set forth in a former part of the indictment, and is a sufficient averment of guilty knowledge. *State v. Neddo*, 92 Me. 71, 42 Atl. 253. In *Blakeley v. State*, 24 Tex. App. 616, 7 S. W. 233, the charging part of the indictment was as follows: "After the commission of the aforesaid offense of murder by the said Erasmus May, as aforesaid, and well knowing the said Erasmus May to have committed said offense, Steve

Blakeley, the defendant, did then and there unlawfully, wilfully, and feloniously conceal and give aid to said Erasmus May, in order that he (the said Erasmus May) might evade an arrest and trial for said offense; and so the grand jurors aforesaid, upon their oaths aforesaid, do say that he (the said Steve Blakeley) did then and there become and make himself an accessory to the murder and killing of the said Derush Daffin by the said Erasmus May, in the manner and form as aforesaid, contrary," etc., and it was held sufficient.

91. *State v. Butler*, 17 Vt. 145.

**Approved Form.** — Where an accessory after the fact and a principal are jointly indicted for the breaking and entering of a dwelling house, if the indictment alleges "that J. N. of W. in said county of K. on said second day of September in the year of our Lord Eighteen Hundred and Ninety-seven, at W. aforesaid in the county of K. aforesaid, said J. N. not standing in the relation of husband or wife or parent or child to the said W. have," etc. This is a sufficient allegation that the accessory did not stand in such relation at the time stated immediately preceding such averment. It could by no possible construction refer to any other time. *State v. Neddo*, 92 Me. 71, 42 Atl. 253.

be alleged in the indictment that the defendant comes within the exception of the statute.<sup>92</sup>

**D. JOINDER OF COUNTS. — 1. Charging Accused as Principal and Accessory.**—If it is doubtful whether the evidence will show that an accused was a principal or an accessory it is permissible to charge him as principal and also as an accessory in different counts in the same indictment,<sup>93</sup> unless certain accessorial acts are made, by statute, a substantive offense.<sup>94</sup>

Where two or more are jointly indicted the same rule obtains. A and B may be charged in the same indictment; A as principal and B as accessory in one count, and B as principal and A as accessory in another.<sup>95</sup> Or A and B may both be charged as principals in one

92. *State v. Smith*, 24 Tex. 285; *State v. Butler*, 17 Vt. 145. See *State v. Miller*, 182 Mo. 370, 81 S. W. 867; *State v. Reed*, 85 Mo. 194.

**Statute Not Applicable to One Committing Substantive Offense While Engaged in Accessorial Act.**—In Texas one section of the Criminal Code condemns the act of conveying into any jail anything useful in aiding a prisoner to escape; another defines an accessory; and another exempts from punishment the near relatives of a criminal for acting as accessories to him. It has been held that this latter section was never intended to exempt such relatives from any separate substantive crime committed by him in carrying out his designs, such as that mentioned in the first section referred to. *Peeler v. State*, 3 Tex. App. 533.

**Resisting Arrest Excepted.**—In Arkansas the statute provides that persons standing to the accused in the relation of parent, child, brother, sister, husband or wife shall not be deemed accessories after the fact, unless they resist the lawful arrest of the offender. *Edmonson v. State*, 51 Ark. 115, 10 S. W. 21.

Under the Arkansas statute, defining an accessory after the fact, a wife cannot be compelled to become an informer against her husband. A wife is not an accessory of one who participated with her husband in the commission of a crime because of the fact that she concealed such crime, if the facts within her knowledge were such that she could not inform against one without implicating the other. *Edmonson v. State*, 51 Ark. 115, 10 S. W. 21.

93. **U. S.**—*United States v. Burns*, 5 McLean 23, 24 Fed. Cas. No. 14,691. **Ark.**—*Gill v. State*, 59 Ark. 422, 27 S.

W. 598 (citing 2 Bish. Cr. Pr. 37); *Corley v. State*, 50 Ark. 305, 7 S. W. 255; *Lay v. State*, 42 Ark. 105. **Cal.**—*People v. Shepardson*, 48 Cal. 189; *People v. Valencia*, 43 Cal. 552; *People v. Davidson*, 5 Cal. 133. **Conn.**—*State v. Hamlin*, 47 Conn. 95, 36 Am. Rep. 54. **Ind.**—*Harty v. State*, 3 Blackf. 386. **Ky.**—*Puckett v. Com.*, 13 Ky. L. Rep. 466, 17 S. W. 335; *Thompson v. Com.*, 1 Met. 13. **La.**—*State v. Ardoin*, 49 La. Ann. 1145, 22 So. 620, 62 Am. St. Rep. 678, citing many Louisiana cases. **S. C.**—*State v. Burbage*, 51 S. C. 284, 23 S. E. 937. **Tenn.**—*Mitchell v. State*, 5 Coldw. 53.

And see cases cited *infra*, III, F, "Election Between Counts."

Where a defendant has been acquitted on a charge as principal in an indictment charging him in one count as principal and in another as an accessory, on a second trial he cannot be held to answer the whole indictment. *Hollister v. Com.*, 60 Pa. 103, 106.

94. Thus in Illinois where one count in an indictment charges one with the keeping of a bucket-shop and another count charges the same defendant as an accessory under the statute which makes all who shall communicate, receive or accept, or display in any manner any offer to buy or sell or any statement or quotations of prices of property with a view to any of the transactions prohibited, an accessory, the latter count should be quashed, since the part of the statute denouncing the crime of being an accessory refers to others than the principal and who in that way assists the principal in committing the offense. *Soby v. People*, 31 Ill. App. 242.

95. *People v. Valencia*, 43 Cal. 552.

count and A as principal and B as accessory in another count.<sup>94</sup>

**2. Charging Accused as Accessory Before and After.**—An indictment may charge a defendant in one count as an accessory before the fact and in another as an accessory after the fact.<sup>97</sup>

**E. REFERRING IN ONE COUNT TO ANOTHER.**—It has been held that where one of two or more defendants is charged as principal in one count, another count may charge another as accessory to the “felony aforesaid,” as set forth in the preceding count.<sup>98</sup> And if there are two offenses charged against a principal in as many counts, the term “said count” used by way of reference in another count charging an accessory will refer to the next antecedent count.<sup>99</sup>

**F. ELECTION BETWEEN COUNTS.**—**1. Charging Accused as Principal and Accessory Before.**—When two offenses are charged in an indictment or developed by the evidence, the prosecution should be required to elect on which of the charges he intends to claim a conviction as soon as he has examined the witnesses far enough to identify the transaction, and as a general rule the election should be made before the defendant offers his evidence.<sup>1</sup> But generally, where an accused is charged in separate counts as principal, and as an accessory before the fact to the same felony, the state will not be required to elect upon which count it will proceed, since each count is only a different mode of charging the same offense.<sup>2</sup>

**2. Charging Accused as Principal and as Accessory After.**—Where an accused is charged in one count as a principal and in another as

96. Ky.—*Thompson v. Com.*, 1 Met. 13. Miss.—*George v. State*, 39 Miss. 570. Ohio.—*Methard v. State*, 19 Ohio St. 363.

Where three are charged as principals in one count, and two of them as principals and the third as an accessory in a second count, this is held not to be a misjoinder of counts. *State v. Hamlin*, 47 Conn. 95, 36 Am. Rep. 54.

97. *Rex v. Blackson*, 8 C. & P. 43, 34 E. C. L. 285.

98. *Stoops v. Com.*, 7 Serg. & R. (Pa.) 491, 10 Am. Dec. 482.

But even in a jurisdiction where the distinction between principals and accessories has been abolished by statute, the rule has been laid down that a count charging one as an accessory should be as full, complete and specific as would be necessary in charging a principal, and that nothing needed should be embraced by words of reference to a preceding count in which another is charged as principal. *Territory v. Conley*, 2 Wyo. 331.

99. *Sampson v. Com.*, 5 Watts & S. (Pa.), 385.

1. See title “Indictment and Information.”

2. Ark.—*Gill v. State*, 59 Ark. 422, 27 S. W. 598; *Corley v. State*, 50 Ark. 305, 7 S. W. 255; *Lay v. State*, 42 Ark. 105. Ga.—*Williams v. State*, 69 Ga. 11. Ky.—*Puckett v. Com.*, 17 S. W. 335. La.—*State v. Ardoin*, 49 La. Ann. 1145, 22 So. 620, 62 Am. St. Rep. 678, holding the case of *State v. Sales*, 30 La. Ann. 916, easily distinguishable, or if not, then overruled by other decisions cited. N. H.—*State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831, citing 1 Chit. Cr. Law 253.

In Texas, however, when a party is charged as a principal he cannot under the Code, be convicted as an accomplice (which is an accessory before the fact in this jurisdiction), nor *vice versa*. Therefore, where an accused is charged in one count as principal and in another count as an accomplice, a motion requiring the state to elect upon which count it will proceed should be sustained in view of the rule above stated as well as because of the differences in the rules of evidence applicable to



an accessory after the fact to the same felony, the prosecution must elect upon which count it will proceed.<sup>3</sup>

**3. Charging Accused as Accessory Before and After.** — Where an accused is charged in one count of the indictment as an accessory before the fact and in another count as an accessory after the fact, to the same felony, the prosecutor cannot be called upon to elect since there may be a conviction on both counts.<sup>4</sup>

**G. DUPLICITY.** — As a rule, an indictment is bad which charges a defendant in one count as principal and as accessory,<sup>5</sup> or as an accessory before and also after the fact.<sup>6</sup> But when an accused is prosecuted under a statute enumerating a series of acts, either of which separately, or all together, may constitute the offense, all of such acts may be charged in a single count.<sup>7</sup>

**IV. ARRAIGNMENT, TRIAL AND PUNISHMENT.** — **A. JOINT ARRAIGNMENT WITH PRINCIPAL.** — In jurisdictions where an accessory jointly indicted with his principal is entitled to a separate trial, it is not necessary that they should be separately arraigned.<sup>8</sup>

**B. CHALLENGING JURORS.** — A juror is not incompetent because of the fact that he served as a juror on a prior trial of the defendant or of co-defendants, if it appears that on such former trial entirely dif-

such diverse prosecutions. *Simms v. State*, 10 Tex. App. 131.

**3.** *Reg. v. Brannon*, 14 Cox C. C. (Eng.), 394.

**4.** *Rex v. Blackson*, 8 C. & P. 43, 34 E. C. L. 285.

**5.** *La.* — *State v. Sales*, 30 La. Ann. 916, charging that accused did "assist and abet," and that he was "accessory before the fact," etc. *Neb.* — *Wendell v. State*, 46 Neb. 823, 65 N. W. 884, aiding in burning a house and hiring, causing, or procuring another to burn it. *N. Y.* — *People v. Sebring*, 35 N. Y. Supp. 237, uttering forged paper, and inducing another to commit forgery. *Tex.* — *Wandell v. State* (Tex. Crim.), 25 S. W. 27.

In *Beu v. State*, 22 Ala. 9, 58 Am. Dec. 234, it was held that an indictment charging that the defendant "did administer to" A., etc., was not double.

**6.** *State v. Hinkle*, 33 Ore. 93, 54 Pac. 155.

**7.** *U. S.* — *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. ed. 1097 (a counterfeiting case). *Cal.* — *People v. Gusti*, 113 Cal. 177, 48 Pac. 263 (an information charging that the defendant did "furnish and cause to be furnished intoxicating liquor" to an Indian, is not objectionable as charging two offenses); *People v. Gosset*, 93 Cal. 641,

29 Pac. 246; *People v. Harrold*, 84 Cal. 567, 24 Pac. 106. *Ind.* — *Rosenbarger v. State*, 154 Ind. 425, 56 N. E. 914; *Rhodes v. State*, 128 Ind. 189, 27 N. E. 866, 25 Am. Rep. 429 (an indictment charging that defendant did "introduce" and "cause to be introduced" an instrument into the womb of a pregnant woman, with intent to produce a miscarriage); *Boswell v. State*, 8 Ind. 499; *State v. Slocum*, 8 Blackf. 315. *N. J.* — *State v. Price*, 11 N. J. L. 203. *N. Y.* — *La Beau v. People*, 33 How. Pr. 66, 6 Park Cr. 371, *affirmed*, 34 N. Y. 223. *S. C.* — *State v. Houseal*, 2 Brev. 219. *Vt.* — *State v. Morton*, 27 Vt. 310, 65 Am. Dec. 201.

*United States v. Janes*, 74 Fed. 545, was a prosecution under a federal statute for mailing a newspaper containing obscene matter, and it was held that to allege that the defendant "did deposit, and cause to be deposited," etc., was not such duplicity as vitiated the indictment.

**8.** *Rawlins v. State*, 124 Ga. 31, 52 S. E. 1.

**Joint Announcement of Ready for Trial.** — On the calling of an indictment against the principal and an accessory jointly, the court may require both to answer ready or not ready for trial. In case they answer and the principal is put on trial, putting his

ferent issues were involved.<sup>9</sup> The fact that it appears on the trial of an accessory who was jointly indicted with several principals that a juror had served on the trial of a previous indictment against the same defendants, who were then indicted jointly with him as principals, is not a ground for challenge for cause, it appearing that the other trial was a different case and involved an entirely different state of facts.<sup>10</sup>

C. TIME OF TRIAL AND CONVICTION WITH REFERENCE TO PRINCIPAL'S.

**1. At Common Law.**—It is a well settled rule of the common law that an accessory cannot be put upon his trial without his express consent,<sup>11</sup> before the conviction of his principal,<sup>12</sup> even though the prin-

accessory on his trial at the same term of court after conviction of the principal, without any new requirement to announce, is not erroneous unless it appear that some cause for a continuance has happened since the first calling of the case. *Loyd v. State*, 45 Ga. 57.

9. See the title "**Jurors.**"

10. *Buck v. Com.*, 107 Pa. 486.

11. A plea of not guilty does not amount to a consent to be tried before the principal; the consent must be express. *Fla.*—*Ex parte Bowen*, 25 Fla. 214, 6 So. 65, *citing* 2 Bish. Cr. Pr. 37; 1 Bish. Cr. Law, 36, 67; 1 Chit. Cr. Law, 272. *Ind.*—*McCarty v. State*, 44 Ind. 214, 15 Am. Rep. 232. *Mass.*—*Com. v. Phillips*, 16 Mass. 423, (*citing* 1 Hale P. C. 675); *Com. v. Andrews*, 3 Mass. 126. *Tenn.*—*Whitehead v. State*, 4 Humph. 278.

12. *Cal.*—See *People v. Bearss*, 10 Cal. 68. *Fla.*—*Doughtrey v. State*, 46 Fla. 109, 35 So. 397, 110 Am. St. Rep. 84; *Ex parte Bowen*, 25 Fla. 214, 6 So. 65; *Keech v. State*, 15 Fla. 591. *Ga.*—*Edwards v. State*, 80 Ga. 127, 4 S. E. 268; *Jordan v. State*, 56 Ga. 92; *Smith v. State*, 46 Ga. 298 (*citing* Whart. Cr. Law, Vol. 1, § 135); *Simmons v. State*, 4 Ga. 465 (*citing* Fost. 309, 1 Hale 523, Hawk. b. 2, c. 29, s. 36, 4 Black. c. 40, 1 Chit. Cr. Law 266, 7). *Ind.*—*Harty v. State*, 3 Blackf. 386. *Kan.*—See *State v. Bogue*, 52 Kan. 79, 34 Pac. 410, *citing* 1 Whart., § 237; 1 Bish. New Cr. Law, § 667. *Mass.*—*Com. v. Phillips*, 16 Mass. 423; *Com. v. Andrews*, 3 Mass. 126; *Com. v. Woodward*, Thatch. Cr. Cas. 63. *N. H.*—*State v. York*, 37 N. H. 175. *N. Y.*—*Jones v. People*, 20 Hun 545, *affirmed*, 81 N. Y. 637; *Baron v. People*, 1 Park. Cr. 246. *N. C.*—*State v.*

*Duncan*, 28 N. C. 98; *State v. Chittam*, 13 N. C. 49; *State v. Groff*, 5 N. C. 270. *Ohio.*—*Brown v. State*, 18 Ohio St. 496. *Ore.*—See *State v. Steeves*, 29 Ore. 85, 43 Pac. 947. *Pa.*—*Holmes v. Com.*, 25 Pa. 221; *Stoops v. Com.*, 7 Serg. & R. 491, 10 Am. Dec. 482. *Tenn.*—*State v. Pybass*, 4 Humph. 442; *Whitehead v. State*, 4 Humph. 278. See *State v. Rogers*, 6 Baxt. 563. *Tex.*—*State v. McDaniel*, 41 Tex. 229 (*citing* Russ. on Crimes, 37); *Armstrong v. State*, 28 Tex. App. 526, 13 S. W. 864; *West v. State*, 27 Tex. App. 472, 11 S. W. 482. *Va.*—*Hatchett v. Com.*, 75 Va. 925. *Eng.*—*Reg. v. Caspar*, 9 C. & P. 289, 38 E. C. L. 124; *Reg. v. Ashmall*, 9 C. & P. 236, 38 E. C. L. 97; *Reg. v. Leddington*, 9 C. & P. 79, 38 E. C. L. 42.

**Rule Applicable to Statutory Felonies.**—The proposition is maintainable neither by reason or by authority that when the offense has been at common law, a misdemeanor, and has been by statute created a felony, and the relation of the accessory has also been constituted, that the accessory may, without his consent, be put on trial with or before his principal. Every reason which exists for the trial and conviction of the principal in a common law felony before the accessory should be put upon his trial, applies with equal force to the case of principal and accessory in a statutory felony. *State v. Pybass*, 4 Humph. (Tenn.) 442.

**Rule Not Applicable to Accessories at the Fact.**—The common law rule requiring the conviction of the principal before an accessory could be tried, did not apply to aiders and abettors present at the commission of the crime. They might be convicted,

principal is unknown,<sup>13</sup> unless they are tried together.<sup>14</sup> But in no case can an accessory be convicted in advance of the conviction of the principal.<sup>15</sup>

Where the principal has been acquitted, the accessory should be discharged,<sup>16</sup> though the principal's acquittal occurs after the accessory's conviction.<sup>17</sup>

though the chief actors or principals in the first degree had been acquitted. See *People v. Bearss*, 10 Cal. 68.

**An accessory to a suicide** was not triable at common law because the principal could not be tried, and under the statute (79, 4, c. 64, s. 9) such accessory is not triable, for that does not contemplate the trying of an accessory except where he might have been tried before. *Rex v. Russell*, 1 Moody, C. C. (Eng.) 356.

**Trial But no Conviction Before Principal's Conviction.**—In *Jones v. People*, 20 Hun (N. Y.) 545, *affirmed*, 81 N. Y. 637, it was held that while it was true that an accessory could not be convicted until after the principal's conviction, he could nevertheless be put upon trial before such conviction. In this case, the conviction of the principal occurred after the commencement of the accessory's trial and it was held that the record of such conviction was properly offered in evidence against the accessory.

**Prior Trial With Consent—Suspension of Judgment.**—When the accessory himself desires to be tried first and is so tried, upon conviction, judgment will be suspended until trial and conviction of the principal can be had. *State v. McDaniel*, 41 Tex. 229, *citing* *Russ. on Crimes*, 37.

**Arrest of Judgment.**—Where a defendant is indicted as an accessory after the fact to murder jointly with his principal, in case of a severance, the two records become distinct and upon the defendant's conviction, an arrest of judgment cannot be had on the ground that the principal was first convicted, such fact not being a matter of record but of evidence. *State v. Rogers*, 6 Baxt. (Tenn.) 563.

**Effect of Rule.**—At common law the accessory could never be arraigned before the actual attainder of the principal and the consequence was that if that was prevented by his death, his standing mute, challenging peremp-

torily above the number of jurors allowed by law, by a pardon or being admitted to the benefits of the clergy, the accessory went free. *Simmons v. State*, 4 Ga. 465, *citing* 1 Chit. Cr. Law 420; 2 Inst. 183; 4 Cro. Eliz. 541; 2 Hale 222; *Fost.* 362; *Hawk. b.*, 2, c. 29, s. 41; 4 Black., c. 323. See also *State v. Steeves*, 29 Ore. 85, 43 Pac. 947, *citing* 4 Bl. Com. 323.

13. In *Whitehead v. State*, 4 Humph. (Tenn.) 278, the court said: "It would be strange indeed to hold that an accessory cannot be tried until after the conviction of the principal, where he is known, but may be where he is not, causing thereby two uncertainties to overcome a difficulty, which one had thrown in the way."

14. *Simmons v. State*, 4 Ga. 465; *State v. Pybass*, 4 Humph. (Tenn.) 442; *Whitehead v. State*, 4 Humph. (Tenn.) 278.

15. See *State v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686.

16. U. S.—*United States v. Cram*, 4 McLean 317, 25 Fed. Cas. No. 14,888. Cal.—*People v. Bearss*, 10 Cal. 68. Ga.—*Edwards v. State*, 80 Ga. 127, 4 S. E. 268. Ia.—See *State v. Lee*, 91 Iowa 499, 60 N. W. 119. Neb.—*Ray v. State*, 13 Neb. 55, 13 N. W. 2. N. C.—*State v. Jones*, 101 N. C. 719, 8 S. E. 147; *State v. Chittum*, 13 N. C. 49. Eng.—*Sanchez's Case*, 9 Coke 117a, 77 Eng. Reprint 902; *Goff v. Byby*, Cro. Eliz. 540, 78 Eng. Reprint 789.

17. Fla.—*Bowen v. State*, 25 Fla. 645, 6 So. 459. Ga.—*Groves v. State*, 76 Ga. 808. Ind.—*McCarty v. State*, 44 Ind. 214, 15 Am. Rep. 232, where it was said that this could be done on motion.

If the term of court has passed, the subsequent acquittal of the principal cannot be legally availed of, and the only remedy is an appeal to executive clemency. *McCarty v. State*, 44 Ind. 214, 15 Am. Rep. 232.



Upon the principal's death before conviction an accessory cannot be tried without his consent.<sup>18</sup>

Upon the principal's pardon before conviction, the accessory must be discharged.<sup>19</sup> If, however, executive clemency is extended to the principal after conviction, the benefit is personal to him, and the accessory is not thereby relieved from trial and conviction.<sup>20</sup>

Where an accused is charged as accessory to several principals, the fact that some of such principals have been acquitted will not preclude a trial of the accessory.<sup>21</sup> But he cannot be tried as accessory to all of such principals without his consent.<sup>22</sup>

**2. Modern Rule.**—Under the statutes in most jurisdictions the trial and conviction of an accessory, whether indicted separately or jointly with his principal, is in no way dependent upon the principal's conviction.<sup>23</sup> Especially is this true under the provisions of many statutes making the procuring of the commission of crimes in general,<sup>24</sup>

**18. U. S.**—*Gallot v. United States*, 87 Fed. 446, 31 C. C. A. 44. **Mass.**—*Com. v. Phillips*, 16 Mass. 423. **Tex.**—*State v. McDaniel*, 41 Tex. 229; *Moore v. State*, 40 Tex. Crim. 389, 51 S. W. 1108.

**Death Not an "Escape"**—Under the Texas code an accessory can only be tried and punished before the principal "when the latter has escaped." In *State v. McDaniel*, 41 Tex. 229, it was said that it could not be contended with color of law or reason that the death of the principal is in the nature of an escape such as is contemplated by the statute.

**19. Bibitthe's Case**, 4 Coke 43b, 76 Eng. Reprint 991.

**20. Com. v. House**, 10 Pa. Super. 259.

**21. Starin v. People**, 45 N. Y. 333; *Stoops v. Com.*, 7 Serg. & R. 491, 10 Am. Dec. 482.

Formerly where one was indicted as accessory in the same crime to two or more persons, he could not have been arraigned until all the principals were convicted and attainted. See *Starin v. People*, 45 N. Y. 333, citing *Hale P. C.*, 623, c. 47.

**22. Stoops v. Com.**, 7 Serg. & R. (Pa.) 491, 10 Am. Dec. 482.

**23. Ark.**—*Smith v. State*, 37 Ark. 274. **Pa.**—*Buck v. Com.*, 107 Pa. 486 (since the act of 1860); *Com. v. Hughes*, 11 Phila. 430; *Com. v. Bradley*, 16 Pa. Super. 561. **Va.**—*Hatchett v. Com.*, 75 Va. 925.

In Tennessee the common law rule as to an accessory before the fact has

been changed by the code but not as to an accessory after the fact. An accessory before the fact may be tried before the principal's conviction. *State v. Rogers*, 6 Baxt. (Tenn.) 563, the statute specifying the punishment to be inflicted upon the accessory does not change the relation as established by the common law, between the principal and accessory, or the mode in which the prosecution shall be conducted. *Whitehead v. State*, 4 Humph. (Tenn.) 278.

Under the Utah statute an accessory after the fact cannot be jointly tried with his principal. *People v. Chadwick*, 7 Utah 134, 25 Pac. 737.

**24. Fla.**—*Ex parte Bowen*, 25 Fla. 214, 6 So. 65. **Ga.**—*Stone v. State*, 118 Ga. 705, 45 S. E. 630, 98 Am. St. Rep. 145. **Ia.**—*State v. Lee*, 91 Iowa 499, 60 N. W. 119. **Ohio.**—*Noland v. State*, 19 Ohio 131.

The language of the Maine statute providing for the indictment and conviction of the accessory before the fact without reference to the conviction of the principal shows that it was the meaning of the legislature that the two offenses of principal and accessory should still continue distinct. The accessory can be indicted and convicted of a "substantive felony" whether the principal has or has not been convicted, clearly preserving the difference between the two. By the modification of the common law in these provisions, more effectual modes for the prosecution and punishment of accessories to felonies before the fact,

or of a particular crime.<sup>25</sup> a substantive offense, and under statutes abrogating the common law distinction between principals and accessories.<sup>26</sup>

Under various statutes, it has been held that the accessory may be tried and convicted, notwithstanding the fact that the principal has never been apprehended,<sup>27</sup> or indicted,<sup>28</sup> or tried,<sup>29</sup> or that he has died

was intended. The change has the tendency to prevent the delays attending the trial and escape of accessories, arising from the failure to bring the principals to trial. The history of legislation upon this subject conclusively shows that such was the purpose. The statute in England (7 Geo. 4, c. 64, §9) commences with the words, "and for the more effectual prosecution of accessories before the fact to felony, be it enacted," etc. *State v. Ricker*, 29 Me. 84.

25. *Stone v. State*, 118 Ga. 705, 45 S. E. 630, 98 Am. St. Rep. 145 (subornation of perjury); *Goins v. State*, 46 Ohio St. 287, 21 N. E. 476 (accessory to arson).

Under the Ohio statute, the crime of advising, aiding or participating in an embezzlement by a public officer is made a distinct and substantial offense, and the party charged with such offense may be put upon his trial and convicted before the conviction of the embezzling officer. *Brown v. State*, 18 Ohio St. 496.

26. Cal.—*People v. Bearss*, 10 Cal. 68. Ia.—*State v. Smith*, 100 Iowa 1, 69 N. W. 269. Kan.—*State v. Gray*, 55 Kan. 135, 39 Pac. 1050; *State v. Bogue*, 52 Kan. 79, 34 Pac. 410. Ky.—*Travis v. Com.*, 96 Ky. 77, 27 S. W. 863. Mo.—*State v. Anderson*, 89 Mo. 312, 1 S. W. 135. N. Y.—*People v. Kief*, 37 N. Y. 477. Pa.—*Com. v. Bradley*, 16 Pa. Super. 561. S. D.—*State v. Phelps*, 5 S. D. 480, 59 N. W. 471. Wash.—*State v. Gifford*, 19 Wash. 464, 53 Pac. 709; *State v. Duncan*, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888. Eng.—*Reg. v. Fisher*, 3 Cox C. C. 68; *Reg. v. Hughes*, Bell C. C. 242, 29 L. J. M. C. 71, 6 Jur. N. S. 177, 1 L. T. 450, 8 W. R. 195, 8 Cox. C. C. 278.

The evident purpose of the legislatures of the various states where statutes have been enacted abolishing the distinction between principals and ac-

cessories was to do away with those settled distinctions of the common law between principals in the first and second degree and accessories before the fact, and to permit the trial of participants in the crime independently of each other, so that each should suffer punishment for his own guilt without being dependent upon the result of the prosecutions against others. Of course if the crime be committed through the instrumentality of another, the acts of such instrument essential to establish the guilt of the person on trial must be shown. The statute does not in any manner enlarge or diminish the essential elements of criminality. It merely does away with some of the arbitrary nomenclature which has come down from English jurisprudence and has been found to be a serious stumbling block in the administration of criminal justice. *State v. Bogue*, 52 Kan. 79, 34 Pac. 410.

27. U. S.—*United States v. New*, 27 Fed. Cas. No. 15,866a. Ark.—*Smith v. State*, 37 Ark. 274. Ky.—*Com. v. Hicks*, 118 Ky. 637, 82 S. W. 265; *Begley v. Com.*, 26 Ky. L. Rep. 598, 82 S. W. 285.

But see *United States v. Crane*, 4 McLean, 317, 25 Fed. Cas. No. 14,888.

A receiver of stolen goods knowing them to have been stolen is made by the Georgia statute an accessory after the fact and it is provided that he may be tried and punished, whenever the principal thief cannot be taken, so as to be prosecuted and convicted. *Licette v. State*, 75 Ga. 253.

Under the Texas penal code a principal under arrest must be tried before an accessory. *Williams v. State*, 27 Tex. App. 466, 11 S. W. 481.

28. Ark.—*Smith v. State*, 37 Ark. 274. Ind.—*Ulmer v. State*, 14 Ind. 52. Okla.—*Pearce v. Territory*, 11 Okla. 438, 68 Pac. 504.

29. *Smith v. State*, 37 Ark. 274; *Pearce v. Territory*, 11 Okla. 438, 68 Pac. 504.

before conviction,<sup>30</sup> or has been tried and acquitted,<sup>31</sup> or pardoned after conviction.<sup>32</sup>

**D. SEPARATE TRIAL OR JOINT TRIAL WITH PRINCIPAL.**—Though an accessory is jointly indicted with his principal it appears from some cases that the former is entitled to a separate trial,<sup>33</sup> but that if he expresses no desire in regard to the manner of trial, the matter is discretionary with the court,<sup>34</sup> or prosecutor.<sup>35</sup>

**Effect of Statute Providing for Trial Before or After Principal.**—A statute providing that an accessory may be tried before or after the prin-

30. **Ark.**—*Smith v. State*, 37 Ark. 274. **Ky.**—*Com. v. Hicks*, 118 Ky. 637, 82 S. W. 265. **Tenn.**—*Self v. State*, 6 Baxt. 244.

**Accessory to Suicide May Be Tried.**—*Com. v. Hicks*, 118 Ky. 637, 82 S. W. 265.

31. **Cal.**—*People v. Bearss*, 10 Cal. 68. **Ia.**—*State v. Lee*, 91 Iowa 499, 60 N. W. 119. **Mo.**—*State v. Phillips*, 24 Mo. 475. **Okla.**—*Pearce v. Territory*, 11 Okla. 438, 68 Pac. 504. **Eng.**—*Reg. v. Hughes*, Bell C. C. 242, 29 L. J. M. C. 71, 6 Jur. (N. S.) 177, 1 L. T. 450, 8 W. R. 195, 8 Cox. C. C. 278.

**Statutes authorizing the trial and conviction of an accessory after that of the principal do not authorize the conviction of an accessory after the trial and acquittal of the principal.** **Fla.**—*Ex parte Bowen*, 25 Fla. 214, 6 So. 65. **Ind.**—*McCarthy v. State*, 44 Ind. 214, 15 Am. Rep. 232. **N. C.**—*State v. Jones*, 101 N. C. 719, 8 S. E. 147.

32. *Smith v. State*, 37 Ark. 274; *Com. v. House*, 10 Pa. Super. 259.

**Plea of Guilty Not Followed by Judgment of Conviction.**—See *Groves v. State*, 76 Ga. 808.

**In England under the act of Anne the trial of the accessory is not prevented by the principal's failure of punishment.** This statute has been copied in some of our states. *Smith v. State*, 46 Ga. 298; *Simmons v. State*, 4 Ga. 465; *Baron v. People*, 1 Park. Cr. (N. Y.) 246.

**Under the statute of Victoria, an accessory may be tried before his principal.** *Reg. v. Hansill*, 3 Cox C. C. (Eng.) 597, construing 11 and 12 Vict. c. 46, s. 1 & 2.

33. *Rawlins v. State*, 124 Ga. 31, 52 S. E. 1; *Sampson v. Com.*, 5 Watts & S. (Pa.) 385.

**Where they voluntarily appear and plead and go to trial jointly, the finding is conclusive upon them.** *Sampson v. Com.*, 5 Watts & S. (Pa.) 385.

**The general rule of the common law is that an accessory may be tried separately or jointly with his principal, when the two are jointly indicted.** **U. S.**—*United States v. Hartwell*, 3 Cliff. 221, 26 Fed. Cas. No. 15,318. **Ky.**—*Com. v. Hicks*, 118 Ky. 637, 82 S. W. 265. **N. Y.**—*Baron v. People*, 1 Park. Cr. 246. **Eng.**—*Reg. v. Fisher*, 3 Cox C. C. 68.

**The regular course for the prosecuting officer where the indictment includes the principal and the accessory, and they are tried together, is to introduce all his substantive testimony against all the several parties on trial before they are required to state their defense, as in other cases where more than one defendant is on trial at the same time.** Perfect protection is afforded to all concerned, in that state of the case, as well to the principal and accessory as to the government by the instructions of the court to the jury. They are instructed to consider the case of the principal defendant in the first place, and if they find him not guilty, then it is their duty also to acquit the accessory, but that if they find the principal defendant guilty, they must then proceed to examine the charge against the accessory, and determine from the evidence whether the charge against him is also sustained. *United States v. Hartwell*, 3 Cliff. 221, 26 Fed. Cas. No. 15,318. To like effect see *Simmons v. State*, 4 Ga. 465.

34. *Simmons v. State*, 4 Ga. 465; *Sampson v. Com.*, 5 Watts & S. (Pa.) 385.

35. *State v. Calvin*, Charl. (Ga.) 151; *Allen v. State*, 10 Ohio St. 288.



cipal does not change the common law rule that they may be tried together.<sup>36</sup>

If tried separately, the trial of the principal must precede that of the accessory.<sup>37</sup>

In Florida it is expressly required by law that the accessory before the fact shall be tried, either at the same time with the principal, or after the conviction of the principal, unless the accused be indicted for a "substantive felony."<sup>38</sup>

E. BURDEN OF PROOF. — Under the common law, in the prosecution of an accessory, the burden is upon the state to prove the guilt of the principal if alleged as well as that of the defendant, whether the accused is charged as an accessory before,<sup>39</sup> or after the fact.<sup>40</sup> Where a principal and accessory are jointly indicted, but tried separately, the record of conviction of the former is *prima facie* evidence of his guilt on the latter's trial, and the burden is upon the accessory on trial to show not merely that it is questionable whether the principal ought to have been convicted, but that he clearly ought not to have been convicted.<sup>41</sup>

F. ORDER OF PROOF. — COURT'S DISCRETION. — It is not error to allow facts to be shown on the trial of an accessory tending to prove the guilt of the principal, although the record shows the conviction of the principal has been admitted in evidence, since the question as to the order of proof is in the discretion of the court. The question of the principal's guilt of the offense charged is not entirely put at rest as against an accessory by the introduction in evidence of the record of the principal's conviction since it is open to the accessory to controvert the propriety of the conviction of the principal.<sup>42</sup>

G. INSTRUCTIONS TO JURIES. — Where an accused is charged as an accessory or as principal, and the evidence shows the commission of accessorial acts, he has a right to have the jury charged as to what constitutes such acts,<sup>43</sup> though a special instruction is unnecessary where the court in a general charge has applied the law directly to

36. *State v. York*, 37 N. H. 175.

37. *United States v. Hartwell*, 3 Cliff. 221, 26 Fed. Cas. No. 15,318; *Baron v. People*, 1 Park. Cr. (N. Y.) 246.

38. *Keech v. State*, 15 Fla. 591, where the record failed to show that the principal had been tried.

39. Fla. — *Bowen v. State*, 25 Fla. 645, 6 So. 459. Ga. — *Rawlins v. State*, 124 Ga. 31, 52 S. E. 1; *Brooks v. State*, 103 Ga. 50, 29 S. E. 485. Ky. — *Begley v. Com.*, 26 Ky. L. Rep. 598, 82 S. W. 285. Miss. — *Lynes v. State*, 36 Miss. 617. Tenn. — *Self v. State*, 6 Baxt. 244. Tex. — *Simms v. State*, 10 Tex. App. 131. Wis. — *Ogden v. State*, 12 Wis. 592.

40. It is a familiar rule of the law

of pleading that a party is held to prove all the material allegations and even immaterial ones, unless they be wholly impertinent and irrelevant to the cause, and so where an indictment charges a defendant with the offense of being an accessory after the fact to a larceny committed by one especially named, it is necessary to prove that the larceny was committed by that individual. *Simmons v. State*, 4 Ga. 465.

41. *Com. v. Knapp*, 10 Pick. (Mass.) 477, 20 Am. Dec. 534.

42. *Levy v. People*, 80 N. Y. 327.

43. Ala. — *Singleton v. State*, 17 So. 327. Mo. — *State v. Taylor*, 134 Mo. 109, 35 S. W. 92; *State v. Gooch*, 105 Mo. 392, 16 S. W. 892. Tex. — *Wood v.*

the facts.<sup>44</sup> And where the question as to whether one was an accomplice in a murder is submitted to the jury as a mixed question of law and fact, under appropriate instructions, their determination of the question is final.<sup>45</sup>

**II. CONVICTION. — AS TO WHAT OFFENSE. —** An accused may be convicted as an accessory to a lower grade of offense than that with which he is charged.<sup>46</sup> But an accused can only be convicted of aiding and abetting such persons as are charged as principals.<sup>47</sup> And the accessory may be convicted of a higher degree of offense than the principal was convicted of.<sup>48</sup>

**General Verdict Applied to Charge Sustained by Proof. —** Where an indictment contains three counts, one charging the defendant as a principal, the second charging him as an accomplice to another person named, and the third charging him as an accomplice to the murder committed by some person, to the grand jurors unknown, and there is

State, 28 Tex. App. 14, 11 S. W. 678.

44. *Dent v. State*, 43 Tex. Crim. 126, 65 S. W. 627.

45. *Melton v. State*, 43 Ark. 367; *Rex v. Greenacre*, 8 C. & P. 35, 34 E. C. L. 280.

46. Although a defendant is charged in an indictment as an accessory to the murder after the fact, he may be convicted of being an accessory after the fact of the crime of manslaughter. *State v. Burbage*, 51 S. C. 284, 28 S. E. 937; *Rex v. Greenacre*, 8 C. & P. 35, 34 E. C. L. 280. And since a defendant may be convicted of a lesser offense than that with which he is charged, if a defendant is charged as being an accessory before the fact in a larceny of goods of more than a certain value, a verdict finding him guilty of a misdemeanor because the goods were of less value than that stated in the indictment is proper. *Groves v. State*, 76 Ga. 808.

**Instruction. —** Where punishment of an accessory is governed by that affixed to the crime committed by the principal offender (being the lowest penalty to which the principal is liable), if there be lesser offenses contained in the one charged and the evidence requires it, an instruction upon these degrees must be given. *Poston v. State*, 12 Tex. App. 408.

47. If an indictment by a specific allegation charges one of the defendants with aiding or abetting another person named in the commission of the offense or his co-defendant, it may well

be conceded that a conviction could not be had upon the evidence that he aided or abetted some third person. *State v. Berger*, 121 Iowa 581, 96 N. W. 1094.

**Under the New York Penal Code**, robbery in the first degree is defined as robbery committed by a person aided by an accomplice actually present, and where two persons are alleged to have committed a crime, each as principal and as the accomplice of the other, if one is acquitted, judgment entered upon a verdict finding the other guilty as charged must be set aside, since if the evidence is insufficient to convict one, it is insufficient as well to convict the other. *People v. Munroe*, 190 N. Y. 435, 83 N. E. 476, reversing *People v. Munroe*, 119 App. Div. 704, 104 N. Y. Supp. 675.

48. **Kan.**—*State v. Gray*, 55 Kan. 135, 39 Pac. 1050; *State v. Patterson*, 52 Kan. 335, 34 Pac. 784. **Ohio.**—*Goins v. State*, 46 Ohio St. 457, 21 N. E. 476. **S. C.**—*State v. Burbage*, 51 S. C. 284, 28 S. E. 937. **Tex.**—But see *Dent v. State*, 43 Tex. Crim. 126, 65 S. W. 627.

In *State v. Gray*, 55 Kan. 135, 39 Pac. 1050, the court remarked that many cases might be imagined where the elements of deliberation and premeditation, and even of malice, might be absent from the mind of the actual perpetrator of the deed, yet present in the most ample degree in that of the one who planned, counseled, abetted and procured the commission of a murder.

a general verdict of guilty without stating upon which count the verdict is based, this is sufficient and the verdict can be applied to the count sustained by the proof.<sup>49</sup>

I. SENTENCE AND PUNISHMENT. — By the common law a greater punishment could not be imposed upon an accessory before the fact than was meted out to the principal.<sup>50</sup>

Under the statutes of some states accessories before the fact are punishable as their principals.<sup>51</sup> In at least one state the accessory is punishable as the principal in the first degree, not as his individual principal would be.<sup>52</sup>

Statutes abrogating the distinction between principals and accessories usually provide that one who would have been an accessory before the fact at common law shall receive the same punishment as his principal.<sup>53</sup>

Accessories after the fact under the common law and some of the earlier statutes were subject to the same punishment as principals;<sup>54</sup>

49. *Isaacs v. State*, 36 Tex. Crim. 505, 38 S. W. 40.

50. *Nuthill v. State*, 11 Humph. (Tenn.) 247.

In Tennessee the judgment of the law upon the grade of homicide or murder in the first degree is death both as to the principal and the accessory before the fact, but by a statute it is enacted that where any person is convicted of murder in the first degree and the jury shall find mitigating circumstances in the case the punishment shall be commuted to imprisonment for life. Where a principal to a murder is sentenced to imprisonment for life, the verdict showing mitigating circumstances, if an accessory is tried subsequently, a judgment sentencing him to imprisonment for life is proper, though the jury does not find mitigating circumstances, there being no statute abrogating the common law rule that a greater punishment ought not to be meted out to an accessory than to a principal. *Nuthill v. State*, 11 Humph. (Tenn.) 247.

51. Ark. — *Williams v. State*, 41 Ark. 173. Ga. — *Anderson v. State*, 63 Ga. 675. La. — *State v. Hunter*, 8 So. 624. Va. — *Hatchett v. Com.*, 75 Va. 925.

The court in the case of *Anderson v. State*, 63 Ga. 675, said: "This may mean that the sentence of the principal, in case of his conviction, shall be the exact measure of that pronounced upon the accessory, but the better construction probably is, that the latter shall not exceed what the former might have been if the court had seen proper

to inflict the maximum of the law. At all events, where, as in this case, the direct penalty put upon the accessory is the same as that put upon the principal, and the difference is only in the amount of the money alternative, the pecuniary commutation, we think there is no departure from the statute."

52. *Loughridge v. State*, 6 Mo. 594.

In Kentucky aiders and abettors in the commission of certain offenses are by the statute subject to a fine and imprisonment or both and not to the same punishment as the principal. *Bland v. Com.*, 10 Bush (Ky.) 622.

In Nebraska it is held that a statute declaring that any person who procures another to commit a felony shall be punished by imprisonment in the penitentiary applies to acts made felonies by subsequent legislation. *Lamb v. State*, 69 Neb. 212, 95 N. W. 1050.

53. Ala. — *Griffith v. State*, 90 Ala. 583, 8 So. 812. Cal. — *People v. Davidson*, 5 Cal. 133. Ill. — *Brennan v. People*, 15 Ill. 511. Ia. — *State v. Empey*, 79 Iowa 460, 44 N. W. 707; *Bonsell v. United States*, 1 Greene 111. Ky. — *Stricklin v. Com.*, 83 Ky. 566.

And see also cases cited *supra*, III, B, 1, b, (I), (A.)

54. 4 Bl. Com. 39.

In Tennessee by an early statute accessories after the fact to felonies of certain grades are punishable as principals. *Long v. State*, 1 Swan (Tenn.) 287. In this case the accused was charged as accessory after the fact to the crime of obtaining goods by false pretenses.



but by the later statutes, a lighter degree of punishment is usually provided for.<sup>55</sup>

**J. CONTINUANCES.** — **Grounds.** — It is not a ground for a continuance that the principal, though convicted, intends to move for a new trial.<sup>56</sup>

**V. VARIANCE.** — Under modern statutes abrogating the distinction between principals and accessories, there is no variance between the allegations of an indictment charging an accused directly with the commission of a felony as principal, and evidence showing that he procured the crime to be committed.<sup>57</sup>

**VI. DEFENSES.** — Where it is necessary to show the principal's guilt in order to convict an accessory, though the principal has been

55. *People v. Gassaway*, 28 Cal. 404. *Reynolds v. People*, 83 Ill. 479, 25 Am. Rep. 410.

In *Kentucky* an accessory after the fact to murder may, under the statute, be punished by fine and imprisonment, at the discretion of the jury. *Tully v. Com.*, 13 Bush (Ky.) 142.

56. *Loyd v. State*, 45 Ga. 57.

**Alibi.** — An application for a continuance to enable the defendant to prove an alibi is properly overruled, since an accomplice to a crime need not be personally present at its commission. *Dent v. State*, 43 Tex. Crim. 126, 65 S. W. 627.

57. *Coates v. People*, 72 Ill. 303; *State v. Whitman*, 103 Minn. 92, 114 N. W. 363.

Thus there is no variance between the indictment and the proof where the former charges a defendant with stealing a certain chattel and the latter shows that the defendant was found guilty of procuring, aiding and abetting another in the commission of the offense. *Bonsell v. United States*, 1 Greene (Iowa) 111.

And there is no fatal variance between the indictment and the proof, where the charge is that the defendant did unlawfully keep and set up a house of ill fame for purposes of prostitution, and the evidence merely tends to establish that defendant owned the premises and received rental therefor from a woman who used the place for purposes of prostitution. *Rosencranz v. United States*, 155 Fed. 38.

In *State v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686, where the in-

formation alleged merely that the defendant held and discharged the gun by which the victim was killed, it was held that proof of counseling and directing on the part of the defendant was admissible and that there was no variance.

But in *State v. Gifford*, 19 Wash. 464, 53 Pac. 709, which was a prosecution for a statutory rape, it was held that where the information charges the defendant with committing the crime upon the female by having carnal knowledge of her and the evidence shows that the defendant acted as a procurer to others to perpetrate the act constituting the offense, it was a variance in view of the constitution of the state, providing that in a criminal prosecution, the accused shall have a right to demand the nature and cause of the accusation against him and the code providing that the act or omission charged as a crime must be clearly and distinctly set forth in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended. The court said: "For the requirements of the law are that the indictment must be direct and certain as regards the particular circumstances of the crime charged, that it certainly must follow that the proof must correspond with the allegations of the indictment for it cannot be said that the indictment in this case furnished the defendant with any notice that proof would be brought charging him with procuring others to commit the crime of rape upon this prosecuting witness, and it is not the policy of the

previously convicted, it is competent for the accessory to dispute the principal's guilt and thus establish his own innocence.<sup>58</sup>

It is no bar to the prosecution of one as accessory after the fact that he has been indicted as principal and acquitted.<sup>59</sup>

**Limitations.**—The crime of an accessory before the fact to a murder is murder, and is not barred by the statute of limitations.<sup>60</sup>

**VII.—REVIEW.**—**Presumption of Presentation of Legal Proof of Principal's Conviction.**—Where the record shows a conviction of the principal before the accessory's trial, an appellate court will presume that legal proof of the principal's conviction was presented to the jury.<sup>61</sup>

law to compel persons charged with a crime, to enter upon their defense without knowledge of the character of the proof which they will be compelled to meet." *State v. Duncan*, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888, was disapproved.

58. *Simmons v. State*, 4 Ga. 465,

citing *Fost.* 365, 121, 1 *Leach* 288, *Hawk. b.* 2, c. 29, s. 49, n. 4, 4 *Black. c.* 324, 1 *Chit.* 422.

59. *Reynolds v. People*, 83 Ill. 479, 25 Am. Rep. 410.

60. *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

61. *Holmes v. Com.*, 25 Pa. 221.

# ACCORD AND SATISFACTION

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CROSS-REFERENCES:

Account and Accounting;	Novation;
Arbitration and Award;	Release;
Compromise and Settlement;	Tender.

**I. GENERAL PRINCIPLES.** — A. DEFINITIONS AND DISTINGUISHING FEATURES. — An accord and satisfaction is an executed agreement between a claimant and the party against whom a claim is made, whereby the latter undertakes to give, and the former to receive, something,<sup>1</sup> or the promise to do or to give something, in lieu of such

1. For other definitions to the same effect, see **U. S.** — *Way v. Russell*, 33 Fed. 5. **Ill.** — *Bailey v. Cowles*, 86 Ill. 333. **Ia.** — *Walston v. F. D. Calkins Co.*, 119 Iowa 150, 93 N. W. 49; *Perin v. Cathcart*, 115 Iowa 553, 89 N. W. 12. **Minn.** — *Hennessy v. St. Paul City R. Co.*, 65 Minn. 13, 67 N. W. 635. **Mo.** — *Carter v. Chicago, B. & I. R. Co.*, 136 Mo. 35, 119 S. W. 35. **N. Y.** — *Coche-nour v. Rieser*, 58 Misc. 521, 109 N. Y. Supp. 807. **Pa.** — *Hearn v. Kiehl*, 38 Pa. 147, 80 Am. Dec. 472; *Langhead v. Cope Co.*, 28 Pa. Co. Ct. 97. Other definitions are: "A settlement of a dispute or the satisfaction of a claim, by an executed agreement between the party injuring and the party injured." *Bull v. Bull*, 43 Conn. 455; *Rogers v. Spokane*, 9 Wash. 168, 37 Pac. 300. "An 'accord and satisfaction' is sometimes called in the old books, an 'accord and execution' and operates as

claim.<sup>2</sup> It is the substitution and execution of a new agreement.<sup>3</sup>

Accord and satisfaction is distinguishable from payment or performance,<sup>4</sup> and from a compromise,<sup>5</sup> or reference to arbitration.<sup>6</sup>

a bar to the right of action." Rogers v. Spokane, 9 Wash. 168, 37 Pac. 300, quoting approvingly Rap. & L. Law Dict.

"Accord is a satisfaction agreed upon between the party injuring and the party injured, which, when performed, is a bar to all actions upon this account." Aetna Ins. Co. v. Stevens, 48 Ill. 31 (citing 3 Bl. Com. 15; 1 Bac. Abr., title "Accord;" 2 Greenleaf's Ev. 28). And see Story v. Maclay, 6 Mont. 492, 13 Pac. 198.

Blackstone, to illustrate what constitutes an accord and satisfaction, says: "As if a man contract to build a house or deliver a horse, and fail in it; this is an injury for which the sufferer may have his remedy by action; but if the party injured accepts a sum of money or other thing as a satisfaction, this is a redress of that injury, and entirely takes away the action." 3 Bl. Com., c. 1, pp. 15, 16.

"Accord, executed, is satisfaction; accord, executory, is only substituting one cause of action in the room of another, which might go on to any extent." Chief Justice Eyre, in Lynn v. Bruce, 2 H. Bl. 317. See Black, Law Dict. p. 16, quoted in Rogers v. Spokane, 9 Wash. 168, 37 Pac. 300; Miller v. Electrical S. & C. Co., 46 Colo. 221, 103 Pac. 290.

2. N. Y.—Nassoiv v. Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695; Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491 (citing Kinsler v. Pope, 5 Strobb. [S. C.] 126; Pars. on Cont. 683, note; Evans v. Powis, 1 Exch. [Eng.] 601). Tex.—Fort v. Barnett, 23 Tex. 460. Vt.—Manley v. Vermont Mut. F. Ins. Co., 78 Vt. 331, 62 Atl. 1020. Eng.—Page v. Meek, 3 B. & S. 259, 113 E. C. L. 258.

"There is another and more modern and probably better application of this principle, which has been sustained by the courts, viz., that an accord and satisfaction is the substitution of another agreement between the parties in satisfaction of the former one; or probably a better definition would be where a promise to do a thing is set

up in satisfaction of the prior right or claim." Rogers v. Spokane, 9 Wash. 168, 37 Pac. 300.

3. Colo.—Heath v. Vaughn, 11 Colo. App. 384, 53 Pac. 229. See Boston, Newmarket Gold Min. Co. v. Orme, 71 Pac. 885. Mo.—Swofford Bros. Dry Goods Co. v. Goss, 65 Mo. App. 55. Mont.—Story v. Maclay, 6 Mont. 492, 13 Pac. 198 (citing Pars. on Contracts, Vol. 2, p. 281). Neb.—Bankers' Union of the World v. Favalora, 73 Neb. 427, 102 N. W. 1013. Pa.—Hosler v. Hursh, 151 Pa. 415, 25 Atl. 52. Wis.—Continental Nat. Bank v. McGeoch, 92 Wis. 286, 66 N. W. 606.

4. Ala.—Barrelli v. O'Conner, 6 Ala. 617. Mont.—Story v. Maclay, 6 Mont. 492, 13 Pac. 198. N. Y.—City Sav. Bank v. Stevens, 59 N. Y. Super. 549, 15 N. Y. Supp. 139. Eng.—Webb v. Weatherby, 1 Bing. (N. C.) 502, 27 E. C. L. 474.

"It would seem that *accord and satisfaction* was something other than *strict performance or payment*. It is doing that by the covenantor which the covenantee accepts in lieu of a performance of the terms of the covenant." Franklin Fire Ins. Co. v. Hamill, 5 Md. 170.

"It may be true, that if a debt has been satisfied, it has been paid, but the plea of payment and satisfaction are not the same. Whether a debt has been satisfied, depends upon the acceptance by the owner of the debt, of the thing offered in satisfaction." Karter v. Fields, 140 Ala. 352, 37 So. 204.

5. Where the parties come together and agree upon a settlement and put its terms in writing, such an agreement is not an accord, but a compromise. Flegal v. Hoover, 156 Pa. 276, 27 Atl. 162. And see Barelli v. O'Conner, 6 Ala. 617; Bandman v. Finn, 185 N. Y. 508, 75 N. E. 175, 12 L. R. A. (N. S.) 1134. But see Harrison v. Henderson, 67 Kan. 194, 72 Pac. 875, in which the distinction seems to have been overlooked.

6. Accord Distinguished From Reference.—An accord must appear to be advantageous to the party, otherwise it is no satisfaction. A reference to

A novation exists where an old contract is extinguished by a new one, whether or not there is a change of parties. It is not essentially different, therefore, from that form of accord where the new promise is itself accepted as satisfaction.<sup>7</sup>

**Effect.**—In the absence of duress, fraud or mistake,<sup>8</sup> an executed accord operates as a bar to an action on the original claim,<sup>9</sup> or on a collateral claim,<sup>10</sup> so far as concerns everything contemplated by the agreement.<sup>11</sup> An executory accord, however, does not constitute such a bar.<sup>12</sup>

**B. ESSENTIAL ELEMENTS.**—It is of the very essence of accord and satisfaction that it finally and definitely closes the matter covered by it. Nothing of, or pertaining to, that matter must be left unsettled or open to further question or arrangement. In law it is a new contract founded on a new consideration, and to be enforceable it must have all the essential elements of a contract, among them mutuality and certainty.<sup>13</sup>

arbitration is no more advantageous to the plaintiff than to the defendant. *Williams v. London Coml. Exch. Co.*, 29 Eng. L. & Eq. 429. And see *Chit. Pl.*, Vol. 1, p. 749.

7. **N. Y.**—See *Bandman v. Finn*, 185 N. Y. 508, 78 N. E. 175, 12 L. R. A. (N. S.) 1134 and note. **Tenn.**—*Sharp v. Fly*, 9 Bant. 4. **Vt.**—*Hard v. Burton*, 62 Vt. 314, 20 Atl. 269. **Wis.**—*Guichard v. Brande*, 57 Wis. 534, 15 N. W. 764.

8. **Colo.**—*Guldager v. Rockwell*, 14 Colo. 549, 24 Pac. 556. **Ill.**—*Reed v. Engel*, 142 Ill. App. 413, judgment affirmed, 86 N. E. 1110. **Kan.**—*Kansas City, etc. R. Co. v. Hicks*, 30 Kan. 288, 1 Pac. 396.

9. **Ga.**—*Glaze v. The Western & A. R. Co.*, 67 Ga. 761. **Kan.**—*The Kansas City, etc. R. Co. v. Hicks*, 30 Kan. 288, 1 Pac. 396. **Me.**—*Richardson v. Taylor*, 100 Me. 175, 60 Atl. 796. **Mass.**—*Alden v. Thurber*, 149 Mass. 271, 21 N. E. 312. **Mich.**—*Allison v. Connor*, 36 Mich. 283. **N. J.**—*Oliver v. Phelps*, 20 N. J. L. 180. **N. Y.**—*Harrison v. Close*, 2 Johns. 418, 2 Am. Dec. 444. **Pa.**—*Laughead v. H. C. Frick Coke Co.*, 209 Pa. 368, 58 Atl. 685; *Hosler v. Hursh*, 151 Pa. 415, 25 Atl. 52.

10. In *Breeden v. Frankford, M. etc. Ins. Co.*, 220 Mo. 327, 119 S. W. 576, an employe of a mining company recovered judgment against the latter

for injuries. The mining company paid a less sum to the plaintiff in satisfaction. An indemnity insurance company which defended the suit was present when the settlement was made and furnished the money. Such settlement was a discharge of all claims for damages the plaintiff had against the insurance company for the unlawful part it took in defending the mining company's case.

11. **U. S.**—*Scully v. Delamater*, 28 Fed. 114. **Ill.**—*St. Louis, etc. R. Co. v. Hurst*, 25 Ill. App. 98. **Iowa.**—*Walston v. F. D. Calkins Co.*, 119 Iowa 150, 93 N. W. 49. **N. Y.**—*Bloomington Min. Co. v. Brooklyn Hygienic Ice Co.*, 68 N. Y. Supp. 699, affirmed, memo., 171 N. Y. 673, 64 N. E. 1118; *Littell v. Ellison*, 17 N. Y. Supp. 294.

12. *Carter v. Chicago, B. & Q. R. Co.*, 136 Mo. App. 719, 119 S. W. 35; *Bandman v. Finn*, 185 N. Y. 508, 78 N. E. 175, 12 L. R. A. (N. S.) 1134; *Kromer v. Heim*, 75 N. Y. 574, 31 Am. Rep. 491.

13. **U. S.**—*Scully v. Delamater*, 28 Fed. 114. **Kan.**—*Matheney v. City of Eldorado*, 109 Pac. 166. **Mass.**—*Lee v. Tarplin*, 183 Mass. 52, 66 N. E. 431. **Mich.**—*Detlaff v. Ideal Mfg. Co.*, 144 Mich. 342, 108 N. W. 76. **Minn.**—*Hennessy v. St. Paul City R. Co.*, 65 Minn. 13, 67 N. W. 635. **Mo.**—*Barrett v. Kern*, 121 S. W. 774, 780. **N.**



C. NECESSITY FOR NEW AGREEMENT. — To constitute a valid accord and satisfaction, a new agreement is necessary.<sup>14</sup>

**Y.** — *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785.

A debtor after having made an offer of accord and satisfaction may consent to the creditor's receiving it on his own terms. **Conn.** — *Potter v. Douglass*, 44 Conn. 541. **Ia.** — *Perin v. Catheart*, 115 Iowa 553, 89 N. W. 12. **Vt.** — *Gassett v. Andover*, 21 Vt. 342. **Wis.** — *Sicotte v. Barber*, 83 Wis. 431, 53 N. W. 697.

**Offer.** — To constitute an accord and satisfaction, it is necessary that the money should be offered in satisfaction of the claim, and the offer accompanied with such acts and declarations as amount to a condition that, if the money is accepted, it is accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such condition. When a tender or offer is thus made, the party to whom it is made has no alternative but to refuse it, or to accept it upon such condition. If he takes it, his claim is canceled, and no protest, declaration, or denial of his, so long as the condition is insisted on, can vary the result. **Ia.** — *Perin v. Catheart*, 115 Iowa 553, 89 N. W. 12, citing many cases. **Pa.** — *Laughead v. H. C. Frick Coke Co.*, 209 Pa. 368, 58 Atl. 685, 103 Am. St. Rep. 1014, 28 Pa. Co. Ct. 97. **Vt.** — *Preston v. Grant*, 34 Vt. 201, *per* Pierpont, J.

An acceptance is essential. *Huger v. Cunningham*, 126 Ga. 684, 56 S. E. 64; *Coleman v. Larson*, 49 Wash. 321, 95 Pac. 262.

Where a plaintiff has notice of the condition upon which a payment is made and accepts it with full knowledge, this constitutes an accord and satisfaction. **Ill.** — *Canton Union Coal Co. v. Parlin & O. Co.*, 215 Ill. 244, 74 N. E. 143, 106 Am. St. Rep. 162. **N. Y.** — *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785 (annotated case); *Logan v. Davidson*, 18 App. Div. 353, 45 N. Y. Supp. 961. **Pa.** — *Laughead v. H. C. Frick Coke Co.*, 209 Pa.

368, 58 Atl. 685, 103 Am. St. Rep. 1014, 28 Pa. Co. Ct. 97, citing many cases. Thus where a claim is unliquidated and the debtor remits a check for a certain amount to the creditor, and states in his letter that such amount is paid in full satisfaction of the claim, if the creditor cashes the check, he is not entitled to recover an alleged balance. *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785. The case is not altered by the fact that the plaintiff immediately notifies the defendant of the condition upon which he receives it. *Mitterwallner v. Supreme Lodge*, 109 App. Div. 70, 95 N. Y. Supp. 1090 (holding that receiving payment in full under protest is not an accord and satisfaction); *Logan v. Davidson*, 18 App. Div. 353, 45 N. Y. Supp. 961. But see in this connection *Canton Union Coal Co. v. Parlin & O. Co.*, 215 Ill. 244, 74 N. E. 143, 106 Am. St. Rep. 162.

**Performance — Necessity For.** There is an obvious distinction between an engagement to accept a promise in satisfaction and an agreement requiring performance of the promise. If the promise itself and not its performance is accepted in satisfaction, this is a good accord and satisfaction without performance. **Ala.** — *Smith v. Elrod*, 122 Ala. 269, 24 So. 994. **Mich.** — *Burr's Damascus Tool Works v. Peninsular Tool Mfg. Co.*, 142 Mich. 417, 105 N. W. 858, citing many cases from various jurisdictions. **Pa.** — *Laughead v. Frick Coke Co.*, 209 Pa. 368, 58 Atl. 685, 103 Am. St. Rep. 1014, 28 Pa. Co. Ct. 97. **Vt.** — *Babcock v. Hawkins*, 23 Vt. 561. **Eng.** — *Cartwright v. Cooke*, 3 B. & A. 701, 23 E. C. L. 165.

*Contra*, *Frost v. Johnson*, 8 Ohio 393.

**A Compromise Is Not an Essential Element.** — *Goodrich v. Sanderson*, 35 App. Div. 546, 55 N. Y. Supp. 881.

**14. Kan.** — *Harrison v. Henderson*, 67 Kan. 194, 72 Pac. 875, 100 Am. St. Rep. 386, 67 L. R. A. 760. **Mass.** — *Lee v. Tarplin*, 183 Mass. 52, 66 N. E.

The agreement need not be express, but may be implied from circumstances.<sup>15</sup>

As to what constitutes such an agreement, no invariable rule can be laid down with any degree of certainty. Each case must be determined largely on its peculiar facts.<sup>16</sup>

D. NECESSITY AND SUFFICIENCY OF CONSIDERATION. — There can be no accord and satisfaction of a disputed claim unless something of legal value has been received in full payment thereof, to which the creditor had no previous right.<sup>17</sup>

The court will not consider the reasonableness,<sup>18</sup> or adequacy,<sup>19</sup> of the consideration.

431. **Mich.** — *Ginn v. W. C. Clark Coal Co.*, 143 Mich. 84, 106 N. W. 867, 107 N. W. 904. **Minn.** — *Hennessy v. St. Paul City R. Co.*, 65 Minn. 13, 67 N. W. 635. **Mo.** — *Barrett v. Kern*, 121 S. W. 774. **N. Y.** — *Nassoiv v. Tomlinson*, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695, reversing 75 Hun 613, 28 N. Y. Supp. 1129; *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785.

15. **Ga.** — *Garbutt Lumb. Co. v. Parsons*, 6 Ga. App. 52, 64 S. E. 291. **Ia.** — *Perin v. Cathcart*, 115 Iowa 553, 89 N. W. 12. **N. C.** — *Griffin v. Petty*, 101 N. C. 380, 7 S. E. 729.

16. *Perin v. Cathcart*, 115 Iowa 553, 89 N. W. 12.

Where a plaintiff sells defendant goods and a third party who was indebted to defendant by agreement of parties credits plaintiff with the purchase price, and charges defendant therewith, this constitutes an accord and satisfaction. *Van Allen v. Shulenburg*, 58 Misc. 136, 110 N. Y. Supp. 464.

17. **Colo.** — *Miller v. Electrical S. & C. Co.*, 46 Colo. 221, 103 Pac. 290. **Mass.** — *Gilson v. Nesson*, 198 Mass. 598, 84 N. E. 854, 17 L. R. A. (N. S.) 1208. **Minn.** — *Demeules v. Jewel Tea Co.*, 103 Minn. 150, 114 N. W. 736, 123 Am. St. Rep. 315, 14 L. R. A. (N. S.) 954; *Ness v. Minnesota & Colorado Co.*, 87 Minn. 413, 92 N. W. 333. **N. D.** — *Webster v. McLaren*, 123 N. W. 395. **Ore.** — *Sutherlin v. Bloomer*, 50 Ore. 398, 93 Pac. 135. **Va.** — *Frank v. Gump*, 104 Va. 306, 51 S. E. 358. **Eng.** — *Cumber v. Wane*, 1 Str. 426, 1 Sm. L. C. 146.

Payment of an admitted claim is no consideration for release of a distinct unliquidated demand. **Ia.** — *Walston v. F. D. Calkins Co.*, 119 Iowa 150, 93

N. W. 49, payment of conceded balance for services no consideration for release of claim for damages arising by reason of alleged wrongful discharge. **Minn.** — *Ness v. Minnesota & Colorado Co.*, 87 Minn. 413, 92 N. W. 333. **N. Y.** — *Mintzer v. Supreme Council, A. L. H.*, 41 Misc. 512, 85 N. Y. Supp. 23.

*Compare Tanner v. Merrill*, 108 Mich. 58, 65 N. W. 664, 62 Am. St. Rep. 687, 31 L. R. A. 171.

Where a party is entitled to payment in sterling money acceptance of its equivalent in dollars is not an advantage to himself or a detriment to the debtor, and therefore is not a sufficient consideration to support an accord and satisfaction. *Saunders v. Whitcomb*, 177 Mass. 457, 59 N. E. 192.

*Compare San Juan v. St. John's Gas Co.*, 195 U. S. 510, 25 Sup. Ct. 108, 49 L. ed. 299, holding that an agreement to pay in United States currency instead of Porto Rican money was binding, there having been a bona fide dispute as to which currency the claim was payable in, though the court finally construed the contract under which the claim arose as requiring payment in United States money or its equivalent in foreign currency.

Consideration as Validating Accord and Satisfaction of Liquidated Demand. See *infra*, I, E, "What Amounts to Accord and Satisfaction."

18. **Conn.** — *Bull v. Bull*, 43 Conn. 455. **S. C.** — *Ex parte Zeigler*, 83 S. C. 78, 64 S. E. 513, 916, 21 L. R. A. (N. S.) 1005. **Wis.** — *Palmer v. Yager*, 20 Wis. 97. **Eng.** — *Pinnet's Case*, 5 Co. 117a.

19. **Ala.** — *Singleton, Hunt & Co. v. Thomas*, 73 Ala. 205. **Vt.** — *Mann v. Haley*, 79 Vt. 66, 64 Atl. 449. **Wis.** — *Palmer v. Yager*, 20 Wis. 97.

**E. WHAT AMOUNTS TO ACCORD AND SATISFACTION.**—It is well settled that where a claim is unliquidated or disputed, payment and acceptance of a less sum than that claimed in satisfaction thereof operates as an accord and satisfaction.<sup>20</sup> And it is equally well established in most jurisdictions that the payment and acceptance of a part of the whole of a liquidated demand is not an accord and satisfaction;<sup>21</sup>

**20. U. S.**—United States *v.* Child & Co., 12 Wall. 232, 20 L. ed. 360. **Ark.**—Barham *v.* Bank of Delight, 126 S. W. 394. **Conn.**—Bull *v.* Bull, 43 Conn. 455. **D. C.**—Andrews *v.* Haller Wall Paper Co., 32 App. Cas. 392. **Ky.**—New York Life Ins. Co. *v.* Van Meter's Admr., 121 S. W. 438; Cunningham *v.* Standard Const. Co., 119 S. W. 765. **Mass.**—Attorney-General *v.* Supreme Council, A. L. H., 196 Mass. 151, 81 N. E. 966. **Mo.**—Arnold *v.* Railway Steel Spring Co., 126 S. W. 795; Goodloe *v.* Empson Pack. Co. (Mo. App.), 122 S. W. 771; Barrett *v.* Kern, 121 S. W. 774, 780; Publishers George Knapp & Co. *v.* Pepsin Syrup Co., 137 Mo. App. 472, 119 S. W. 38. **N. Y.**—Policastro *v.* Pitske, 120 N. Y. Supp. 743; Seybel *v.* Metz, 120 App. Div. 291, 105 N. Y. Supp. 145, *affirmed*, 194 N. Y. 589. 88 N. E. 1132. **Tex.**—Hunt *v.* Ogden (Tex. Civ. App.), 125 S. W. 386. **Wyo.**—City of Rawlins *v.* Jungquist, 16 Wyo. 403, 94 Pac. 464, 96 Pac. 144.

**Honest Dispute Only Basis for an Accord.**—In Simons *v.* American Legion of Honor, 178 N. Y. 263, 70 N. E. 776, the court said: "Now it is the settled law of this state that if a debt or claim be disputed or contingent at the time of payment, the payment when accepted of a part of the whole debt is a good satisfaction, and it matters not that there was no solid foundation for the dispute. The test in such case is: Was the dispute honest or fraudulent? If honest, it affords a basis for an accord between the parties which the law favors, the execution of which is the satisfaction."

In Cornell *v.* Taylor, 122 N. Y. Supp. 157, plaintiff furnished defendant a casket and performed certain services, all at an agreed price of \$140. Defendant sent plaintiff a money order for \$75 which plaintiff cashed. Defendant claimed that he had agreed to give \$140 for what in fact was worth but \$75. It was held that without fraud or misrepresentation on the part of

the defendant, that would not constitute a dispute of the validity of the plaintiff's claim. A dispute as to the moral obligation to pay cannot be made a basis for an accord and satisfaction. See also Beach *v.* Schroeder (Colo.), 107 Pac. 271; Atkinson *v.* Heine, 134 App. Div. 406, 119 N. Y. Supp. 122; Caravia *v.* Levy, 119 N. Y. Supp. 160.

**21. U. S.**—The City of New Orleans, 33 Fed. 683. **Ala.**—Scott & Sons *v.* Rawls, 48 So. 710. **D. C.**—Andrews *v.* Haller Wall Paper Co., 32 App. Cas. 392, citing many federal cases. **Ga.**—Stewart & Co. *v.* Stephens (Ga. App.), 67 S. E. 199. **Ill.**—Hayes *v.* Massachusetts Mut. L. Ins. Co., 125 Ill. 626, 18 N. E. 322; Martin *v.* White, 40 Ill. App. 281. **Ia.**—Bodenhofer *v.* Hogan, 120 N. W. 659. **Ky.**—New York Life Ins. Co. *v.* Van Meter's Admr., 121 S. W. 438 (where the insured had accepted less than the actual cash value fixed by his policy); Cunningham *v.* Standard Const. Co., 119 S. W. 765. **Mass.**—Gilson *v.* Nesson, 198 Mass. 598, 84 N. E. 854, 17 L. R. A. (N. S.) 1208; Tyler *v.* Odd Fellows' Mut. Relief Assn., 145 Mass. 134, 13 N. E. 360. **Minn.**—Wherley *v.* Rowe, 106 Minn. 494, 119 N. W. 222. **Mo.**—Barrett *v.* Kern, 121 S. W. 774; New Amsterdam Cas. Co. *v.* Mesker, 128 Mo. App. 183, 106 S. W. 561. **Neb.**—McKinnon *v.* Holden, 85 Neb. 406, 123 N. W. 439. See Sampson *v.* Northwestern Nat. Life Ins. Co., 85 Neb. 319, 123 N. W. 302. **N. J.**—Gussow *v.* Betheson, 68 Atl. 907. **N. Y.**—City of New York *v.* New York City R. Co., 126 App. Div. 36, 110 N. Y. Supp. 720, *affirmed*, 193 N. Y. 680, 87 N. E. 1117; Dorman *v.* Arkin, 120 N. Y. Supp. 757. **N. C.**—Mitchell *v.* Sawyer, 71 N. C. 70. **Pa.**—Martin *v.* Frantz, 127 Pa. 389, 18 Atl. 20. **W. Va.**—Nixon *v.* Kiddy, 66 S. E. 500. **Wis.**—Weidner *v.* Standard Life & Acc. Ins. Co., 130 Wis. 10, 110 N. W. 426. **Eng.**—Cumber *v.* Wane, 1 Str. 426, 1 Sm. L. C. 146.



although a contrary rule is followed in a few jurisdictions,<sup>22</sup> in some of which the matter is regulated by statutory provisions.<sup>23</sup> And perhaps universally the rule is regarded as highly technical and unsatisfactory, and everywhere the slightest variation of circumstances is seized upon to take the case out of the rule. So if the payment and acceptance of a part of a liquidated demand is sustained by any consideration whatever, however insignificant or technical, if valuable, it will be enforced.<sup>24</sup>

**Leading Case.**—*Cumber v. Wane*, 1 Str. (Eng.) 426, 1 Sm. L. C. 146, is the leading case, but the rule of the text was first announced in *Pinnel's Case*, 5 Coke (Eng.) 117a, and is thus stated by the supreme court of South Carolina which has adopted it. "The payment of a sum smaller than a liquidated debt in pursuance of an agreement, not under seal, to accept such sum in satisfaction, cannot be satisfaction of the whole. Such payment notwithstanding the agreement operates only as a payment *pro tanto*." *Parker v. Mayes* (S. C.), 67 S. E. 559; *Ex parte Zeigler*, 83 S. C. 78, 64 S. E. 513, 916, 21 L. R. A. (N. S.) 1005 (annotated case). See also *Tanner v. Merrill*, 108 Mich. 58, 65 N. W. 664.

22. Conn.—*Ford v. Hubinger*, 64 Conn. 129, 29 Atl. 129. Miss.—*Clayton v. Clark*, 74 Miss. 499, 21 So. 565, 22 So. 189, 60 Am. St. Rep. 521, 37 L. R. A. 771. N. H.—*Frye v. Hubbell*, 74 N. H. 358, 68 Atl. 325, 17 L. R. A. (N. S.) 1197.

In *Clayton v. Clark*, *supra*, Chief Justice Woods thus commented upon the rule of *Pinnel's Case*: "Pinnel pleaded payment of the lesser sum before the date of the maturity of the greater sum named in the bond, and its acceptance by his creditor, in full satisfaction; and he lost, unhappy wretch that he was—born two or three centuries too soon, and not knowing the difference betwixt legal tweedle-dum and legal tweedle-dee, because he pleaded that he paid a part of the greater original sum, and that the plaintiff accepted it in full satisfaction, and did not plead that he paid it in full satisfaction. The rule is found in *Pinnel's Case*, but it is bald *dictum*, and, as stated by Lord Blackburn in *Foakes v. Beer*, before the House of Lords (L. R. 9 App. Cas. 605), for the long period of one hundred and fifteen years after *Pinnel's Case* was decided no case is to be found 'in which the question was raised whether pay-

ment of a lesser sum could be satisfaction of a liquidated demand.' And even after the lapse of more than a century when the hoary *dictum* in 3 Coke, (*Pinnel's Case*), had by some of the English courts been thought to have ripened into authority, the authority of the *dictum* was doubted in other tribunals, and its correctness more than once denied, as Lord Blackburn vividly and overwhelmingly demonstrates."

23. Ala.—*Scott & Sons v. Rawls*, 48 So. 710; *Eufaula Nat. Bank v. Passmore*, 102 Ala. 370, 14 So. 683, accord *nudum pactum* if not in writing. Cal.—See Civ. Code § 1524; *Pacific Coast Cas. Co. v. Home Tel. & T. Co.*, 11 Cal. App. 712, 106 Pac. 262. Ga.—*Phinizz v. Bush*, 129 Ga. 479, 59 S. E. S. E. 259 (executed accord for less amount is binding); *Rogers v. Ball*, 54 Ga. 15. Me.—*Knowlton v. Black*, 102 Me. 503, 67 Atl. 563; *Weymouth v. Babcock*, 42 Me. 42. N. C.—*Drewry-Hughes Co. v. Davis*, 151 N. C. 295, 66 S. E. 139; *Petit v. Woodlief*, 115 N. C. 120, 20 S. E. 208; *Jones v. Wilson*, 104 N. C. 9, 10 S. E. 79. S. D.—*Chrystal v. Gerlach*, 125 N. W. 633. Tenn.—See *Shannon's Code*, §§ 5570, 5571. Va.—*Standard S. M. Co. v. Gunter*, 102 Va. 568, 46 S. E. 690.

24. U. S.—*Chicago etc. R. Co. v. Clark*, 178 U. S. 353, 20 Sup. Ct. 924, 44 L. ed. 1099 (rule construed strictly.) Ala.—*Webster v. Wyser*, 1 Stew. 184. Conn.—*Blinn v. Chester*, 5 Day 359. Ill.—*Donohue v. Brooks*, 143 Ill. App. 188. Ia.—*Greenlee v. Mosnat*, 116 Iowa 535, 90 N. W. 338, citing many Iowa cases. N. Y.—*Booth v. Smith*, 3 Wend. 66. Pa.—*Melroy v. Kemmerer*, 218 Pa. 381, 67 Atl. 699, 11 L. R. A. (N. S.) 1018. Tenn.—*First Nat. Bank v. Shook*, 100 Tenn. 436, 45 S. W. 338, slight consideration sufficient. Tex.—*Rotan Grocery Co. v. Noble*, 36 Tex. Civ. App. 226, 81 S. W. 586. Wis.—*Herman v. Schlesinger*, 114 Wis. 382

90 N. W. 460. **Eng.**—Curlewis v. Clark, 3 Exch. 375.

In *Jaffray v. Davis*, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710 (an annotated case), the court of appeals after reviewing the decisions, quoted the language of *Goddard v. O'Brien*, L. R. 9 Q. B. D. 37, 46 L. T. 306, 30 W. R. 549 as correctly setting forth the state of the law. There *Grove, J.*, said: "The doctrine of *Cumber v. Wane*, Str. 426, if not actually overruled, has been very much qualified. In the notes to that case in the 8th edition of *Smith's Leading Cases*, at p. 363, it is said: 'In *Sibree v. Tripp*, 15 M. & W. 26, the case of *Cumber v. Wane* was much observed upon, and the decision qualified to this extent, that a negotiable security may operate, if so given and taken, in satisfaction of a debt of greater amount; the circumstance of negotiability making it in fact a different thing and more advantageous than the original debt, which was not negotiable.' The rule cannot be better stated than it is in the same note, at p. 366: 'The general doctrine in *Cumber v. Wane*, and the reason of all the exceptions and distinctions which have been engrafted on it, may perhaps be summed up as follows, viz., that a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being nudum pactum. But, if there be any benefit, or even any legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement.' " And Judge Potter in *Jaffray v. Davis*, *supra*, proceeded: "All that is necessary to produce satisfaction of the former agreement is a sufficient consideration to support the substituted agreement. . . . Upon this distinction the cases rest, which hold that the acceptance by the creditor in discharge of the debt of a different thing from that contracted to be paid, although of much less pecuniary value or amount, is a good satisfaction, as, for example, a negotiable instrument binding the debtor and a third person for a smaller sum. *Curlewis v. Clark*, 3 Exch. 375."

**Giving Security for Payment of Smaller Sum.**—*Ariz.*—*In re Black*

*Diamond Copper Min. Co.*, 95 Pac. 117, unsecured debt settled by merger with smaller secured obligation. **Ill.**—*Kemmerer v. Kokendifer*, 65 Ill. App. 31. **N. J.**—*Fred v. Fred*, 50 Atl. 776.

**Payment in a different medium** from that stipulated for in the original contract will be considered as a sufficient consideration for the accord and satisfaction, since the substituted thing or promise may have a special value to the recipient. **U. S.**—*Missouri-American Electric Co. v. Hamilton-Brown Shoe Co.*, 165 Fed. 283, 91 C. C. A. 251. **Cal.**—*Gavin v. Annan, Lord & Co.*, 2 Cal. 494. **Pa.**—*Dimmick v. Sexton*, 125 Pa. 334, 17 Atl. 345.

*Compare* the recent cases of *Morrill v. Baggott*, 157 Ill. 240, 41 N. E. 639; *Flenor v. Flenor*, 30 Ky. L. Rep. 543, 99 S. W. 258.

**Payment of Smaller Amount Before Maturity of Obligation.**—**Md.**—*Chicora Fertilizer Co. v. Dunan*, 91 Md. 144, 46 Atl. 347, 50 L. R. A. 401. **Pa.**—*Weiss v. Marks*, 206 Pa. 513, 56 Atl. 59. **Tex.**—*Mayfield Woolen Mills Co. v. Long* (Tex. Civ. App.), 119 S. W. 908.

**Abandonment of Appeal.**—*Roberts v. Banse* (N. J.), 72 Atl. 452.

**Release in Writing.**—*Dreyfus & Co. v. Roberts*, 75 Ark. 354, 87 S. W. 641, 112 Am. St. Rep. 67, 69 L. R. A. 823.

**Release Under Seal.**—*Wood v. Bangs*, 2 Penne. (Del.) 435, 48 Atl. 189; *Jackson v. Security Mut. L. Ins. Co.*, 233 Ill. 161, 84 N. E. 198.

**Refraining From Going Into Bankruptcy.**—If a debtor contemplating bankruptcy is dissuaded from so doing by his creditor who accepts a portion of the debt in full satisfaction, the consideration is sufficient. **Ga.**—*Dawson v. Beall*, 68 Ga. 328. **Me.**—*Hinckley v. Arey*, 27 Me. 362. **Pa.**—*Melroy v. Kemmerer*, 218 Pa. 381, 67 Atl. 699, 12 L. R. A. (N. S.) 1018. **Tex.**—*Mayfield Woolen Mills Co. v. Long* (Tex. Civ. App.), 119 S. W. 908.

**Mutual Agreement of Creditors to Composition Agreement.**—**U. S.**—*Dyer v. Muhlenberg County*, 117 Fed. 586, 54 C. C. A. 172. **N. H.**—*Gage v. De Courcy*, 68 N. H. 579, 41 Atl. 183. **Pa.**—*Crawford v. Krueger*, 201 Pa. 348, 50 Atl. 931. **Wis.**—*Continental Nat. Bank v. McGeoch*, 92 Wis. 286, 66 N. W. 606.

**Payment by Third Person.**—**Ia.**—

**II. SPECIAL PLEA.** — A. IN GENERAL. — 1. Nature of Plea.

A plea of accord and satisfaction is a plea in confession and avoidance, admitting that the plaintiff once had a cause of action, but alleging that it has been discharged.<sup>25</sup>

**2. At Common Law.** — At common law in an action of debt on a specialty,<sup>26</sup> or judgment,<sup>27</sup> in covenant,<sup>28</sup> and in trespass *vi et armis*,<sup>29</sup> it was necessary to plead specially an accord and satisfaction;<sup>30</sup> but in assumpsit,<sup>31</sup> or debt on simple contract,<sup>32</sup> or in

Marshall *v.* Bullard, 114 Iowa 462, 87 N. W. 427, 54 L. R. A. 862. Mass. — Saunders *v.* Whitecomb, 177 Mass. 457, 59 N. E. 192. Pa. — Ebert *v.* Johns. 206 Pa. 395, 55 Atl. 1064.

**Payment of part of claim conceded due** as consideration for release of disputed part. Upon this proposition the authorities are in conflict. Mr. Chief Justice Fuller, in Chicago, etc. R. Co. *v.* Clark, 178 U. S. 353, 20 Sup. Ct. 924, 44 L. ed. 1099, cited many cases as authority for the proposition "that where an aggregate amount is in dispute, the payment of a specified sum conceded to be due, that is, by including certain items but excluding disputed items, on condition that the sum so paid shall be received in full satisfaction," constitutes an extinguishment of the whole. And the following cases are to the same effect: Mich. — Tanner *v.* Merrill, 108 Mich. 58, 65 N. W. 664, 62 Am. St. Rep. 687, 31 L. R. A. 171. Neb. — Treat *v.* Price, 47 Neb. 875, 66 N. W. 834. N. Y. — Ravenswood Paper Mill Co. *v.* Dix, 61 Misc. 235, 113 N. Y. Supp. 721. A contrary rule is adhered to in: Ill. — Bostrom *v.* Gibson, 111 Ill. App. 457. Ia. — Cartan *v.* Wm. Tackaberry Co., 139 Iowa 586, 117 N. W. 953. Minn. — Jordan *v.* Great Northern R. Co., 80 Minn. 405, 83 N. W. 391. Wis. — Weidner *v.* Standard Life & Acc. Ins. Co., 130 Wis. 10, 110 N. W. 246.

**Necessity for Consideration in General.** — See *supra*, I. D. "Necessity and Sufficiency of Consideration."

25. Covell *v.* Carpenter, 24 R. I. 1, 51 Atl. 425.

26. Bailey *v.* Cowles, 86 Ill. 333 (citing Chit. Pl., Vol. I, pp. 482, 485); Covell *v.* Carpenter, 24 R. I. 1, 51 Atl. 425.

Under plea of nil debit, however, in an action on a specialty, accord and

satisfaction may be proved. Bailey *v.* Cowles, 86 Ill. 333.

27. Covell *v.* Carpenter, 24 R. I. 1, 51 Atl. 425.

28. Chit. Pl., Vol. 1, pp. 486, 487; Saunders Pl. & Ev., Vol. 1, p. 23.

29. Ala. — Phillips *v.* Kelley, 29 Ala. 628. Ill. — Kenyon *v.* Sutherland, 8 Ill. 99. N. J. — Longstreet *v.* Ketcham, 1 N. J. L. 170. R. I. — Covell *v.* Carpenter, 24 R. I. 1, 51 Atl. 425. Eng. — Bird *v.* Randall, 3 Burr. 1345, 97 Eng. Reprint 866; Doe *v.* Lee, 4 Taunt. 459.

**30. Reason for Rule.** — "Such a rule is not a mere technicality. The defense brings into the case, by way of settlement of an acknowledged wrong, an independent consideration or cause of action which may be the subject of a separate suit. It should therefore appear upon the record, for the mutual protection of the parties." Covell *v.* Carpenter, 24 R. I. 1, 51 Atl. 425.

31. Ind. — Bunge *v.* Dishman, 5 Blackf. 272. See Johnston *v.* Niemeyer, 10 Ind. 350. Mass. — Baylies *v.* Pettyplace, 7 Mass. 325. N. H. — Curtis *v.* Egan, 52 N. H. 511. N. Y. — Bird *v.* Caritat, 2 Johns. 342, 3 Am. Dec. 433. Ohio. — Stewart *v.* Saybrook Twp., Wright 374; Chappell *v.* Phillips, Wright 372. W. Va. — First Nat. Bank *v.* Kimberlands, 16 W. Va. 555. Eng. — Fitch *v.* Sutton, 5 East 230, 102 Eng. Reprint 1058; Kearslake *v.* Morgan, 5 T. R. 513, 101 Eng. Reprint 289; Bird *v.* Randall, 3 Burr. 1375, 97 Eng. Reprint 866; Paramore *v.* Johnson, 1 Ld. Raym. 566, 91 Eng. Reprint 1278.

32. Page *v.* Prentice, 7 Blackf. (Ind.) 322; Chit. Pl., Vol. 1, pp. 578, 582.

**Reason for Rule.** — "At common law accord and satisfaction may be shown under the general issue in actions of contract, because, as it sets up pay-



case,<sup>33</sup> accord and satisfaction could be given in evidence under the general issue.<sup>34</sup>

Where it is allowable to show an accord and satisfaction under the general issue, that practice may be followed or the defendant may plead specially.<sup>35</sup>

**3. Under Code Procedure.**—Under modern codes and practice acts it is generally held that accord and satisfaction is an affirmative defense which is not available unless pleaded,<sup>36</sup> and so cannot be

ment, and thereby that the defendant is not in default under the contract in suit, evidence to that effect is responsive to the declaration." *Covell v. Carpenter*, 24 R. I. 1, 51 Atl. 425.

33. *City of Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271; *Fitch v. Sutton*, 5 East 230, 102 Eng. Reprint 1058; *Bird v. Randall*, 3 Burr. 1345, 97 Eng. Reprint 866; *Paramore v. Johnson*, 1 Ld. Raym. 566, 91 Eng. Reprint 1278; *Lane v. Applegate*, 1 Stark. 97, 2 E. C. L. 312; *Martin v. Thornton*, 4 Esp. (Eng.) 180. But see *Gilman v. Noyes*, 57 N. H. 627.

**Rationale.**—"Another essential difference between those cases upon torts and actions upon the case, is, that those are actions *stricti juris*; and therefore such a former recovery, release or satisfaction cannot be given in evidence, but must be *pleaded*; but an action upon the case is founded upon the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in equity, and, in effect, is so; and therefore such a former recovery, release or satisfaction need not be pleaded, but may be *given in evidence*. For whatever will, in equity and conscience according to the circumstances of the case, bar the plaintiff's recovery, may, in this action, be given in evidence by the defendant; because the plaintiff must recover upon the *justice and conscience of his case*, and upon *that only*." *Bird v. Randall*, 3 Burr. 1345, 97 Eng. Reprint 866.

34. *Berdell v. Bissell*, 6 Colo. 162; *Barnum v. Green*, 13 Colo. App. 254, 57 Pac. 757; *Martin v. Thornton*, 4 Esp. (Eng.) 180.

35. *Ala.*—*Dunham v. Ridgel*, 2 Stew. & P. 402. *Ill.*—*Gillfillan v. Farrington*, 12 Ill. App. 101. *Ind.*—*Page v. Prentice*, 7 Blackf. 322, *citing* Gould's Pl. 356 (Will's Gould, p. 500). *N. Y.*—*Bird v. Caritat*, 2 Johns. 342, 3 Am. Dec. 433. *W. Va.*—*First Nat.*

*Bank v. Kimberlands*, 16 W. Va. 555. *Eng.*—*Kearslake v. Morgan*, 5 T. R. 513, 101 Eng. Reprint 289; *Paramour v. Johnson*, 12 Mod. 376, 88 Eng. Reprint 1390; *Hayselden v. Staff*, 5 A. & E. 153, 31 E. C. L. 307.

**As to Several Pleas.**—See *infra*, IV, "Joinder of Pleas."

36. *Ala.*—*Phillips v. Kelly*, 29 Ala. 628. *Cal.*—*Coles v. Soulsby*, 21 Cal. 47. *Conn.*—*Atchison v. Atchison*, 67 Conn. 35, 34 Atl. 761, under a rule of court. *Ga.*—*Ingram v. Hilton & Dodge Lumb. Co.*, 108 Ga. 194, 33 S. E. 961. *Mass.*—*Grinnell v. Spink*, 128 Mass. 25, action on an account annexed. See also *Parker v. Lowell*, 11 Gray 353. *Can.*—*Brown v. Jones*, 17 U. C. Q. B. 50.

**In New York** evidence of accord and satisfaction is not admissible under a general denial, but must be specially pleaded, and this ruling is put upon the ground that the general denial under the code is wholly unlike the general issue at common law. *Mitterwallner v. Supreme Lodge*, 109 App. Div. 70, 95 N. Y. Supp. 1090; *Habrich v. Donohue*, 51 App. Div. 375, 64 N. Y. Supp. 604; *Niggli v. Foehry*, 83 Hun 269, 31 N. Y. Supp. 931; *Jacobs v. Day*, 5 Misc. 410, 25 N. Y. Supp. 763.

**Notice of Defense.**—**In Vermont**, by statute, accord and satisfaction is special matter of defense, and is not available unless specially pleaded, or unless, when pleading the general issue, the defendant gives notice in writing that he will give it in evidence under the general issue, and rely upon it as a defense of the action as required by the statute. *Seaver v. Wilder*, 68 Vt. 423, 35 Atl. 351.

**In England**, since the Hilary Rules, the defense must be pleaded specially. *Alexander v. Strong*, 9 M. & W. (Eng.) 733.

proved under a plea of payment,<sup>37</sup> or under a plea of set-off,<sup>38</sup> but must be specially set up in the answer as new matter, on the ground that there is no general issue, correctly speaking, under the code practice.<sup>39</sup>

**B. WHERE EVIDENCE IS INTRODUCED BY PLAINTIFF.**—It seems that it is not necessary, according to the weight of authority, to plead an accord and satisfaction, in order that it may be availed of as a defense, if plaintiff, as a part of his case, has established facts showing the existence of the defense. If there is evidence before the court of an accord and satisfaction, the court is bound to decide the case accordingly, though it is not pleaded.<sup>40</sup>

37. *Ala.*—*Smith v. Elrod*, 122 *Ala.* 269, 24 *So.* 994. *Ark.*—*Owens v. Chandler*, 16 *Ark.* 651. *Colo.*—*Barnum v. Green*, 13 *Colo. App.* 254, 57 *Pac.* 757. *Conn.*—*Kisham v. Hazard*, 1 *Root* 75. *Ky.*—*Hamilton v. Coons*, 5 *Dana* 317. *Mass.*—*Grinnell v. Spink*, 128 *Mass.* 25 (action on an account annexed); *Howe v. Mackay*, 5 *Pick.* 44. *Mo.*—*Freiermuth v. McKee*, 86 *Mo. App.* 64.

But see *Henderson v. Moore*, 5 *Cranch* (U. S.) 11, 3 *L. ed.* 22, and *First Nat. Bank v. Kimberlands*, 16 *W. Va.* 555.

**Accord and satisfaction, partial or total**, is not admissible under an issue as to entire payment. *Church v. Rhodes*, 1 *Root* (Conn.) 141; *Hamilton v. Coons*, 5 *Dana* (Ky.) 317.

38. *McCreary v. McCreary*, 5 *Gill & J.* (Md.) 147.

39. *Cal.*—*Sweet v. Burdett*, 40 *Cal.* 97; *Coles v. Soulsby*, 27 *Cal.* 47, *overruling* *McLarren v. Spalding*, 2 *Cal.* 510, and *Gavin v. Annan, Lord & Co.*, 2 *Cal.* 494. *Colo.*—*Harvey v. Denver & R. G. R. Co.*, 44 *Colo.* 258, 99 *Pac.* 31, 130 *Am. St. Rep.* 120; *Berdell v. Bissell*, 6 *Colo.* 162; *Barnum v. Green*, 13 *Colo. App.* 254, 57 *Pac.* 757. *Conn.*—*Fogil v. Boody*, 76 *Conn.* 194, 56 *Atl.* 526; *Atchison v. Atchison*, 67 *Conn.* 35, 34 *Atl.* 761, under *Rules of Practice*, 58 *Conn.* 566, § 6, *citing* *Atwood v. Welton*, 57 *Conn.* 514, 18 *Atl.* 322, as stating the principles upon which this requirement rests. *D. C.*—*Metropolitan R. Co. v. Snashall*, 3 *App. Cas.* 420. *Ga.*—*Ingram v. Hilton & D. Lumb. Co.*, 108 *Ga.* 194, 33 *S. E.* 961, under the statute abolishing the general issue and requiring each paragraph of the complaint to be distinctly answered. *Ill.*—*Kenyon v. Sutherland*, 8 *Ill.* 99. *Ia.*—*Taylor v. Frink & Co.*, 2 *Iowa* 54. *Md.*—*McCreary v. McCreary*, 5

*Gill & J.* 147. *Mass.*—*Grinnell v. Spink*, 128 *Mass.* 25. But see *Baylies v. Pettyplace*, 7 *Mass.* 325. *Mo.*—*Combs v. Smith*, 78 *Mo.* 32; *Freiermuth v. McKee*, 86 *Mo. App.* 64. *Neb.*—*Barker v. Wheeler*, 60 *Neb.* 470, 83 *N. W.* 678, 83 *Am. St. Rep.* 541. *N. H.*—*Gilman v. Noyes*, 57 *N. H.* 627. *N. J.*—*Longstreet v. Ketcham*, 1 *N. J. L.* 170. *N. Y.*—*Habrich v. Donahue*, 51 *App. Div.* 375, 64 *N. Y. Supp.* 604; *Niggli v. Foehry*, 83 *Hun* 269, 31 *N. Y. Supp.* 931; *Jacobs v. Day*, 5 *Misc.* 410, 25 *N. Y. Supp.* 763. But see *Looby v. West Troy*, 24 *Hun* 78. *R. I.*—*Covell v. Carpenter*, 24 *R. I.* 1, 51 *Atl.* 425. *Tenn.*—*Gossett v. Southern R. Co.*, 115 *Tenn.* 376, 89 *S. W.* 737, 112 *Am. St. Rep.* 846, 1 *L. R. A.* (N. S.) 97. *Eng.*—*Alexander v. Strong*, 9 *M. & W.* 733, under *Hilary Rules*,

*Mr. Justice Field*, writing the opinion in *Coles v. Soulsby*, 21 *Cal.* 47, 51, said: "New matter must be specially pleaded; and whatever admits that a cause of action, as stated in the complaint, once existed, but at the same time avoids it—that is, shows that it has ceased to exist—is new matter. It is that matter which the defendant must affirmatively establish. Such are release, and accord and satisfaction. Defenses of this character must be distinctly set up in the answer, or evidence to establish them will be inadmissible."

**Error in admitting evidence without a special plea is harmless** where it appears that the jury found that there was no accord and satisfaction. *Covell v. Carpenter*, 24 *R. I.* 1, 51 *Atl.* 425.

40. *Looby v. West Troy*, 24 *Hun* (N. Y.) 78; *Covell v. Carpenter*, 24 *R. I.* 1, 51 *Atl.* 425, at common law.

In *Brett v. Society of Brooklyn*, 63 *Barb.* (N. Y.) 610, the ruling was based

**C. WAIVER OF RIGHT TO INSIST UPON SPECIAL PLEA.**—Where the defendant introduces evidence of an accord and satisfaction without specially pleading it, the plaintiff may waive his right to have the same specially pleaded by failing to object to the introduction of the evidence.<sup>41</sup>

**D. PLEA OF AGREEMENT MADE AFTER SUIT BROUGHT.**—An accord and satisfaction alleged to have been entered into after the commencement of the suit and issue formed must be specially pleaded *purs darrein continuance*,<sup>42</sup> and should not be considered on motion.<sup>43</sup>

In such a case it must be averred that the accord and satisfaction embraced the items of costs and damages sustained.<sup>44</sup>

It is within the court's discretion to refuse to allow a plea of accord and satisfaction after the next continuance after the facts or events have occurred and become known.<sup>45</sup>

**Amendments.**—A plea of accord and satisfaction pleaded *purs darrein continuance* may be amended at any time before trial and entitled as of the same term as the original plea.<sup>46</sup>

on the ground that defendant's pleadings must be deemed to have been amended so as to include this evidence. (*Contra*, *Combs v. Smith*, 78 Mo. 32.

41. **Colo.**—*Berdell v. Bissell*, 6 Colo. 162. **Mo.**—*Freiermuth v. McKee*, 86 Mo. App. 64. **N. Y.**—*Looby v. West Troy*, 24 Hun 78; *Bret v. First Universalist Society*, 63 Barb. 610. **R. I.**—*Covell v. Carpenter*, 24 R. I. 1, 51 Atl. 425.

But see *contra*, *Smith v. Owens*, 21 Cal. 11.

As illustrating the general rule, in a personal injury case, it is error to refuse to admit in evidence a receipt signed by the plaintiff as showing an accord and satisfaction, when there is no objection to admitting the receipt on the ground that the defendant has not pleaded a discharge, and the trial court has held that the plea could not be amended so as to make the receipt admissible to show such discharge. *Donaldson v. Carmichael*, 102 Ga. 40, 29 S. E. 135.

42. **U. S.**—*Good v. Davis*, Hempst. 16, 10 Fed. Cas. No. 5,530a, citing 1 Salk 168, 2 Str. 1105, 1 Chit. Pl. 697, 5 Taunt. 333. **Ala.**—*Evans v. C., S. & M. R. Co.*, 78 Ala. 341. **Ill.**—*City of Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271; *Washington v. Louisville & N. R. Co.*, 136 Ill. 49, 26 N. E. 53; **Ia.**—*Taylor v. Frink & Co.*, 2 Iowa 84. **Miss.**—*Heirn v. Carron*, 11 Smed. & M. 361, 49 Am. Dec. 65. **N. Y.**—*Wat-*

*kinson v. Inglesby*, 5 Johns. 386. **Eng.**—*Francis v. Crywell*, 5 B. & Ald. 886, 7 E. C. L. 289.

In case it has been held that an exception to the rule of the text arises. Here the defendant may introduce evidence of an accord and satisfaction entered into after the bringing of the suit under the general issue. *City of Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271.

**Form in trespass**, where one defendant in an action against two pleads accord and satisfaction by the other after action brought. Chit. Pl., Vol. 3, p. 1062.

**Necessity for Verification.**—See *infra*, III, 3, I.

43. *Taylor v. Frink & Co.*, 2 Iowa 84. But see *Washington v. Louisville & N. R. Co.*, 136 Ill. 49, 26 N. E. 653, holding that where the parties seek not only to settle the amount of the claim but also to have judgment entered in accordance therewith, an accord and satisfaction may be considered on motion.

44. *Ash v. Pouppeville*, L. R. 3 Q. B. 86; *Goodwin v. Cremer*, 18 Q. B. 757, 83 E. C. L. 756.

45. *Tilton v. Morgaridge*, 12 Ohio St. 98. But see *Robinson v. Burkell*, 3 Ill. 278, holding that an accord and satisfaction relating to matter arising after a continuance may be pleaded at any time before trial.

46. *Webster v. Wyser*, 1 Stew. (Ala.) 184.



After an appeal has been taken accord and satisfaction cannot be pleaded *pais darrein continuance*.<sup>47</sup>

**III. REQUISITES IN PLEADING.**—A. CERTAINTY AND COMPLETENESS.—According to the general rule of pleading, an answer setting up accord and satisfaction must plainly, fully and distinctly set forth the defense. Every accord ought to be full, perfect and complete; for if divers things are to be performed by the accord, the performance of part is not sufficient, but all ought to be performed.<sup>48</sup>

47. Where, after judgment in a justice's court, and previous to an appeal, the suit between the parties is settled, and the defendant notwithstanding prosecutes an appeal, the plaintiff cannot allege the accord and satisfaction by way of plea *pais darrein continuance*; his proper course is to apply to the common pleas by motion to dismiss the appeal. *Schenck v. Lincoln*, 17 Wend. (N. Y.) 506.

48. *Peytoe's Case*, 9 Coke 77b. 77 Eng. Reprint 847. See also *Brunswick & W. R. Co. v. Clem*, 86 Ga. 524, 7 S. E. 84. Thus, where a plea avers that a certain sum was paid and accepted in satisfaction of the promises and undertakings in the declaration, before the exhibiting of plaintiff's bill, and a replication, by setting out a writ issued prior to the payment and acceptance, shows a further demand to which the plaintiff was liable, viz: the costs of the writ, the plea therefore to have been sufficient should have alleged a payment in discharge, not only of the promises and undertakings in the declaration, but of all costs and damages accrued by reason of the non-performance of those promises and undertakings. That allegation being omitted, the plea is incomplete. *Francis v. Crywell*, 5 B. & A. 886, 7 E. C. L. 289.

And a plea of accord and satisfaction alleging that defendant gave to plaintiff certain bonds and accounts against third parties is insufficient for failing to aver that the same were assigned. *Nave v. Fletcher*, 4 Litt. (Ky.) 242.

The form generally approved by the courts for pleading accord and satisfaction is to allege that the thing delivered, or money paid, was delivered or paid to the plaintiff, and received by him in full satisfaction and discharge of his said cause of action, or the claim set forth in the petition. *City of Rawlins v. Jungquist*, 16 Wyo. 403, 94 Pac. 464, 96 Pac. 144. And in this connec-

tion see *Bailey v. Cowles*, 86 Ill. 333.

In *Wilson v. Northwestern Nat. Life Ins. Co.*, 103 Minn. 35, 114 N. W. 251, an action to recover commissions for obtaining applications for life insurance, for defendant's assignor, the following pleading of a satisfaction was held sufficient: "That on a day more than a month after the alleged breach of the contract the plaintiffs fully compromised and settled their said claims for services for soliciting said life insurance applications; that on said date said plaintiffs received from the hands of — the premium notes given for the first year's premium on the policies of (here followed a list of names); and that said premium notes were accepted and received by plaintiffs in full settlement, satisfaction, and discharge for all services rendered by them, or either of them, in soliciting applications for life insurance of the applicants herein named."

**Plea Though Informal Good on General Demurrer.**—See *Woods v. Harris*, 5 Blackf. (Ind.) 585, and *Fitch v. Haight*, 5 Ill. 51.

**Forms in Particular Actions—Common Counts—Averting Delivery of Deed.**—"And for a further plea in this behalf, as to the said first count of the said declaration, the said defendants by leave, &c., say, *actio non*, &c., because they say, that after the making of the promissory note in the said first count mentioned, and before the day of payment in the said note specified, to wit, on the 10th day of March, A. D. 1841, at the county aforesaid, the said defendant Coleman, bargained, sold, and conveyed to the said plaintiff, a certain tract of land, situated in the county of Jefferson, aforesaid, in full satisfaction and discharge of the said promissory note, in said first count specified, which the said plaintiff then and there accepted and received in full payment and satisfaction of the said promissory note in said

first count mentioned, and this the said defendants are ready to verify.' " Dent *v. Coleman*, 10 Smed. & M. (Miss.) 83.

**Alleging Acceptance of Less Sum Than Claimed.—Claim Unliquidated.**—See *Page v. Meek*, 3 B. & S. 259, 113 E. C. L. 258.

**In Assumpsit or Debt.**—*Boyd v. Hitchcock*, 20 Johns. (N. Y.) 76, 11 Am. Dec. 247, contains a form of plea averring the acceptance of notes: "That, after making the said promises and undertakings, in the said declaration mentioned, and before the commencement of the suit, to wit, on the 7th of August, 1818, at the city of *New York*, he, the defendant, caused to be delivered to the plaintiffs his three several promissory notes, made payable to D. W. C., for 916 dollars and 67 cents each, dated May 18, 1818, and by him endorsed to the plaintiffs; one of the said notes payable in twelve months, one in eighteen months, and the other in twenty-four months, in full satisfaction and discharge of the said several promises and undertakings, in the said declaration mentioned, and of the damages sustained by the plaintiffs, by reason of the non-performance of the said promises and undertakings; and which said notes they, the plaintiffs, then and there, accepted and received, of and from the defendant, in full satisfaction and discharge of the said promises and undertakings, &c."

*Kearslake v. Morgan*, 5 T. R. 513, 101 Eng. Reprint 289, contains a form of plea alleging indorsing of note to plaintiff: "2d, That as to 4£. 14s. 6d. parcel &c. the plaintiffs on &c. at &c. took, accepted and received in full satisfaction and discharge thereof and of a certain other sum, to wit, 5£. 5s. 6d. paid by the plaintiffs to the defendant, a certain promissory note before that time made by one P. according to the form of the statute &c. for paying to the defendant or his order at a certain time in the said note mentioned and elapsed before the commencement of this suit the sum of 10£. and indorsed by the defendant to the plaintiffs &c. with verification &c. 3d. That as to the said sum of 4£. 14s. 6d. the said P. before the commencement of this suit at &c. made his certain note in writing according to the form of the statute &c. and then and there delivered the same to the defendant, by which note the said P. promised to pay to the defendant or his order at a certain time in the said note mentioned,

and elapsed before the commencement of this suit, the sum of 10£.; that the defendant afterwards and before the time appointed by the said note for the payment of the said sum of money therein mentioned, to wit, on &c. at &c. *for and on account of the said sum of 4£. 14s. 6d. and of a certain other sum of 5£. 5s. 6d. paid by the plaintiffs to the defendant*, made his certain endorsement in writing upon the said note, and then and there delivered the said note with the said endorsement thereon to the plaintiffs; by which said endorsement and delivery the defendant appointed the contents of the said note to be paid to the plaintiffs: and that *the plaintiffs then and there accepted and received the note for and on account of the said several sums of 4£. 14s. 6d. and 5£. 5s. 6d. to wit, at &c. with a verification &c.*"

*Williams v. London Com. Exch. Co.*, 29 Eng. L. & Eq. 429, contains a form averring agreement to abide by decision of arbitrators: "That, after the accruing of the causes of action in the declaration mentioned, and before the making of the agreement hereinafter mentioned, disputes and differences were existing between the plaintiff and the defendants touching and concerning divers dealings and transactions which had taken place between them, and touching certain matters of account arising out of those dealings and transactions; and that some of the said matters consisted of the several transactions in the declaration mentioned as to the direction to purchase shares for the plaintiff, and others of such matters were the subject of an action then depending in this court by the plaintiff against the defendants for damages claimed by the plaintiff in respect of certain other dealings between the plaintiff and the defendants, and certain other directions by the plaintiff to the defendants to purchase for the plaintiff certain other shares. Whereupon, the said disputes and differences then existing and the said action depending as aforesaid, it was agreed between the plaintiff and the defendants that, in consideration that the defendants would consent to a judge's order, by which the matters of the said action should be referred to the award of C. C., and that the defendants would agree to perform in all things his award, to be made of and concerning the matters



so to be to him referred, so far as the same award should direct performance to be made by the defendants, the plaintiff should and would accept such agreement by the defendants in full satisfaction of all damages sustained by the plaintiff for and in respect of the several causes of action in the declaration in this action alleged. Averments. That, in pursuance of the said agreement, a judge's order in the said then depending action was consented to by the defendants, and was made by Sir T. J. Pratt, Knight, one of the barons of this court, whereby, and by consent of the plaintiff and the defendants, the matters of the said then depending action were referred to the award of the said C. C., and whereby it was ordered that the costs of the said cause should abide the event of the said award, &c.; and the plaintiff did then accept such consent and such order made in pursuance of the said agreement, in full satisfaction and discharge of all damages by the plaintiff sustained for and in respect of the several causes of action in the declaration in this present action alleged. The plea then proceeded to state that the arbitrator made his award, and found for the plaintiff, damages 424*l.* 9*s.* 6*d.*, which the defendants paid to the plaintiff, with costs."

*Baldwin v. Bank of Massillon*, 1 Ohio St. 141, contains a form of plea alleging delivery of deed: "That on 1st January, 1843, B., one of the defendants, delivered to the Bank of Massillon 'a certain deed of conveyance, containing the usual and full covenants of warranty and seizin—executed by himself and wife—therein and thereby conveying to the bank certain real estate in fee simple,' to-wit: five city lots in Ohio City; 44 acres of land in tract 82, township 3, at the Rapids of the Miami of Lake Erie; the southeast quarter of section 22, township 6, north, range 11, in Wood county, and an undivided half of the north half of the southwest quarter of section 27, in town, range, and county last named, 'in full satisfaction and discharge' of the amount due on said bond; 'which said deed and the premises therein mentioned and described, the bank then and there accepted and received in full satisfaction and discharge,' etc."

*Booth v. Smith*, 3 Wend.. (N. Y.) 66, contains a form alleging acceptance of

third party's note: "The defendant to the first count pleaded, that before the commencement of the suit, to-wit, on the 15th April, 1826, an account was stated between the plaintiff and defendant, of and concerning the money in the said first count mentioned; that the defendant was found in arrear, and indebted on account thereof in the sum of \$270, for which sum, he then and there delivered to the plaintiff a promissory note, made by A. D. J., S. D. J. and A. J., bearing date the 15th April, 1826, by which the makers promised to pay to him, the defendant, or bearer, one year after the date thereof, the sum of \$270 with interest; that at the time of the delivery of the last mentioned note to the plaintiff, he, the defendant, endorsed the same and ordered the contents thereof to be paid to the plaintiff; that the plaintiff then and there accepted and received the said last mentioned note for and on account and in full satisfaction of the note in the first count of the declaration mentioned. By reason whereof, the makers of the note and he, the defendant, as the endorser thereof, then and there became and still are liable to pay the same, according to its tenor concluding with a verification and prayer of judgment, &c."

*Watkinson v. Inglesby*, 5 Johns. (N. Y.) 386, contains a form alleging agreement to assign stock in trade and outstanding debts. This was an action on two notes against two defendants, one of whom pleaded that he and his co-defendant "being unable to pay their debts, did agree to and with the several persons to whom they were indebted, and among others, to and with the plaintiff, to assign to their said creditors, all their stock in trade, and outstanding debts due the defendants; in consideration whereof, the plaintiff and the other persons to whom the defendants were indebted, promised and agreed to receive the assignment of all the said stock and debts due the defendants, in full satisfaction of and for the debts due to the creditors respectively; and Stokes averred, that the defendants, in pursuance of the said agreement, thereupon delivered all the stock in trade, which they then had, and did assign all the debts then due and owing to them, for the use and benefit of the plaintiff, and the other creditors of the defendants; which said delivery



of stock, and assignment of debts, was on the same day and year, received by the plaintiff, in full satisfaction of the promises and undertakings, mentioned in the declaration of the plaintiff, and by the other creditors of the defendants, in full satisfaction of the debts due to them respectively, and this he, the said Stokes, was ready to verify, wherefore, &c."

See also *Seaman v. Haskins*, 2 Johns. Cas. (N. Y.) 195 (for form alleging acceptance of judgment); *Jones v. Sawkins*, 5 M., G. & S. 142, 57 E. C. L. 141 (for form alleging seizure of defendant's goods in satisfaction).

**Form in Account Stated.**—See *Lyth v. Ault*, 11 Eng. L. & Eq. 580; and *Chit. Pl.*, Vol. 3, p. 926.

**In Trespass.**—In *Heirn v. Carron*, 11 Smed. & M. (Miss.), 361, 49 Am. Dec. 65, the defendant filed the following plea: "March term, 1846, Nicholas Carron v. Finley B. Heirn. And now at this term comes the defendant, and by leave of the court, first had and obtained, defends the wrong and injury when, &c., and for a further plea in this behalf, defendant saith, that as to all of the said plaintiff's ground of action in this behalf, except so much thereof, as had accrued in costs of court, resulting from this suit, from the commencement up to the 25th day of September, 1845, defendant saith, *actio non*; because he saith, that after the institution of said suit, to-wit, on the 27th day of September, 1845, he, the said defendant, compounded to and with the plaintiff in this action, for the trespass herein complained of, and thereupon agreed to pay him therefor the sum of thirty-six dollars, in full satisfaction thereof, to be paid to plaintiff on the 26th day of December, 1845, and to be responsible for all costs heretofore incurred by reason of said suit; and defendant avers that, in conformity with said agreement and compounding with said complainant, he, this defendant, did, on the 26th day of December, A. D. 1845, tender the said sum of thirty-six dollars, and then and there, to-wit, at the county aforesaid, did offer to pay him the same, according to said agreement, but plaintiff then and there refused, and still doth refuse, to receive the same, though defendant then and there was, and still is, willing to pay the same, and herewith tenders the same sum of money

into court, to be paid to said plaintiff; and for all court costs which had accrued in said action up to the said 26th day of December, A. D. 1845, defendant acknowledges himself liable for, and willing to pay the same. Wherefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action against him to recover any more, or greater damages than said sum of thirty-six dollars, and the said costs of court up to the 26th day of December, A. D. 1845; and of this he puts himself upon the country. Henderson and Fourniquet, defendant's attorneys."

For another form, see *Bainbridge v. Lax*, 9 Q. B. 819, 58 E. C. L. 818.

**In Libel.**—"That after the commencement of this suit the plaintiff and defendant agreed together to accept certain mutual apologies, to be published by the plaintiff and defendant respectively in certain weekly journals belonging to and published by the plaintiff and defendant respectively, in full satisfaction and discharge of all the causes and rights of action in the declaration mentioned, and all damages and costs sustained by the plaintiff in respect thereof. And the defendant says that thereupon and in pursuance of the said agreement he the defendant did, to-wit, on the 14th day of December, A. D. 1864, print and publish his part of the said mutual apologies in the said weekly journal belonging to and published by him the defendant, and so agreed upon in that behalf as aforesaid, that is to say, in the defendant's weekly journal called 'The Orchestra,' of which the plaintiff had notice. And the plaintiff did also, after the making of the said agreement and in pursuance thereof, to-wit, on the 14th day of May, A. D. 1864, print and publish his part of the said mutual apologies in the said weekly journal belonging to and published by him the plaintiff, and so agreed upon in that behalf as aforesaid, that is to say, in the plaintiff's weekly journal called 'Boosey's Musical and Dramatic Review.'" *Boosey v. Wood*, 3 H. & C. 484, 34 L. J. Ex. 65, 11 Jur. (N. S.), 181, 31 W. R. 317.

**Form Alleging Delivery of a Bond.**—See *Chit. Pl.*, Vol. 3, p. 925.

**Form Alleging Signing of Composition Deed.**—See *Chit. Pl.*, Vol. 3, p. 931. For another form, see *Pontious v. Durlinger*, 59 Ind. 27.

The answer should put the plaintiff upon notice of the exact terms of the agreement,<sup>49</sup> allege that it was entered into in relation to the matters complained of,<sup>50</sup> and aver when,<sup>51</sup> and with whom, it was entered into.<sup>52</sup> But a plea of accord and satisfaction need not specifically confess the wrong alleged in the declaration,<sup>53</sup> nor state the kind or quantity of goods received in satisfaction.<sup>54</sup>

**B. THE ACCORD.**—It is generally held necessary to allege the existence of the accord or agreement to accept satisfaction as well as the acceptance, the averment of mere performance or acceptance being

**Character of Satisfaction as Controlling Form of Plea.**—A plea of accord and satisfaction to an action on a bond is not good, unless it avers an acquittance under seal. *Ligon v. Dunn*, 28 N. C. 133; *Preston v. Christmas*, 2 Wils. C. P. (Eng.), 86. But see *Bailey v. Cowles*, 86 Ill. 333.

49. *Ala.*—*Karter v. Fields*, 140 Ala. 352, 37 So. 204. *Ga.*—*Smith v. Mechanics' Nat. Bank*, 108 Ga. 211, 33 S. E. 857. *Ky.*—*Burnsides v. Smith's Exr.*, 5 T. B. Mon. 464.

In a justice court an answer alleging "That prior to the commencement of this action the plaintiff was fully paid and satisfied and discharged, the plaintiff and defendant settled and adjusted said claim, and the defendant was released and discharged from said claim and the whole thereof," is sufficient under the present liberal system of pleading, especially in view of the fact that the same strict rules are not exacted in justice's courts that sometimes obtain in courts of record, although it would have been better had the answer set up the claimed accord and satisfaction with more particularity. *Van Allen v. Shulenburg*, 58 Misc. 36, 110 N. Y. Supp. 464.

50. Thus in an action against an electric company to recover overcharges by reason of unjust discrimination, an allegation in the answer that prior to the commencement of the action plaintiff settled and adjusted all accounts of the defendant against plaintiff for electric light, and that plaintiff paid defendant in full therefor, is not an allegation of accord and satisfaction, because failing to allege that the adjustment was made of the matters and things complained of. *Armour & Co. v. Edison Elec. Illum. Co.*, 115 App. Div. 57, 100 N. Y. Supp. 609.

**Judgment Striking Plea on Another Ground Sustained.**—When an objection has been raised by demurrer to a plea on the ground indicated in the text above this and preceding note, a judgment of the trial court striking the plea will not be reversed, although the judge, in his order sustaining the demurrer, may have based his ruling on an entirely different and even erroneous reason. *Smith v. Mechanics' Nat. Bank*, 108 Ga. 211, 33 S. E. 857.

**Sufficiency Cannot Be Questioned After Going to Trial.**—Where an answer supports the inference that the acceptance as well as the payment, was in full satisfaction of the claim, if the parties go to trial without objection to its sufficiency, it will be held sufficient as against an objection upon the trial to the introduction of evidence. *City of Rawlins v. Jungquist*, 16 Wyo. 403, 94 Pac. 464, 96 Pac. 144.

51. *Smith v. Mechanics' Nat. Bank*, 108 Ga. 211, 33 S. E. 857.

52. *Smith v. Mechanics' Nat. Bank*, 108 Ga. 211, 33 S. E. 857.

53. *Snyder v. Witt*, 99 Tenn. 201, 42 S. W. 441, quoting extracts from *Chit. Pl.*, 16th Am. ed., Vol. 1, p. 678, and *Caruther's History of a Lawsuit*, page 191.

54. In *Hart v. Crawford*, 41 Ind. 197, it was said that if the plea was not sufficiently certain, the court on motion, might have required it to be made more certain.

**Quantity.**—*Richards v. Carl*, 1 Blackf. (Ind.), 313.

**Negotiability of Draft.**—In alleging the acceptance of a draft of a third person, it is unnecessary to aver that it was negotiable, since evidence is admissible under the plea as to its negotiability. *Salomon v. Pioneer Co-op. Co.*, 21 Fla. 374, 58 Am. Rep. 667.

insufficient;<sup>55</sup> but some of the earlier cases adhered to a contrary rule.<sup>56</sup> On the other hand it is generally held that a plea is insufficient which alleges an accord only.<sup>57</sup>

C. THE CONSIDERATION.—A plea of accord and satisfaction should state what was given in satisfaction as showing a consideration for the accord.<sup>58</sup> An accord must appear to be advantageous to the accepting party,<sup>59</sup> or detrimental to the one giving the amount or thing, or performing the act.<sup>60</sup> And this is especially true where the plea is that a less sum was given in satisfaction for a greater liquidated amount.<sup>61</sup> Where it appears on the face of the plea that the accord

55. *Ala.*—*City Council v. Shirley*, 48 So. 679. *Colo.*—*Barnum v. Green*, 13 *Colo. App.* 254, 57 *Pac.* 757. *Ga.*—*Smith v. Mechanics' Nat. Bank*, 108 *Ga.* 211, 33 *S. E.* 857. *Me.*—*Young v. Jones*, 64 *Me.* 563, 18 *Am. Rep.* 279. *N. Y.*—*Clough v. Murray*, 3 *Robt.* 7. *Pa.*—*Hearn v. Kiehl*, 38 *Pa.* 147, 80 *Am. Dec.* 472.

56. *Daniels v. Hallenbeck*, 19 *Wend.* (N. Y.), 408; *Young v. Rudd*, 5 *Mod.* 86, 2 *Salk.* 627, *Comb.* 346, 1 *Ld. Raym.* 60, *Carth.* 347, 87 *Eng. Reprint* 535.

In *Peytoe's Case*, 9 *Coke* 77b, 77 *Eng. Reprint* 847, Lord Coke says, "Nota reader, the best and most secure form of pleading of an accord, is to plead it by way of satisfaction, and not by way of accord; for if he pleads it by way of accord, he ought to plead the precise execution thereof in the whole, and if he fails of any part thereof, his plea is insufficient; but by way of satisfaction he shall plead no more, than that the defendant paid the plaintiff 6*£*. 10*s.* in full satisfaction of the same action, which the plaintiff received, etc."

57. *Johnson's Admr. v. Hunt*, 81 *Ky.* 321; *Guion v. Doherty*, 43 *Miss.* 538. *Compare Hayes v. Atlanta*, etc. *R. Co.*, 143 *N. C.* 125, 55 *S. E.* 437.

58. *Ala.*—*City Council v. Shirley*, 48 *So.* 679. *Ga.*—*Patterson v. Ramspeck*, 81 *Ga.* 808, 10 *S. E.* 390. *Ind.*—*Sheets v. Russell*, 12 *Ind. App.* 677, 40 *N. E.* 30. *Ky.*—*Davis v. Noaks*, 3 *J. J. Marsh.* 494; *Bank of the Com. v. Letcher*, 3 *J. J. Marsh.* 195; *Burnsides v. Smith's Exr.*, 5 *T. B. Mon.* 464; *Com. v. Miller*, 5 *T. B. Mon.* 205. *Mass.*—*Tuckerman v. Newhall*, 17 *Mass.* 583. *N. C.*—*State Bank v. Littlejohn*, 18 *N. C.* 563. *R. I.*—*Heath v. Doyle*, 18 *R. I.* 252, 27 *Atl.* 333. *Va.*—*Frank v. Gump*, 104 *Va.* 306, 51 *S. E.* 358.

Thus in an action against the United

States for an alleged balance of the purchase price of beef sold, in alleging that plaintiff had accepted a certain sum in full satisfaction of all claims, a further allegation was proper and necessary that certain discounts were to be allowed but had been omitted from the contract by mistake and that the settlement had been made to conform to such discounts, as showing a consideration for the settlement. *Torrey v. United States*, 42 *Fed.* 207.

**The Satisfaction Must Appear To Be of Value.**—*Bank of the Com. v. Letcher*, 3 *J. J. Marsh.* (Ky.) 195.

59. *Ala.*—*City Council v. Shirley*, 48 *So.* 679. *Va.*—*Frank v. Gump*, 104 *Va.* 306, 51 *S. E.* 358. *Eng.*—*Williams v. London C. Exch. Co.*, 29 *Eng. L. & Eq.* 429, *citing* *Bac. Abridg.*, title "Accord and Satisfaction." (A.).

60. Thus in a libel suit a plea that the parties had agreed to accept the publication of mutual apologies in satisfaction and discharge, and that they published mutual apologies is sufficient as a plea of accord and satisfaction, since expense had been incurred in printing the apologies. *Boosey v. Wood*, 3 *H. & C.* 484, 34 *L. J. Ex.* 65, 11 *Jur.* (N. S.) 181, 31 *W. R.* 317.

61. *U. S.*—*Torrey v. United States*, 42 *Fed.* 207. *Ala.*—*T. J. Scott & Sons v. Rawls*, 48 *So.* 710. *Ky.*—*Williams v. Langford*, 15 *B. Mon.* 566; *Akers v. Central Kentucky L. Asylum*, 10 *Ky. L. Rep.* 817. *Eng.*—*Down v. Hatcher*, 10 *A. & E.* 121, 37 *E. C. L.* 69; *Evans v. Powis*, 1 *Exch.* 601.

**Form.—Agreement for Payment at Earlier Date.**—In a recent English case the declaration alleged that a certain controversy had been submitted to arbitration, that the defendant was ordered to pay a certain amount in instalments, and non-payment. "Plea—that after the making and breach of the



was without consideration, the plea is bad after verdict and judgment should properly be entered for plaintiff *non obstante veredicto*.<sup>62</sup>

D. THE EXECUTION OF THE ACCORD. — 1. In General. — A plea of accord and satisfaction, to be sufficient, must allege, not only that the parties had agreed upon the terms of settlement, but that the agreement was executed, and satisfaction performed in compliance with the agreement.<sup>63</sup>

said award in the non-payment of the first instalment of 2,000£. on the day on which it was to be paid, but before any further instalment had become due, it was mutually agreed between the plaintiff and defendants that the defendants should pay to the plaintiff, and that the plaintiff should accept from the defendants 4,500£. by instalments, all of which were to become payable before the day on which the last instalment of the sum so awarded to the plaintiff was to become payable by virtue of the said award, namely, 1,000£., part of the said 4,500£., on the day of making the said agreement; 1,000£., further part thereof, in February, 1851; 1,250£., further part thereof, on the 14th of April, 1851, and 1,250£., residue thereof, on the 14th of June, 1851, in full satisfaction and discharge of the said sum so awarded to be paid as aforesaid, and of the said award thereof, and of all causes of action in respect thereof, and of the said breach of the said award; and that the plaintiff accepted the said agreement, and the performance thereof by the defendants, in full satisfaction and discharge of the said sum so awarded to the plaintiff as aforesaid, and of the said award thereof, and of all causes of action in respect thereof, and of the said breach of the said award. Averment—that the defendants paid to the plaintiff the said 1,000£., being the first instalment of the said sum of 4,500£., which the plaintiff then accepted in satisfaction and discharge of the said first instalment; and the said sum of 1,000£., further part thereof, in the said month of February, 1851; and the sum of 1,250£., further part thereof, to-wit, on the 14th of April, 1851, which the plaintiff then accepted in satisfaction and discharge of the said third instalment of the said sum of 4,500£., and the sum of 1,250£., residue thereof, on the 14th of June, 1851, in full satisfaction and discharge of the said sum so awarded as aforesaid, and of the said

award, and of all causes of action in respect thereof, and of the said breach of the said award, according to and in performance of the said agreement; and that the plaintiff accepted from the defendants the said sum of 4,500£., and the payment thereof by the said several instalments on the said several days and times in that behalf aforesaid, and on the several occasions on which the said several instalments were so paid to him as aforesaid, in pursuance of the said agreement.” *Smith v. Trowsdale*, 22 Eng. L. & Eq. 360.

62. *Frank v. Gump*, 104 Va. 306, 51 S. E. 358; *Down v. Hatcher*, 10 A. & E. 121, 37 E. C. L. 69.

63. Ark. — *West v. Carolina Life Ins. Co.*, 31 Ark. 476. Cal. — *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58; *Simmons v. Oullahan*, 75 Cal. 508, 17 Pac. 543. Ga. — *Patterson v. Ramspeck*, 81 Ga. 808, 10 S. E. 390. Ill. — *Fitch v. Haight*, 5 Ill. 51. Ind. — *Eichholtz v. Taylor*, 88 Ind. 38; *Coquillard's Admrs. v. French*, 19 Ind. 274; *Sheets v. Russell*, 12 Ind. App. 677, 40 N. E. 30; *Richards v. Carl*, 1 Blackf. 313 (an accord and satisfaction as to a precedent condition is equivalent to a performance). Ky. — *Hale v. Grogan*, 99 Ky. 170, 35 S. W. 282, citing many Kentucky cases. Me. — *Young v. Jones*, 64 Me. 563, 18 Am. Rep. 279. Miss. — *Guion v. Doherty*, 43 Miss. 538. Neb. — *Goble v. American Nat. Bank*, 46 Neb. 891, 65 N. W. 1962. N. M. — *Armijo v. Abeytia*, 4 N. M. 533, 25 Pac. 777. N. C. — *State Bank v. Littlejohn*, 18 N. C. 563. Pa. — *Hearn v. Kiehl*, 38 Pa. 147, 80 Am. Dec. 472. R. I. — *Pettis v. Ray*, 12 R. I. 344. Wash. — *Rogers v. Spokane*, 9 Wash. 168, 37 Pac. 300. Eng. — *Allen v. Harris*, 1 Ld. Raym. 122, 91 Eng. Reprint 978; *Gabriel v. Dresser*, 15 C. B. 622, 80 E. C. L. 620; *Pinnel's Case*, 5 Coke 117a, 77 Eng. Reprint 237.

Thus under a plea of accord and satisfaction in an action on a judgment, it is not competent to show an accord and satisfaction as to a part of the

Where it is apparent on the face of the plea that the accord was not executed, it is defective.<sup>64</sup>

**2. Tender or Delivery.** — a. *In General.* — As a rule, it must be alleged that the amount or thing was given, or the act performed in satisfaction of plaintiff's cause of action.<sup>65</sup> But a plea alleging delivery in satisfaction alone,<sup>66</sup> or readiness to perform the accord,<sup>67</sup> or tender of performance,<sup>68</sup> or even part performance and readiness to

judgment, under an agreement with one or both of the judgment plaintiffs. An accord cannot constitute a bar, or complete defense, unless shown to have been fully executed. *Jackson v. Olmstead*, 87 Ind. 92, citing many cases.

And in an action upon a promissory note, the execution of which is admitted, where as a defense an accord and satisfaction is attempted to be pleaded, the plea is bad when the performance necessary to constitute the satisfaction is not alleged and it appears upon the face of the plea that performance, and not the agreement to perform, was to be received in satisfaction. *Perdew v. Tillma*, 62 Neb. 865, 88 N. W. 123.

And where there is an agreement to settle a controverted demand for a consideration fixed by the parties, all or a portion of which is executory, the defendant may set it up by making proper averments in regard to performance, as an accord and satisfaction of the original demand. *Hayes v. Atlanta R. Co.*, 143 N. C. 125, 55 S. E. 437.

64. *Fitch v. Haight*, 5 Ill. 51; *Rogers v. Spokane*, 9 Wash. 168, 37 Pac. 300.

65. *Cal.* — *Hogan v. Burns*, 33 Pac. 631. *Ind.* — *Hancock v. Yaden*, 121 Ind. 366, 23 N. E. 253, 16 Am. St. Rep. 396, 6 L. R. A. 576; *Swope v. Bier*, 10 Ind. App. 613, 38 N. E. 340, citing earlier cases. *Mass.* — *Howe v. Mackay*, 5 Pick. 44. *R. I.* — *Heath v. Doyle*, 18 R. I. 252, 27 Atl. 333. *Wyo.* — *City of Rawlins v. Jungquist*, 16 Wyo. 403, 94 Pac. 464, 96 Pac. 144. *Eng.* — *Paine v. Masters*, 1 Str. 573, 93 Eng. Reprint 708; *Pinnel's Case*, 5 Coke 117a, 77 Eng. Reprint 237; *Graham v. Gibson*, 4 Exch. 768.

In an action by an endorser against the acceptor of a bill of exchange, a plea alleging that after the endorsement and before the commencement of the action, the drawers had delivered to plaintiffs, and that the latter had accepted divers goods in full satisfac-

tion and discharge of the bill, and all damages and causes of action in respect thereof, is defective since satisfaction of a bill as between a drawer or endorser, and an endorsee, made before or after the bill became due, does not inure as a satisfaction on behalf of the acceptor and operate to discharge him from liability to the endorsee. *Jones v. Broadhurst*, 9 M., G. & S. 172, 67 E. C. L. 173.

**Form.** — In *Hooker v. Hyde*, 61 Wis. 204, 21 N. W. 52, after stating agreement, the plea proceeded, "which said sum was then and there paid by this defendant, and received, accepted and retained by the plaintiff as and for a full and complete payment and satisfaction for the services of the said plaintiff in and about said sale, under said agreement, and for all claims and demands whatsoever by said plaintiff against this defendant;" etc.

66. *Paine v. Masters*, 1 Str. 573, 93 Eng. Reprint 708.

67. *Me.* — *Mayo v. Leighton*, 101 Me. 63, 63 Atl. 298; *White v. Gray*, 68 Me. 579. *Pa.* — *Hearn v. Kiehl*, 38 Pa. 147, 80 Am. Dec. 472. *Eng.* — *Carter v. Wormald*, 1 Exch. 81; *Allies v. Probyn*, 2 C. M. & R. 408, 5 Tyrwh. 1079, plea of agreement to execute a mortgage in satisfaction when called upon to do so, but that defendant had never been called upon, is bad.

68. *Me.* — *Mayo v. Leighton*, 101 Me. 63, 63 Atl. 298; *White v. Gray*, 68 Me. 579. *Pa.* — *Hearn v. Kiehl*, 38 Pa. 147, 80 Am. Dec. 472. *Eng.* — *Peytoe's Case*, 9 Co. 77b, 77 Eng. Reprint 847; *Gabriel v. Dresser*, 15 C. B. 622, 80 E. C. L. 620. *Can.* — *Stewart v. Hawson*, 7 U. C. C. P. 168, a plea alleging a new agreement to pay a certain sum and to secure the same by an endorsed note and that a tender of the note was made and refused, is insufficient since the delivery of the note was an essential part of the consideration.

perform the rest,<sup>69</sup> is insufficient without further alleging acceptance in satisfaction.<sup>70</sup>

In Mississippi and Colorado, and perhaps in Washington, the rule is otherwise. In these jurisdictions it is held to be sufficient to allege tender of satisfaction and refusal on the ground that this is equivalent to satisfaction.<sup>71</sup>

b. *Time of Delivery.* — Where the accord is that satisfaction shall be by certain payments at certain times, a plea failing to allege that payments were made at these precise times is defective.<sup>72</sup>

c. *By Whom Delivery Was Made.* — (I.) *At Common Law.* — It appears to be necessary at common law to allege by whom delivery of the satisfaction was made. A plea of accord and satisfaction by one of several joint obligors, is valid.<sup>73</sup> And a plea of accord and satisfaction by a stranger, when properly averred, is good.<sup>74</sup>

69. *Hearn v. Kiehl*, 38 Pa. 147, 80 Am. Dec. 472; *Balston v. Baxter*, Cro. Eliz. 304, 78 Eng. Reprint 555 (part payment and an agreement to take the residue at a future day, cannot be pleaded as satisfaction in bar to debt on a bond).

70. See *infra*, III, D, 3, "Receipt and Acceptance."

The exception to these rules is where a number of creditors agree to accept of a common debtor a composition amounting to less than their entire demand. Such agreements are binding, the consideration for the contract of each creditor being found in the agreement of the other creditors. *Hearn v. Kiehl*, 38 Pa. 147, 80 Am. Dec. 472, *citing* 1 Smith's L. C. 443-446; *Sprunberger v. Dentler*, 4 Watts (Pa.) 126; *Rising v. Patterson*, 5 Whart. (Pa.) 316.

71. *Heirn v. Carron*, 11 Smed. & M. (Miss.) 361, 49 Am. Dec. 65 (*citing* *Carley v. Vance*, 17 Mass. 392; *Cushing v. Hurd*, 4 Pick. (Mass.), 255; *Coit v. Houston*, 3 Johns. Cas. (N. Y.) 243; *Peytoe's Case*, 9 Coke 77b, 86, 77 Eng. Reprint 847, and as adhering to a contrary rule; *Clark v. Dinsmore*, 5 N. H. 136; *Russell v. Little*, 6 Wend. (N. Y.), 390, 22 Am. Dec. 537; *Tucker v. Edwards*, 7 Colo. 209, 3 Pac. 233. And see *Evans v. Powis*, 1 Exch. (Eng.), 601, holding that where a plea of accord is not to take a new agreement, but the payment of a certain amount, satisfaction should be averred by payments agreed upon by the accord, or at least a tender of such payments should be alleged.

*Washington.* — An answer alleging that plaintiff agreed to receive the payment of a certain sum agreed upon in satisfaction of his claim, and not an agreement to pay such sum, does not state a defense, it appearing that plaintiff had not accepted any money and that none had been tendered. *Rogers v. Spokane*, 9 Wash. 168, 37 Pac. 300.

72. *Evans v. Powis*, 1 Exch. (Eng.), 601.

If a plea of accord and satisfaction by the delivery of certain property does not state a time when the delivery was made, it is bad on special demurrer. *Pence v. Smock*, 2 Blackf. (Ind.) 315. But see *Strang v. Holmes*, 7 Cow. (N. Y.) 224, holding that the time of accord and satisfaction stated in a notice of special matter, is not material; and may be departed from in evidence.

73. *Strang v. Holmes*, 7 Cow. (N. Y.), 224.

74. *Snyder v. Pharo*, 25 Fed. 398, reviewing early English and American authorities to the contrary, and *citing* *Grymes v. Blofield*, Cro. Eliz. 541, 78 Eng. Reprint 788; *Atlantic Dock Co. v. Mayor*, 53 N. Y. 64; *Clow v. Borst*, 6 Johns. (N. Y.) 37; *Daniels v. Hallenbeck*, 19 Wend. (N. Y.) 408; *Bleakly v. White*, 4 Paige (N. Y.) 654; and approving *Belshaw v. Bush*, 11 C. B. 190, 73 E. C. L. 191; *Goodwin v. Cremer*, 18 Ad. & El. (N. S.) 756, 83 E. C. L. 757; *Kemp v. Balls*, 10 Exch. 607; *Simpson v. Eggington*, 10 Exch. 845; *Leavitt v. Morrow*, 6 Ohio 72; *Cumber v. Wane*, 1 Sm. L. C. 146; *Vadakin v. Soper*, 2 Amer. L. C. 163.



(II.) **Under Reformed Practice.** — But under the reformed procedure, it is unnecessary to state by whom the delivery was made.<sup>75</sup>

d. *To Whom Delivery Was Made.* — A plea of accord and satisfaction must show to whom satisfaction was made.<sup>76</sup>

**3. Receipt and Acceptance.** — According to some of the earlier authorities it was necessary to allege both a receipt and acceptance in satisfaction by plaintiff of the amount, thing or act given in satisfaction.<sup>77</sup> In a New York case it is distinctly held to be unnecessary under the code practice to allege more than an acceptance in satisfaction.<sup>78</sup> Most of the cases, without discussing the question, simply hold that it is necessary to aver an acceptance in satisfaction of what was given or done.<sup>79</sup>

Although the plea does not aver the defendant's authorization of the satisfaction or his subsequent ratification of it, it is to be presumed that authority was given at the time of the act done, and if not, the subsequent ratification by pleading will be held sufficient. *Snyder v. Pharo*, 25 Fed. 398.

75. An allegation setting forth a conclusion of fact that there had been a settlement and that plaintiff received certain notes is sufficient — an allegation of their receipt from defendant's agents is unnecessarily specific. *Wilson v. Northwestern Nat. Life Ins. Co.*, 103 Minn. 35, 114 N. W. 251.

76. *Nill v. Comparet*, 15 Ind. 243.

**Delivery to Third Person.** — In an action for breach of warranty of a deed, a plea of accord and satisfaction to the effect that a certain sum was placed in the hands of a third person as per agreement with plaintiff to be delivered to plaintiff in satisfaction of any damages arising from a breach of the covenant, is sufficient since this amounts substantially to an allegation of payment to and acceptance by the plaintiff. *Reichel v. Jeffrey*, 9 Wash. 250, 37 Pac. 296.

**Necessity for Alleging Agency.** — It is necessary to aver that the party to whom delivery was made was plaintiff's agent. *Bird v. Caritat*, 2 Johns. (N. Y.) 342, 3 Am. Dec. 433.

**Delivery to a Co-plaintiff Sufficient Without Alleging His Authority.** Where several plaintiffs sue a defendant on a joint demand, a defense by way of accord and satisfaction to the effect that one of the plaintiffs who was owing defendant agreed that defendant's claim should be offset against plaintiff's claim is proper without an

allegation as to authorization by other plaintiffs. *Wallace v. Kelsall*, 7 M. & W. (Eng.) 264.

77. *Lindsay v. Gager*, 11 App. Div. 93, 42 N. Y. Supp. 851 (citing many cases); *Paine v. Masters*, 1 Str. 573, 93 Eng. Reprint 708; *Hawkshaw v. Rawlings*, 1 Str. 23, 93 Eng. Reprint 360. See *Martin-Alexander Lumb. Co. v. Johnson*, 70 Ark. 215, 66 S. W. 924, quoting from other earlier Arkansas cases.

**Receipt and Acceptance Averred by Implication.** — Where a plea to *scire facias* distinctly avers an agreement to compromise the suit then pending, for valuable consideration, in satisfaction and discharge of the judgment, and the performance of all the conditions on the defendant's part, an omission of the averment that the acts done on defendant's part in satisfaction were received and accepted in satisfaction and discharge, was the omission of what was necessarily implied in the preceding averment of the plea. *McCullough v. Franklin Coal Co.*, 21 Md. 256.

78. An allegation that plaintiff received money with knowledge that it was paid in full of all claims, and that he accepted and retained the money, sufficiently avers accord and satisfaction, though not in terms alleging that plaintiff received the money as an accord and satisfaction as was essential to good pleading at common law, since the code provides that a defense may be made "in ordinary concise language." *Lindsay v. Gager*, 11 App. Div. 93, 42 N. Y. Supp. 851, *Bartlett J. dissenting*.

79. **U. S.** — *First Nat. Bank v. Leech*, 94 Fed. 310, 36 C. C. A. 262. **Ala.** — *Karter v. Fields*, 140 Ala. 352, 37 So. 204. **Ark.** — *West v. Carolina*

It is obvious that where the accord relates to an agreement to perform only, it is sufficient to aver acceptance of the terms of the agreement and that it is not necessary to allege the acceptance of the amount, thing, or act, itself agreed to be delivered or performed.<sup>89</sup>

Life Ins. Co., 31 Ark. 476. Cal.—Hogan v. Burns, 33 Pac. 631; Holton v. Noble, 83 Cal. 7, 23 Pac. 58; Simmons v. Oullahan, 75 Cal. 508, 17 Pac. 543. Colo.—Barnum v. Green, 13 Colo. App. 254, 57 Pac. 757. Ill.—Allen v. Breusing, 32 Ill. 505; Angus v. Chicago T. & S. Bank, 68 Ill. App. 425, judgment affirmed, 170 Ill. 298, 48 N. E. 946. Ind.—Renihan v. Wright, 125 Ind. 536, 25 N. E. 822, 21 Am. St. Rep. 249, 9 L. R. A. 514 (acceptance of agreement); Hancock v. Yaden, 121 Ind. 366, 23 N. E. 253, 16 Am. St. Rep. 296, 6 L. R. A. 576; Jackson v. Olmstead, 87 Ind. 92; Sheets v. Russell, 12 Ind. App. 677, 40 N. E. 30; Sinard v. Patterson, 3 Blackf. 353; Dupay v. Robbins, 1 Blackf. 473. Ia.—Jones v. Fennimore, 1 Greene 134. Ky.—Hale v. Grogan, 99 Ky. 170, 35 S. W. 282; Johnson's Admr. v. Hunt, 81 Ky. 321. Me.—Mayo v. Leighton, 101 Me. 63, 63 Atl. 298; White v. Gray, 68 Me. 579; Young v. Jones, 64 Me. 563, 18 Am. Rep. 279. Mass.—Howe v. MacKay, 5 Pick. 44. Miss.—Burrus v. Gordon, 57 Miss. 93; Guion v. Doherty, 43 Miss. 538. Mo.—Shaw v. Burton, 5 Mo. 478. Neb.—Van Housen v. Broehl, 58 Neb. 348, 78 N. W. 624, affirmed, 59 Neb. 48, 80 N. W. 260; Goble v. American Nat. Bank, 46 Neb. 891, 65 N. W. 1062. N. J.—Morris Canal, etc. Co. v. Van Vorst, 21 N. J. L. 100. N. C.—State Bank v. Littlejohn, 18 N. C. 563. Pa.—Diller v. Brubaker, 52 Pa. 498, 91 Am. Dec. 177. R. I.—Heath v. Doyle, 18 R. I. 252, 27 Atl. 333. S. D.—Troy Min. Co. v. White, 10 S. D. 475, 74 N. W. 236, 42 L. R. A. 459. Eng.—Drake v. Mitchell, 3 East 251, 102 Eng. Reprint 594; Hall v. Flockton, 20 L. J. Q. B. 208. Can.—Macfarlane v. Ryan, 24 U. C. Q. B. 474.

**Necessary To Aver Either Receipt or Acceptance.**—Wilkerson v. Bruce, 37 Mo. App. 156.

**Waiver by Failure To Demur.**—By failing to demur to a plea for failing to allege acceptance, the objection is waived. Oil Well Supply Co. v.

Wolfe, 127 Mo. 616, 30 S. W. 145; Wilkerson v. Bruce, 37 Mo. App. 156.

**Where the plaintiff, by replication, alleges an accord and satisfaction to a plea of set-off he must aver, as in a plea by defendant, a giving and acceptance in satisfaction of the cause of action specified in the plea.** Heath v. Doyle, 18 R. I. 252, 27 Atl. 333.

**Form.**—In Troy Min. Co. v. White, 10 S. D. 475, 74 N. W. 236, 42 L. R. A. 549, which was an action by a corporation to recover funds alleged to have been received by defendant's intestate as plaintiff's treasurer, the defendant, after setting out in full an agreement for an accord and satisfaction, alleged that "the said claim and demand of the plaintiff against the said . . . for the sum of . . . was thereupon, upon the said date, settled, compromised, satisfied, and discharged by the said company and the said . . . by the said company accepting the claim and demand of the said . . . for the use of the said assay outfit and survey instrument, together with the said outfit and the said instrument in full settlement, satisfaction, compromise, accord, and discharge for the said claim of the plaintiff against the said W. and the said plaintiff thereupon became the owner of the said assay outfit and the said survey instrument, and has ever since been the owner and in control thereof; that the said claim of . . . , so settled, compromised, and discharged upon . . . , is the identical claim upon which this suit is brought." The court said: "It would be difficult to aver in stronger language that the agreement for an accord was executed by an acceptance 'of the consideration of the accord.'"

**For another form, see supra, note 65.**

80. Clough v. Murray, 3 Robt. (N. Y.) 7; Hall v. Flockton, 20 L. J. Q. B. (Eng.) 208.

Thus in a libel suit, a plea that the parties had agreed to accept the publication of mutual apologies in satisfaction and discharge, and that such

E. A PLEA MUST ANSWER ALL IT PROFESSES TO ANSWER. — As is the case with other pleas, a plea of accord and satisfaction which professes to be an answer to the whole declaration, but which, in fact, is an answer to part only, is defective.<sup>81</sup>

F. AMBIGUITY OF PLEAS. — A plea of accord and satisfaction must not be ambiguous;<sup>82</sup> but if such a plea is capable of being construed as a good answer, it will be held good, if plaintiff fails to demur thereto, but pleads over.<sup>83</sup>

G. REPUGNANCY IN PLEADING. — Where a bill of particulars is filed with a plea of accord and satisfaction and the two, construed together, contain contradictory and repugnant statements, the one being incon-

apologies were published, is a good plea of accord and satisfaction as against an objection that the acceptance of such publication was not averred since an allegation as to the execution of the agreement was sufficient. *Boosey v. Wood*, 3 H. & C. 484, 34 L. J. Ex. 65, 11 Jur. (N. S.) 181, 31 W. R. 317.

Form. — "The said G. says, that the said B., from having and maintaining his action thereof against him, ought to be barred; because he says, that by a certain covenant or agreement in writing, signed by the said B., and by the said Gale, and sealed with their seals, and duly delivered on the day of the date thereof, and dated the 17th day of November, 1828, it was mutually agreed by and between the said B. and the said G., that the said G. should, on or before the first Tuesday in December, then next, deliver to the said B. a certain horse, called the John Hatch horse, sound, and in as good condition as when the said B. saw him at C., in full satisfaction of the said several promises in the declaration of said B. mentioned, and in full satisfaction of all damages sustained by reason of the non-performance of the said several promises, and of all costs which had accrued in the said suit; and that on such delivery of the said horse, the said B. should give up to the said G. the said notes to be cancelled, and that the said suit should be no further prosecuted; and that in case said G. did not deliver said horse to said B., by said first Tuesday in December then next, that said suit should not be withdrawn, but should be entered and stand for trial at the said court, as by the covenant and agreement now here ready in Court to

be shown appears: and the said G. avers, that before the said first Tuesday, viz. on the 25th day of November aforesaid, at said Plainfield, he, the said G., did offer to deliver and tender to the said B. the said horse, sound, and in as good condition as when said B. saw him in C., and the said B. did then and there neglect and refuse to receive the said horse: all which the said G. is ready to verify. Wherefore, he prays judgment of the Court here, whether the said B., from having and maintaining his said action thereof against him, ought not to be barred, and for his costs." *Bryant v. Gale*, 5 Vt. 416.

81. *Thomas v. Heathorn*, 2 B. & C. 477, 9 E. C. L. 152; *Gabriel v. Dresser*, 29 Eng. L. & Eq. 266.

Thus a plea purporting to answer the whole declaration in an action for goods sold and delivered, averring payment in satisfaction of the debt, is defective for failing to allege payment in satisfaction of damages as well. *Ash v. Poupperville*, L. R. 3 Q. B. 86, 37 L. J. 55. To the same effect, see *Francis v. Crywell*, 5 B. & A. 886, 7 E. C. L. 289. And a plea professing to answer the whole declaration but which is in truth only an answer to one of the causes of action complained of is bad. *Hopkinson v. Tahourdin*, 2 Chit. 303, 18 E. C. L. 343.

82. Thus a plea which is uncertain as to whether an agreement to accept the delivery of certain goods occurred contemporaneously with the delivery or subsequently, is ambiguous. *Stead v. Poyer*, 1 M., G. & S. 782, 50 E. C. L. 782.

83. *Stead v. Poyer*, 1 M., G. & S. 782, 50 E. C. L. 782.



sistent with the other, such repugnancy is fatal to the validity of the plea.<sup>84</sup>

II. SHAM PLEAS. — Where a plea is in every respect false, the court will permit plaintiff to sign judgment as for want of a plea.<sup>85</sup>

I. VERIFICATION. — Except as provided by code or statute a plea of accord and satisfaction like other pleas in bar requires no verification.<sup>86</sup> But where accord and satisfaction is raised under a plea of *pais darrin continuance*, the plea must be sworn to.<sup>87</sup>

IV. JOINDER OF PLEAS. — Under modern practice a plea of accord and satisfaction may accompany the general issue,<sup>88</sup> or a plea of payment,<sup>89</sup> or *nul tiel record* to debt on judgment.<sup>90</sup> And in the latter case, trying the issue made by the plea of *nul tiel record* is no waiver of an exception to the court's ruling against the plea of accord and satisfaction.<sup>91</sup>

## V. MANNER OF ATTACKING PLEA. — A. BY REPLICATION.

1. In General. — Where an answer to a plea of accord and satisfaction is permissible, plaintiff should traverse the same by replication,<sup>92</sup>

84. Snyder v. Pharo, 25 Fed. 398.

85. Richley v. Proone, 1 B. & C. 286, 8 E. C. L. 78.

86. Robinson v. Burkell, 3 Ill. 278.

87. Evans v. C., S. & M. R. Co., 78 Ala. 341.

88. Mayo v. Leighton, 101 Me. 63, 63 Atl. 298; First Nat. Bank v. Kimberlands, 16 W. Va. 555.

No Admission of the Cause of Action. — Where a plea of accord and satisfaction is pleaded with the general issue, the former is not an admission of the cause of action. Prince v. Puckett, 12 Ala. 832.

89. Kershaw's Exr. v. Robinson's Admr., 1 Brev. (S. C.) 380.

90. Tucker v. Edwards, 7 Colo. 209, 3 Pac. 233. *Payment and accord and satisfaction may both be pleaded together with nul tiel record*, to debt on judgment. Kershaw's Exr. v. Robinson's Admr., 1 Brev. (S. C.) 380.

91. The reason for this is that the plea of *nul tiel record* and that of accord and satisfaction present entirely dissimilar issues. The former denies the existence of the original judgment as pleaded; the latter admits its existence and avers satisfaction thereof. Tucker v. Edwards, 7 Colo. 209, 3 Pac. 233.

92. III. — Capital City Mut. Fire Ins. Co. v. Detwiler, 23 Ill. App. 656. Eng. — Stears v. South Essex G.-L. & C. Co., 9 C. B. (N. S.) 179, 99 E. C.

L. 180. Can. — See Cruikshank v. McAvity, 20 N. B. 362.

Form of Replication in Damage Suit. In O'Riley v. Wilson, 4 Ore. 97, which was an action for personal injuries, the answer stated that plaintiff paid the surgeon's fees and paid the plaintiff \$75, which was accepted as a full settlement and satisfaction by the plaintiffs. The plaintiffs replied "that it is not true that plaintiffs, in consideration of the payment of the sum of . . . , or any other sum, and the surgeon's fee for attendance upon plaintiff : . . . , accepted the same in full satisfaction and discharge of the damages or liabilities in the complaint mentioned and set out, and of all the damages by the plaintiffs sustained by reason of the matters and things in said complaint alleged, and plaintiffs deny that they have ever received from any person or persons compensation or satisfaction for the injury and damages in the complaint in this action set out." It was insisted that it was not sufficient to deny the allegation of acceptance in settlement, as stated in the pleading replied to, but that the denial must show that there had been no settlement whatever. The court, however, said: "This is not a denial of a conclusion of law. A certain fact is set out in the answer, to wit, that the

and upon failure to do so, the allegations of the plea are admitted.<sup>92</sup> But, as in other cases, a replication which raises an immaterial issue is defective.<sup>94</sup>

**2. Traversing Agreement, Delivery and Acceptance.** — A replication denying both the delivery or performance and acceptance in satisfaction has been held not improper,<sup>95</sup> though as a rule it is sufficient to deny either the performance or delivery,<sup>96</sup> or acceptance.<sup>97</sup> And there is authority for the proposition that where satisfaction is pleaded as made in pursuance of an agreement, a replication traversing the agreement, though not noticing the payment or acceptance, answers the plea.<sup>98</sup>

**3. Traversing Debt in Assumpsit.** — Where in an action of assumpsit defendant avers a debt due from plaintiff's assignors and an account stated in respect of it, a replication traversing the debt is sufficient without traversing the account, since a denial of the debt as a necessary consequence destroyed the account stated.<sup>99</sup>

payment of the surgeon's fee and the payment of seventy-five dollars were accepted by the plaintiffs as a full settlement of the damages; that is to say, that such was the contract and the consideration thereof. Plaintiffs deny that they ever made any such contract. I think this is the denial of a fact, and not the pleading of a conclusion of law."

93. *Capital City Mut. Fire Ins. Co. v. Detwiler*, 23 Ill. App. 656; *Reichel v. Jeffrey*, 9 Wash. 250, 37 Pac. 296.

94. *Jones v. Sawkins*, 5 M., G. & S. 142, 57 E. C. L. 141.

A plea of accord and satisfaction averring the making, delivery and acceptance of promissory notes is not answered by a replication denying that defendant paid the plaintiff the moneys in said plea mentioned. *Stitzel v. Franks*, 126 Ill. App. 260.

95. *Miss.* — *Dent v. Coleman*, 10 Smed. & M. 83. *Ohio* — *Baldwin v. Bank of Massillon*, 1 Ohio St. 141. *Eng.* — *Webb v. Weatherby*, 1 Bing. N. C. 502, 27 E. C. L. 474.

96. *State Bank v. Littlejohn*, 18 N. C. 563. See *Dent v. Coleman*, 10 Smed. & M. (Miss.) 83.

97. *Colo.* — *Berdell v. Bissell*, 6 Colo. 162. *Miss.* — See *Dent v. Coleman*, 10 Smed. & M. 83. *Ore.* — *O'Reiley v. Wilson*, 4 Ore. 96. *Can.* — *Cruikshank v. McAvity*, 20 N. B. 352.

Thus if in *indebitatus* and *quantum meruit* defendant plead in bar that he gave plaintiff a hat, which he accepted in satisfaction of the debt; a replica-

tion protesting that defendant did not give the hat in satisfaction and traversing that he received it in satisfaction, is good. It is not necessary to traverse the grant, since the denial of the acceptance implies that the thing was not given in satisfaction. *Hawkshaw v. Rawlings*, 1 Str. 23, 93 English Reprint 360 (a traverse of an acceptance is an argumentative denial of the payment); *Young v. Rudd*, 5 Mod. 86, 2 Salk. 627, Comb. 346, 1 Ld. Raym. 60, Carth. 347, 87 Eng. Reprint 535.

Though under a statute want of acceptance may be shown under a general denial, plaintiff may nevertheless plead it specially. *Pottlitzer v. Weston*, 8 Ind. App. 472, 35 N. E. 1030.

**Replication Not Duplicious.** — Where a defendant alleges in a plea of accord and satisfaction an accounting between himself and plaintiff, and the acceptance by plaintiff of a bill of exchange in satisfaction, duly drawn on and accepted by defendant, a replication traversing both the accounting and the acceptance by plaintiff is not duplicious. The court said that if it was necessary for the defendants to allege all the facts they did in order to constitute one defense, it was open to the plaintiff to deny them all. *Light v. Woodstock, etc. & H. Co.*, 13 U. C. Q. B. 201.

98. *Bainbridge v. Lax*, 9 A. & E. 819, 58 E. C. L. 818.

99. In *Learmonth v. Grandine*, 4 M. & W. (Eng.) 658, the court said that the plea seemed to be a tricky one and

**4. Alleging New Matter.**—a. *Defendant's Vitiating Act.*—The replication may allege that the accord and satisfaction has become ineffective by reason of defendant's own act.<sup>1</sup>

b. *Defendant's Fraud.*—While, in general, a contract can be set aside in equity only, nevertheless by the weight of authority, the plaintiff, in a suit at law, may meet a plea of release by a replication that the release was obtained by fraud, whether the fraud be in the execution or in misrepresentation of material facts inducing execution, where the issue involves simply a question of fraud between the parties.<sup>2</sup> The plaintiff cannot show fraud vitiating the accord and satisfaction, without alleging the same,<sup>3</sup> and setting forth the facts relied

he thought plaintiff had dealt properly enough with it.

1. Where a plaintiff upon being sued for money had and received pleads accord and satisfaction by the giving of an annuity deed to plaintiff, it is a good answer to such plea that plaintiff had formerly sued to recover arrears in the annuity, and that defendant had set up in that action want of enrollment of a memorial of the deed in defense, since the agreement of accord and satisfaction had thus been rendered nugatory by defendant's own act. *Turner v. Browne*, 3 M., G. & S. 157, 54 E. C. L. 156.

2. **U. S.**—*Wagner v. National Life Ins. Co.*, 90 Fed. 395, 33 C. C. A. 121. **Cal.**—*Dobinson v. McDonald*, 92 Cal. 33, 27 Pac. 1098. **N. C.**—*Hayes v. Atlanta, etc. R. Co.*, 143 N. C. 125, 55 S. E. 437. **Eng.**—*Stears v. South Essex G. L. & C. Co.*, 9 C. B. (N. S.) 179, 99 E. C. L. 180.

**Proof of fraud** may be made for the purpose of attacking the accord and satisfaction. **Cal.**—*Dobinson v. McDonald*, 92 Cal. 33, 27 Pac. 1098. **Iowa.**—*Harrison Co. v. Ogden*, 108 N. W. 451. **Vt.**—*Reynolds v. French*, 8 Vt. 85, 30 Am. Dec. 456. **Wis.**—*Ball v. McGeoch*, 81 Wis. 160, 51 N. W. 443.

See also **ENCYCLOPÆDIA OF EVIDENCE**, title "Account and Satisfaction."

In *Brundige v. Nashville, C. & St. L. R. Co.*, 112 Tenn. 526, 81 S. W. 1248, the court said: "The next question presented is whether an accord and satisfaction may be set aside and disregarded or repudiated and annulled in an action at law, or whether the relief in such case is primarily in a court of chancery to set aside the accord and satisfaction. We have no direct adjudication upon this question. In the

case of *Prater v. Marble Co.*, 105 Tenn. 496, 58 S. W. 1068, the question was expressly reserved; and it was also reserved in the case of *Union Pac. Ry. Co. v. Harris*, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. ed. 1003. It came directly before the United States Circuit Court in the case of *Wagner v. The National Life Ins. Co.*, 90 Fed. 395, 33 C. C. A. 121. . . . The court adds in that case: 'We are glad to come to this conclusion, because it avoids circuitry of action, and thus facilitates the administration of justice.' And again that court says: 'Where the issue is simply one of fraudulent misrepresentation, it may as well be tried by a jury as in a court of equity for fraud is an issue of which courts of law and equity from time immemorial have had concurrent jurisdiction.' See, also, *Lumley v. Railroad*, 76 Fed. 73, 22 C. C. A. 60. This court, in the case of *Byers v. R. R. Co.*, 94 Tenn. 345, 29 S. W. 128, set aside an accord and satisfaction, or compromise agreement and an action at law, because of fraud and unconscionable advantage; but no objection to the jurisdiction of the lower court was made in that case. There have been other cases in this court where the same course has been pursued. We are of opinion, therefore, that in an action at law, an accord and satisfaction may be set aside for fraud or misrepresentation, either in the execution of the contract, or in the inducement to the execution."

3. **Ill.**—*Capital City Mut. Fire Ins. Co. v. Detwiler*, 23 Ill. App. 656. **Vt.**—*Brainard v. Van Dyke*, 71 Vt. 359, 45 Atl. 758. **W. Va.**—*Currey v. Lawler*, 29 V. Va. 111, 11 S. E. 897. But see *Whitehead v. Trussed Concrete Steel Co.*, 51 Misc. 664, 101 N. Y. Supp. 250.



upon.<sup>4</sup> Under ordinary circumstances unless some fact or event prevents and excuses it, it is necessary to aver in the replication a return of the consideration.<sup>5</sup>

The distinction has been made in some cases between fraud in the execution of the release and fraud in the inducement to its execution.<sup>6</sup> And if the contract of accord and satisfaction sought to be set aside is under seal, it has been held that if the fraudulent representations relied upon relate to collateral matters inducing the execution of the instrument, a resort must be had to a court of equity for a decree reforming or setting it aside.<sup>7</sup>

**B. BY DEMURRER.**—An objection that an answer does not state facts sufficient to show an accord and satisfaction should be raised by demurrer.<sup>8</sup>

**VI. BURDEN OF PROOF.**—The burden of proving an accord and satisfaction is, of course, upon the party alleging it,<sup>9</sup> and if the

4. *Brainard v. Van Dyke*, 71 Vt. 359, 45 Atl. 758.

**Fraudulent Acts Must Be Alleged.**

A plaintiff, while an employe of a defendant railway company, having sustained a personal injury by reason of its negligence and having thereafter released his right of action for such injury by a contract of accord and satisfaction fully executed, cannot maintain an action against the company for inducing him to enter into that contract, and accept satisfaction under it by fraudulently persuading him, through its superintendent and its employed physician, to believe that his injury was not a material one, and would not be permanent, it not being alleged that any artifice, trick, or contrivance was used to prevent him from ascertaining the true nature of his injury, and its probable duration, these matters lying as much within his knowledge, or means of knowledge, as within the knowledge of the defendant, its officers, agents, and employes. *Hayes v. East Tennessee, V. & G. R. Co.*, 89 Ga. 264, 15 S. E. 361.

5. *Brainard v. Van Dyke*, 71 Vt. 359, 45 Atl. 758. But see *Hayes v. Atlanta, etc. R. Co.*, 143 N. C. 125, 55 S. E. 437.

**Where Plea Fails To Aver Payment.** In *Knoxville, etc. R. Co. v. Acuff*, 92 Tenn. 26, 20 S. W. 348, an administrator sued for the wrongful death of his intestate and filed a replication alleging that an accord and satisfaction with the widow was procured through fraud but failing to aver that money received

had been tendered back. The court said that this was immaterial to the sufficiency of the replication, since the plea did not aver that any money had been paid, especially in view of the fact that the money was paid into court subsequently.

**Amendment allowed** after an objection has been made for failure to aver return of consideration. *Knoxville, etc. R. Co. v. Acuff*, 92 Tenn. 26, 20 S. W. 348.

6. **U. S.**—*Vandervelden v. Chicago & N. W. R. Co.*, 61 Fed. 54 (in which it is held that where a plaintiff seeks to avoid the effect of a written contract of accord and satisfaction, duly executed, on the ground that he was induced to sign the same through defendant's fraudulent representations, it is necessary to institute a proceeding in equity for that purpose); *Phettipiece v. Sayles*, 4 Mason 312, 19 Fed. Cas. No. 11,083. **Ill.**—*Papke v. Hammond Co.*, 61 N. E. 910. **Ia.**—*Jessup v. Chicago & N. W. R. Co.*, 99 Iowa 189, 68 N. W. 673.

7. *Jackson v. Security Mut. Life Ins. Co.*, 233 Ill. 161, 84 N. E. 198.

8. **Ky.**—*Davis v. Noaks*, 3 J. J. Marsh. 494. **Mo.**—*Shaw v. Burton*, 5 Mo. 478. **Wash.**—*Rogers v. City of Spokane*, 9 Wash. 168, 37 Pac. 300. **Eng.**—*Gabriel v. Dresser*, 15 C. B. 622, 80 E. C. L. 620.

9. **Ala.**—*Johnson v. Collins*, 20 Ala. 435. **Ark.**—*Dickinson v. Burr*, 7 Ark. 34. **Cal.**—*Simmons v. Oullahan*, 75 Cal. 508, 17 Pac. 543. **Colo.**—*La Plate County v. Durnell*, 17 Colo. App. 85,

plaintiff seeks to avoid the plea for fraud or on any other ground, the burden of proof is upon him.<sup>10</sup> So, too, when the plaintiff, in making out his own case, shows an accord which he must dispose of, he must show, *prima facie*, a want of satisfaction.<sup>11</sup>

**VII. PROVINCE OF COURT AND JURY.**—If the facts are ascertained, their effect is purely a question of law for the court.<sup>12</sup> But the question whether or not there has been such a giving and acceptance as will amount to an accord and satisfaction is one of fact to be determined by the jury.<sup>13</sup> And so on a jury trial if the evidence on the subject be such as to give rise to doubt, the question should be submitted to the jury.<sup>14</sup>

66 Pac. 1073. **Ill.**—*American v. Rimpert*, 75 Ill. 228; *McDavitt v. McNay*, 78 Ill. App. 396. **Mich.**—*Browning v. Crouse*, 43 Mich. 489, 5 N. W. 664. **Mo.**—*Barrett v. Kern*, 121 S. W. 774, 780; *Oil Well Supply Co. v. Wolfe*, 127 Mo. 616, 30 S. W. 145; *Bahrenburg v. Conrad Schopp Fruit Co.*, 128 Mo. App. 526, 107 S. W. 440. **Neb.**—*McKinnon v. Holden*, 85 Neb. 406, 123 N. W. 439. **N. Y.**—*Noe v. Christie*, 51 N. Y. 270; *Weinberg v. Novick*, 83 N. Y. Supp. 168; *Rosenfeld v. New*, 10 N. Y. Supp. 232, 32 N. Y. St. 301; *Dolsen v. Arnold*, 10 How. Pr. 528. **Wash.**—*National Cash Reg. Co. v. Petsas*, 43 Wash. 376, 86 Pac. 662. **Wyo.**—*City of Rawlins v. Jungquist*, 16 Wyo. 403, 94 Pac. 464, 96 Pac. 144. **Can.**—*Weldon v. Vaughan*, 5 Can. Sup. Ct. 35; *Crockett v. Macfarlane*, 33 N. B. 29.

See *ENCYCLOPEDIA OF EVIDENCE*, title "Accord and Satisfaction."

**10. Mo.**—*Helling v. United Order of Honor*, 29 Mo. App. 309. **Va.**—See *Lurty's Curator v. Lurty*, 107 Va. 466, 59 S. E. 405. **W. Va.**—*Currey v. Lawler*, 29 W. Va. 111, 11 S. E. 897. **Can.**—*Rowe v. Grand Trunk R. Co.*, 16 U. C. C. P. 500; *Haist v. Grand Trunk R. Co.*, 22 Ont. App. 504.

**11. Browning v. Crouse, 43 Mich. 489, 5 N. W. 664.**

**12. Cal.**—*Creighton v. Gregory*, 142 Cal. 34, 75 Pac. 569. **Colo.**—*Gibbs v. Wall*, 10 Colo. 153, 14 Pac. 216. **Fla.**—*Sanford v. Abrams*, 24 Fla. 181, 2 So. 373. **Minn.**—*Wilkinson v. Crookston*, 75 Minn. 184, 77 N. W. 797; *Washburn v. Winslow*, 16 Minn. 33. **Mo.**—*Helling v. United Order of Honor*, 29 Mo. App. 309. **N. Y.**—*Whitaker v. Eilenberg*, 70 App. Div. 489, 75 N. Y. Supp. 106.

Thus, where it is clear that the accord

was made with the implied understanding, which the law gave to it, that satisfaction was to follow by payment, the question is one of construction and not of intention and it is the court's duty to declare its legal effect. *Carter v. Chicago, B. & Q. R. Co.*, 136 Mo. 35, 119 S. W. 35.

Where an accord and satisfaction is created by letters, and there is no oral evidence modifying their force and effect, and no dispute of fact in connection therewith, this condition creates a question of law solely for the court. *Logan v. Davidson*, 18 App. Div. 353, 45 N. Y. Supp. 961.

**13. Ind.**—*Frick v. Algier*, 87 Ind. 255. **Ia.**—*Greenlee v. Mosnat*, 116 Iowa 535, 90 N. W. 338; *Perin v. Cathcart*, 115 Iowa 553, 89 N. W. 12. **Kan.**—*Fredonia Gas Co. v. Elwood Supply Co.*, 71 Kan. 464, 80 Pac. 969. **Minn.**—*Wilson v. Northwestern Nat. Life Ins. Co.*, 103 Minn. 35, 114 N. W. 251. **Mo.**—*Barrett v. Kern*, 121 S. W. 774, 780.

For example, where the cashing of a check is pleaded as an accord and satisfaction, whether the same was received by plaintiff after being deceived as to the amount to which he was entitled, is for the jury. *Reed v. Engel*, 237 Ill. 628, 86 N. E. 1110. And when a bond for titles is executed by two, and the obligee afterwards accepts from one of them a deed executed by himself and a third person, it is a question for the jury to determine whether the deed was accepted in satisfaction of the bond. *Johnson v. Collins*, 20 Ala. 435.

Whether the delivery of a check to plaintiff and the receipt and subsequent use of it by him amounts to an accord and satisfaction is for the jury, in view of conflicting evidence. *Rothschild v.*

**Trial by the Court.**—Where trial is had before a court without a jury, the finding of the court as to whether there has been an accord and satisfaction will be approved if that finding is supported by substantial evidence and there is no error of law.<sup>15</sup>

In Canada it has been held in a recent personal injury case that an issue as to the effect of a payment and receipt and its procurement by fraud, may be tried by the court within his discretion and need not necessarily be left to the jury.<sup>16</sup>

**VIII. VARIANCE.**—Where the evidence proves an accord and satisfaction of a different character from that alleged,<sup>17</sup> or with a different party,<sup>18</sup> this will not support a verdict.

**IX. VERDICT AND JUDGMENT.**—Though a special finding of fact does not expressly state that the court found that an offer of defendant was made "by way of accord and satisfaction," it may be implied from the context.<sup>19</sup> And if in an action of assumpsit there is a plea of non-assumpsit and a plea of accord and satisfaction, a verdict is sufficient which responds to the general issue, since the special plea is superfluous.<sup>20</sup>

*Mosbacher*, 26 App. Div. 167, 49 N. Y. Supp. 698. To the same effect, see *Armstrong, Cator & Co. v. Lonon*, 149 N. C. 434, 63 S. E. 101.

**Intention of Parties.**—Payment made and accepted for the assignment of a mortgage is not a settlement of a claim for the breach of another and different contract, unless so intended by the parties. Whether it is so intended is a question of fact. *Mayo v. Leighton*, 101 Me. 63, 63 Atl. 298.

The intention of the parties as to whether a note given by a debtor to a creditor should operate as a payment and satisfaction of an existing claim is a question of fact for the jury. *Salomon v. Pioneer Co-operative Co.*, 21 Fla. 374, 58 Am. Rep. 667.

14. **Ia.**—*Rustler Realty Co. v. Swecker*, 134 Iowa 679, 112 N. W. 169; *Greenlee v. Mosnat*, 116 Iowa 535, 90 N. W. 338; *Perin v. Cathcart*, 115 Iowa 553, 89 N. W. 12. **Me.**—*Mayo v. Leighton*, 101 Me. 63, 63 Atl. 298. **Minn.**—*Hillestad v. Lee*, 91 Minn. 335, 97 N. W. 1055. **Mo.**—*Barrett v. Kern*, 121 S. W. 774, 780; *Oil Well Supply Co. v. Wolfe*, 127 Mo. 616, 30 S. W. 145; *Bahrenburg v. Conrad Schopp Fruit Co.*, 128 Mo. App. 526, 107 S. W. 440. **N. Y.**—*McCormick v. Shea*, 47 Misc. 613, 94 N. Y. Supp. 485; *Cornell v. Taylor*, 122 N. Y. Supp. 157.

**N. C.**—*Armstrong, Cator & Co. v. Lonon*, 149 N. C. 434, 63 S. E. 101. **Pa.**—*Laughead v. Frick Coke Co.*, 209 Pa. 368, 58 Atl. 685, 103 Am. St. Rep. 1014, 28 Pa. Co. Ct. 97; *Stone v. Miller*, 16 Pa. 450; *Erie Forge Co. v. Iron Works Co.*, 22 Pa. Super. 550.

**Inclusion of Account in an Award.**—Where in an action on an account, accord and satisfaction was pleaded on the ground that the same subject-matter was submitted to arbitration and passed upon, the evidence being conflicting as to whether this account was included, the question was properly submitted to the jury. *Madden v. Blain*, 66 Ga. 49.

15. *Barrett v. Kern* (Mo.), 121 S. W. 774, 780.

16. *Haist v. Grand Trunk R. Co.*, 22 Ont. App. (Can.) 504.

17. *Walker v. Reese*, 110 Ga. 582, 35 S. E. 771. Thus see *Smith v. Elrod*, 122 Ala. 269, 24 So. 994.

**No Material Variance.**—*Wilson v. Northwestern Nat. Life Ins. Co.*, 103 Minn. 35, 114 N. W. 251; *Smitherman v. Smith*, 20 N. C. 89.

18. *Chappell v. Phillips, Wright* (Ohio) 372.

19. *Worden v. Houston*, 92 Mo. App. 371.

20. *Sapp v. Laughead*, 6 Ohio St. 174.



# ACCOUNT AND ACCOUNTING

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## SCOPE OF SUBJECT.

This article includes definition and classification of accounts; account render; modern actions on accounts; action of book debt and book account; account stated; and accounting in equity. It does not include summary accounting by guardians, committees and other fiduciaries under local laws.

**I. DEFINITION AND CLASSIFICATION.**—A. DEFINITION OF ACCOUNT.—The word account, as a ground of action<sup>1</sup> or defense,<sup>2</sup> is a very comprehensive term, and in its most general sense means any list or statement of an item<sup>3</sup> or items<sup>4</sup> of debt and credit arising out of contract,<sup>5</sup> or from some fiduciary relation.<sup>6</sup>

B. CLASSIFICATION.—There are many different kinds of accounts

1. U. S.—*Dillingham v. Skein*, Hempst. 181, 7 Fed. Cas. No. 3,912a; *Collins v. Johnson*, Hempst. 279, 6 Fed. Cas. No. 3,015a. Ala.—*Morrisette v. Wood*, 128 Ala. 505, 30 So. 630; *Pope v. Robinson*, 1 Stew. 415. Ark.—*State v. Jennings*, 10 Ark. 428. Cal.—*Andrade v. Superior Court*, 75 Cal. 459, 17 Pac. 531; *Anzerais v. Naglee*, 74 Cal. 60, 15 Pac. 371. Conn.—*Tousey v. Preston*, 1 Conn. 175. Ga.—*Mahaffey v. Petty*, 1 Ga. 261. Kan.—*Southern Kan. R. Co. v. Gould*, 44 Kan. 68, 24 Pac. 352. Me.—*Turgeon v. Cote*, 88 Me. 108, 33 Atl. 787. Minn.—*Kramer v. Gardner*, 104 Minn. 370, 116 N. W. 925. Miss.—*Madison County v. Collier*, 79 Miss. 220, 30 So. 610. Mo.—*McWilliams v. Allan*, 45 Mo. 573. N. H.—*Filer v. Peebles*, 8 N. H. 226. N. Y.—*Bottum v. Moore*, 13 Daly 464; *Mersereau v. Bennett*, 62 Misc. 356, 115 N. Y. Supp. 20. N. D.—*Turner v. St. John*, 8 N. D. 245, 78 N. W. 340. Ore.—*Purvis v. Kroner*, 18 Ore. 414, 23 Pac. 260. S. D.—*Betcher v. Grant County*, 9 S. D. 82, 68 N. W. 163. W. Va.—*Somerville v. Grim*, 17 W. Va. 803.

The court in *Kramer v. Gardner*, 104 Minn. 370, 116 N. W. 925, says:

"The expression 'account' indicates an unsettled claim or demand not evidenced by written contract signed by the parties. *McCamant v. Batsell*, 59 Tex. 363. It is usually disclosed by the account books of the owner of the demand, and does not include express contract obligations which have been reduced to writing, such as bonds, bills

of exchange, or promissory notes. *Southern Kan. R. Co. v. Gould*, 44 Kan. 68, 24 Pac. 352; *Burress v. Blair*, 61 Mo. 133."

2. Ala.—*Smith v. Huie*, 14 Ala. 201. Mass.—*Witter v. Witter*, 10 Mass. 223. Pa.—*Vincent v. Watson*, 40 Pa. 306.

3. *Purvis v. Kroner*, 18 Ore. 414, 23 Pac. 260.

4. Me.—*Turgeon v. Cote*, 88 Me. 108, 33 Atl. 787; *Theobald v. Stinson*, 38 Me. 149. Neb.—*Perkins County v. Keith County*, 58 Neb. 323, 78 N. W. 630. N. J.—*American Saw Co. v. First Nat. Bank of Trenton*, 58 N. J. L. 438, 34 Atl. 1; *Maxwell v. McCreery*, 57 N. J. Eq. 287, 41 Atl. 498. N. Y.—*Rensselaer Glass Factory v. Reid*, 5 Cow. 587, 593. N. D.—*Turner v. St. John*, 8 N. D. 245, 78 N. W. 340. Ore.—*Purvis v. Kroner*, 18 Ore. 414, 23 Pac. 260. S. D.—*Betcher v. Grant County*, 9 S. D. 82, 68 N. W. 163.

5. Ala.—*Morrisette v. Wood*, 128 Ala. 505, 30 So. 630. Ind.—*Nelson v. Board of Comrs.*, 105 Ind. 287, 4 N. E. 703. Me.—*Turgeon v. Cote*, 88 Me. 108, 33 Atl. 787. Mass.—*Whitwell v. Willard*, 1 Met. 216. Mo.—*McWilliams v. Allan*, 45 Mo. 573. S. D.—*Ewart v. Kass*, 17 S. D. 220, 95 N. W. 915.

6. Ala.—*Morrisette v. Wood*, 128 Ala. 505, 30 So. 630. Ind.—*Nelson v. Board of Comrs.*, 105 Ind. 287, 4 N. E. 703. Mass.—*Whitwell v. Willard*, 1 Met. 216. Mo.—*McWilliams v. Allan*, 45 Mo. 573.

known to the law, variously denominated as bank,<sup>7</sup> book,<sup>8</sup> complicated,<sup>9</sup> continuous,<sup>10</sup> current<sup>11</sup> (debit and credit), false,<sup>12</sup> itemized<sup>13</sup>

7. U. S.—Central Nat. Bank v. Mutual Life Ins. Co., 104 U. S. 54, 26 L. ed. 693. Kan.—Southern Kan. R. Co. v. Gould, 44 Kan. 68, 24 Pac. 352. N. H.—Gale v. Drake, 51 N. H. 78, 84. Pa.—Pennsylvania Title & Tr. Co. v. Meyer, 201 Pa. 299, 50 Atl. 998.

8. Conn.—Bunuel v. Pinto, 2 Conn. 431, 432. Kan.—Southern Kan. R. Co. v. Gould, 44 Kan. 68, 24 Pac. 352. Minn.—Taylor v. Horst, 52 Minn. 300, 303, 54 N. W. 734, 735. Mo.—Stieglitz v. Lewis Merc. Co., 76 Mo. App. 275, 280. N. C.—State v. Dalton, 6 N. C. 379.

A book account is an indivisible claim, as much as a promissory note; and a party may as well pretend that he kept back a part of his claim on a note, and then, after the award, bring a suit on the note, as he can in the case of a book account. Bunnell v. Pinto, 2 Conn. 431.

9. Ala.—Beggs v. Edison Electric Illuminating Co., 96 Ala. 295, 11 So. 381, 383, 38 Am. St. Rep. 94. Ill.—Tennessee Pack. & Provision Co. v. Fitzgerald, 140 Ill. App. 430. N. Y.—Marvin v. Brooks, 94 N. Y. 71, 85.

10. Higley v. Burlington, etc. R. Co., 99 Iowa 503, 68 N. W. 829, 61 Am. St. Rep. 250.

A continuous account is one which is not interrupted or broken, and not closed by settlement or otherwise, and is a running connected series of transactions. Morse v. Minton, 101 Iowa 603, 70 N. W. 691, 692; Tucker v. Quimby, 37 Iowa 17.

11. Higley v. Burlington, etc. R. Co., 99 Iowa 503, 68 N. W. 829, 61 Am. St. Rep. 250. Kan.—Southern Kan. R. Co. v. Gould, 44 Kan. 68, 24 Pac. 352. Ky.—Dyott v. Letcher, 6 J. J. Marsh. 541. Miss.—Davis v. Tiernan & Co., 2 How. 786. N. M.—Brown & Manzares Co. v. Gise, 14 N. M. 282, 91 Pac. 716. N. Y.—Ramchander v. Hammond, 2 Johns. 200.

"Account current" is a term used to designate a running, connected series of transactions. Tucker v. Quimby, 37 Iowa 17. This term occurs in the statutes of several of the states, as an examination of the cases will show. Cal. Rocca v. Klein, 74 Cal. 526, 16 Pac. 323. Mass.—Eldridge v. Smith, 144

Mass. 35, 10 N. E. 717. Minn.—Taylor v. Parker, 17 Minn. 469, 473.

In a mercantile sense this kind of an account is one which contains items of debit and credit between the parties, from which the balance due either on one side or the other may or can be ascertained. Wilson v. Calvert, 18 Ala. 274.

12. Santa Monica Lumber & Mill Co. v. Hege, 119 Cal. 376, 51 Pac. 555; Putnam v. Osgood, 51 N. H. 192.

13. Lovell v. Sny Island Levee Drainage Dist., 159 Ill. 188, 42 N. E. 600, 602; State v. Smith, 89 Mo. 408, 14 S. W. 557.

Mechanics' Lien Law.—The term "itemized account" is used in some states in the Mechanics' Lien Law. In these states the law requires an "itemized" account of the claim to the lien in order to make such claim sufficient. U. S.—A. F. Withrow Lumb. Co. v. Glasgow Inv. Co., 101 Fed. 863, 42 C. C. A. 61, affirming Breen v. Glasgow Inv. Co., 92 Fed. 760. Ill.—Grace v. Oakland Bldg. Assn., 166 Ill. 637, 46 N. E. 1102. Ia.—Wetmore v. Marsh, 81 Iowa 677, 47 N. W. 1021; Valentine v. Rawson, 57 Iowa 179, 10 N. W. 338. Kan.—Hentig v. Sperry, 38 Kan. 459, 17 Pac. 42; Deatherage v. Woods, 37 Kan. 59, 14 Pac. 474; Newman v. Brown & Co., 27 Kan. 117; North & South Lumb. Co. v. Hegwer, 1 Kan. App. 623, 42 Pac. 388. Mo.—Rude v. Mitchell, 97 Mo. 365, 11 S. W. 225; Coe v. Ritter, 86 Mo. 277, 287; Henry v. Plitt, 84 Mo. 240; Graves v. Pierce, 53 Mo. 423; McWilliams v. Allan, 45 Mo. 573; Neal v. Smith, 49 Mo. App. 328; Curless & Co. v. Lewis, 46 Mo. App. 278; Kern v. Pfaff, 44 Mo. App. 29. Neb.—Jarrett v. Hoover, 41 Neb. 231, 59 N. W. 353. Pa.—Wharton v. Real Estate Inv. Co., 180 Pa. 168, 36 Atl. 725, 57 Am. St. Rep. 629. Va.—Shackleford v. Beck, 80 Va. 573. Wash.—Fairhaven Land Co. v. Jordan, 5 Wash. 729, 32 Pac. 729; Warren v. Quade, 3 Wash. 750, 29 Pac. 827; Gates v. Brown, 1 Wash. 470, 25 Pac. 914.

In the following cases the question was discussed whether or not the accounts were sufficiently itemized: Ill. Grace v. Oakland Bldg. Assn., 166 Ill. 637, 46 N. E. 1102. Kan.—School



(important under mechanics' lien laws), long,<sup>14</sup> merchants',<sup>15</sup> mutual,<sup>16</sup>

Dist. No. 3 v. Howell, 44 Kan. 285, 24 Pac. 365; Sharon Town Co. v. Morris, 39 Kan. 377, 18 Pac. 230. Minn.—Johnson v. Stout, 42 Minn. 514, 44 N. W. 534. Mo.—Mitchell Planing Mill Co. v. Allison, 138 Mo. 50, 40 S. W. 118, 60 Am. St. Rep. 544, reversing 71 Mo. App. 251; Brockmeier v. Dette, 58 Mo. App. 608. Mont.—Bardwell v. Anderson, 13 Mont. 87, 32 Pac. 285. Neb.—Manly v. Downing, 15 Neb. 637, 19 N. W. 601. N. M.—Hobbs v. Spiegelberg, 3 N. M. 222, 5 Pac. 529. N. D.—Turner v. St. John, 8 N. D. 245, 78 N. W. 340. Okla.—Blanchard v. Schwartz, 7 Okla. 23, 54 Pac. 303.

In the following cases the accounts were held not to be sufficiently itemized: U. S.—Springer Land Assn. v. Ford, 168 U. S. 513, 18 Sup. Ct. 170, 42 L. ed. 562; Breed v. Glasgow Inv. Co., 92 Fed. 760, affirmed, 101 Fed. 863, 42 C. C. A. 61. Ill.—Campbell v. Jacobson, 145 Ill. 389, 34 N. E. 39, affirming 46 Ill. App. 287. Kan.—Nixon v. Cydon Lodge No. 5, 56 Kan. 298, 43 Pac. 236. Mo.—Williams v. Chicago, etc. R. Co., 112 Mo. 463, 500, 20 S. W. 631; Rude v. Mitchell, 97 Mo. 365, 11 S. W. 225. Pa.—Lee v. Exeter Club, 9 Pa. Super. 581. Va.—Shackleford v. Beck, 80 Va. 573, distinguished in Taylor v. Netherwood, 91 Va. 88, 20 S. E. 888. Wash.—Bolster v. Stocks, 13 Wash. 460, 43 Pac. 532, 534, 1099.

14. Doyle v. Metropolitan El. R. Co., 80 N. Y. Supp. 865, 863, 49 N. Y. St. 118; Druse v. Horter, 57 Wis. 644, 16 N. W. 14.

What will constitute a long account is not determined. N. H.—Low v. Independent Christian Soc., 67 N. H. 488, 32 Atl. 762. N. Y.—Spence v. Simis, 137 N. Y. 616, 33 N. E. 554; Doyle v. Metropolitan El. R. Co., 136 N. Y. 505, 32 N. E. 1008; Abbott v. Corbin, 22 App. Div. 584, 48 N. Y. Supp. 103. S. D.—Betcher v. Grant County, 9 S. D. 82, 68 N. W. 163.

A few items will not make a long account. D. C.—United States v. Groome, 13 App. Cas. 460. Ga.—Bush v. Murphey, 113 Ga. 345, 38 S. E. 828. Ill.—Glos v. Boettcher, 193 Ill. 534, 61 N. E. 1017; Cusack v. Budasz, 187 Ill. 392, 58 N. E. 326. Mo.—Creve Coeur Lake Ice Co. v. Tamm, 138 Mo. 385, 39 S. W. 791. N. Y.—Parker v.

Snell, 10 Wend. 577. Wis.—Knips v. Stefan, 50 Wis. 286, 6 N. W. 877.

Below are cited a few of the numerous decisions which illustrate what does, and what does not, constitute a long account. Ia.—Blair Town L. & L. Co. v. Walker, 50 Iowa 376. Mo.—Ittner v. St. Louis E. & M. H. Assn., 97 Mo. 561, 11 S. W. 58; Smith v. Haley, 41 Mo. App. 611; Kent v. Highleyman, 28 Mo. App. 614; Francisco v. Rowland, 14 Mo. App. 600; Briscoe v. Kinealy, 8 Mo. App. 76. N. Y.—Masterton v. Howell, 10 Abb. Pr. 118. Ore.—McDonald v. American Mtg. Co., 17 Ore. 626, 21 Pac. 883. Wis.—Sutton v. Wegner, 74 Wis. 347, 43 N. W. 167; Turner v. Nachtsheim, 71 Wis. 16, 36 N. W. 637; Crocker v. Currier, 65 Wis. 662, 27 N. W. 825.

See the title "Reference," where the subject is fully considered.

15. The term "merchants' accounts" has become of common use since the act of Parliament during the reign of James I, providing, "that all actions of accounts or upon the case other than such actions as concern the trade of merchandise between merchant and merchant and their factors or servants, should be commenced within six years."

Nearly all of the states have passed similar statutes. This expression is used nearly always with reference to the statute of limitations and is employed in contradistinction to accounts for ordinary services, such as work and labor, attorney's fees, ordinary store accounts, and the like. In the latter class of accounts the statute often applies, whereas in the former it does not apply. U. S.—Mandeville v. Wilson, 5 Cranch 15, 18, 3 L. ed. 23. Me.—McLellan v. Crofton, 6 Greenl. 307, 337. Miss.—Fox v. Fisk, 6 How. 328, 347. N. Y.—Murray v. Coster, 20 Johns. 576, 582, 11 Am. Dec. 333. Pa.—Mattern v. McDivitt, 113 Pa. 402, 6 Atl. 83, 84. Eng.—Inglis v. Haigh, 8 Mees. & W. 769, 777.

16. Ala.—Attalla Min. & Mfg. Co. v. Winchester, 102 Ala. 184, 14 So. 565; Wilson v. Calvert, 18 Ala. 274. Cal.—Norton v. Larco, 30 Cal. 126, 89 Am. Dec. 70. Ga.—Wagner v. Steele, 117 Ga. 145, 43 S. E. 403. Ill.—James T. Hair Co. v. Daily, 161 Ill. 379, 43 N.

E. 1096. **Ind.**—*Cummins v. White*, 4 Blackf. 356. **Kan.**—*Southern Kan. R. Co. v. Gould*, 44 Kan. 68, 24 Pac. 352. **Me.**—*Dyer v. Walker*, 51 Me. 104, 107. **Mass.**—*Bartlett v. Parks*, 1 Cush. 82; *Penniman v. Rotch*, 3 Met. 216, 223; *Gold v. Whitcomb*, 14 Pick. 188. **Mich.**—*Nash v. Burchard*, 87 Mich. 85, 49 N. W. 492; *In re Hiscock's Estate*, 79 Mich. 537, 44 N. W. 947. **Minn.**—*Garner v. Reis*, 25 Minn. 475; *Taylor v. Parker*, 17 Minn. 469. **N. J.**—*Apperson v. Mutual Ben. L. Ins. Co.*, 38 N. J. L. 272, 273; *Woolley v. Osborne*, 39 N. J. Eq. 54. **N. Y.**—*Sickles v. Mather*, 20 Wend. 72, 32 Am. Dec. 521; *Edmondstone v. Thomson*, 15 Wend. 554; *Chamberlin v. Cuyler*, 9 Wend. 126, 127; *Kimball v. Brown*, 7 Wend. 322; *Tucker v. Ives*, 6 Cow. 193; *Rathbone v. Warren*, 10 Johns. 587; *Post v. Kimberly*, 9 Johns. 470; *Armstrong v. Gilchrist*, 2 Johns. Cas. 424; *Ludlow v. Simond*, 2 Caines Cas. 1; *Wilson v. Mallett*, 4 Sandf. 112; *Ross v. Ross*, 6 Hun 80. **N. C.**—*McLin v. McNamara*, 22 N. C. 82. **Ore.**—*Purvis v. Kroner*, 18 Ore. 414, 23 Pac. 260, 261; *Lockwood v. Hansen*, 16 Ore. 102, 17 Pac. 575. **Pa.**—*Mattern v. McDivitt*, 113 Pa. 402, 6 Atl. 83; *Gloninger v. Hazard*, 42 Pa. 389. **Tenn.**—*Hay v. Marshall*, 3 Humph. 623. **Va.**—*Goddin v. Bland*, 87 Va. 706, 13 S. E. 145; *Coffman v. Sangston*, 21 Gratt. 263; *Bassett's Admr. v. Cunningham's Admr.*, 7 Leigh 402; *Hickman v. Stout*, 2 Leigh 6; *Smith v. Marks*, 2 Rand. 449. **W. Va.**—*Lafever v. Billmyer*, 5 W. Va. 33. **Eng.**—*Padwick v. Hurst*, 18 Beav. 575, 52 Eng. Reprint 225; *Fluker v. Taylor*, 3 Drew. 183, 61 Eng. Reprint 873; *Edwards-Wood v. Baldwin*, 9 L. T. N. S. 474; *O'Connor v. Spaight*, 1 Sch. & Lef. 305; *Downam v. Matthews*, Prec. Ch. 580, 24 Eng. Reprint 260; *Dinwiddie v. Bailey*, 6 Ves. Jr. 136, 31 Eng. Reprint 979; *Kennington v. Houghton*, 2 Y. & C. Ch. 620, 63 Eng. Reprint 278; *Catling v. Skoulding*, 6 T. R. 189, 101 Eng. Reprint 504.

Items on both sides required. **Ala.**—*Todd v. Todd*, 15 Ala. 743. **Cal.**—*Fraylor v. Sonora Min. Co.*, 17 Cal. 594, 596. **N. Y.**—*Hallock v. Losee*, 1 Sandf. 220. **Pa.**—*Ingram v. Sherard*, 17 Serg. & R. 347; *Hay v. Kramer*, 2 Watts & S. 137. **S. C.**—*Turnbull v. Strohecker*, 4 McCord 210, 211. **Vt.**—*Hodge v. Manley*, 25 Vt. 210, 213, 60

Am. Dec. 253. **Wis.**—*Fitzpatrick v. Phelan's Estate*, 58 Wis. 250, 16 N. W. 606, 608.

Payments alone are insufficient. **Cal.**—*Adams v. Patterson*, 35 Cal. 122; *Weatherwax v. Cosumnes, etc. Co.*, 17 Cal. 344, 351. **Ga.**—*Gunn v. Gunn*, 74 Ga. 555, 566, 58 Am. Rep. 447. **Ill.**—*Miller v. Cinnamon*, 168 Ill. 447, 457, 48 N. E. 45. **Ind.**—*Prenatt v. Runyon*, 12 Ind. 174. **Minn.**—*Cousins v. St. Paul, M. & M. R. Co.*, 43 Minn. 219, 45 N. W. 429. **Nev.**—*Warren v. Sweeney*, 4 Nev. 101. **N. Y.**—*Peck v. New York, etc. Mail S. S. Co.*, 5 Bosw. 226, 236.

**Mutual Accounts With Reference to the Statute of Limitations.**—Under the statute of James I, it was early laid down that mutual, open, current accounts, generally, were never to be deemed barred until the statutory period had run against the last item, and that the statute ran only from the last item; and when any item of such an account was within the statutory time, it was held to draw after it all items beyond that time, so as to save the entire account. Under this statute the question has often arisen as to what is a mutual account. It was held in *Catling v. Skoulding*, 6 T. R. 189, 101 Eng. Reprint 504, that so long as the accounts remain unsettled the statute is not admitted to run until the creation of the last item of indebtedness, the cause of action being then regarded as having then accrued. This construction now prevails under statutes of various states. *Warren v. Sweeney*, 4 Nev. 101; *Adams v. Carroll*, 85 Pa. 209; *Ingram v. Sherard*, 17 Serg. & R. (Pa.) 347.

The phrase "reciprocal demands" used in some statutes means no more than mutual accounts. The cause of action is on the balance due. *Green v. Disbrow*, 79 N. Y. 1, 9, 35 Am. Rep. 496.

The mere fact that parties have cross demands against each other will not constitute a mutual account within the meaning of the rule we are now considering. The two sides of the account must be linked together by an express or implied agreement constituting a mutual course of dealing. **Ark.**—*Higgs v. Warner*, 14 Ark. 192. **N. J.**—*Belles v. Belles*, 12 N. J. L. 339. **N. C.**—*Green v. Caldeleugh*, 18 N. C. 320, 28 Am. Dec. 567. A distinct mutual-



open<sup>17</sup> (used frequently in the sense of outstanding), settled,<sup>18</sup>

ity must appear; *Becker v. Jones*, 37 Hun (N. Y.) 35. But the transactions out of which the account arises may unquestionably be of separate and distinct natures, if the course of dealing between the parties is expressly or impliedly understood to look forward to an ultimate adjustment and reduction of the entire account to one balance, constituting the final demand and cause of action of one against the other. *Chamberlain v. Cuyler*, 9 Wend. (N. Y.) 126; *Hannan v. Engelmann*, 49 Wis. 278, 5 N. W. 791.

Generally where the cross demands are remote and disconnected they are not within the rule as to mutual accounts. *Belles v. Belles*, 12 N. J. L. 339; *Huebner v. Roosevelt*, 6 Daly (N. Y.) 337.

An account consisting on one side of payments only, either in money or goods, is not a mutual account within the rule of the Statute of Limitations governing this subject. *Wood on Limitation*, § 278; *Angell on Limitations*, 6th ed. § 142. And see *Cal.—Adams v. Patterson*, 35 Cal. 122; *Weatherwax v. Cosumnes, etc. Co.*, 17 Cal. 344. *Ind.—Prenatt v. Runyan*, 12 Ind. 174. *Me.—Dyer v. Walker*, 51 Me. 104. *Md.—Webster v. Byrnes*, 32 Md. 86, 90. *Mass.—Parker v. Schwartz*, 136 Mass. 30. *Miss.—Abbey v. Owens*, 57 Miss. 810. *Nev.—Warren v. Sweeney*, 4 Nev. 101. *N. Y.—Green v. Disbrow*, 79 N. Y. 1, 35 Am. Rep. 496; *Peck v. New York, etc. Co.*, 5 Bosw. 226, 236; *Bodell v. Gibson*, 23 Hun 40. *N. C.—Green v. Caldecleugh*, 18 N. C. 320, 28 Am. Dec. 567. *Pa.—Adams v. Carroll*, 85 Pa. 209, 214; *Lowber v. Smith*, 7 Pa. 381; *Hay v. Kramer*, 2 Watts & S. 137; *Ingram v. Sherard*, 17 Serg. & R. 347. *Tex.—Judd v. Sampson & Co.*, 13 Tex. 19; *Guichard v. Supervelle*, 11 Tex. 522.

A treasurer of a state keeping her accounts against himself, and his own at the same time against her, may be said to have kept "mutual accounts," in the sense of the legal expression. *State v. Churchill*, 48 Ark. 426, 3 S. W. 352.

**Accounts Which Are Mutual.**—A mutual account is one where each has a demand or right of action against the other, and to constitute such an ac-

count there must be mutual demands. *Mattern v. McDivitt*, 113 Pa. 402, 6 Atl. 83.

**Accounts Which Are Not Mutual.**—If the items in favor of one side are mere payments on the indebtedness to the other, the account is not mutual. *Gunn v. Gunn*, 74 Ga. 555; *McCulla v. Beadleston*, 17 R. I. 20, 20 Atl. 11.

An account on one side and a demand on the other founded on a note, bond or record, do not constitute mutual accounts. *Mattern v. McDivitt*, 113 Pa. 402, 410, 6 Atl. 83; *Lowber v. Smith*, 7 Pa. 381.

17. **U. S.**—*New Orleans, etc. R. Co. v. Lindsay*, 4 Wall. 650, 18 L. ed. 328. **Ala.**—*Hairston v. Sumner*, 106 Ala. 381, 17 So. 709; *Mim's Exrs. v. Sturtevant*, 18 Ala. 359. **Ga.**—*Smith v. Ellington*, 14 Ga. 379, 382. **Ill.**—*Ayers v. Richards*, 12 Ill. 146. **Kan.**—*Southern Kan. R. Co. v. Gould*, 44 Kan. 68, 24 Pac. 352. **Ky.**—*Dyott v. Letcher*, 2 J. J. Marsh. 541. **La.**—*French v. Riggs*, 21 La. Ann. 657; *Dolhonde v. Laurans*, 21 La. Ann. 406; *Williams v. Greiner*, 20 La. Ann. 151; *Succession of Yarbrough*, 16 La. Ann. 258; *City of New Orleans v. Locke*, 14 La. Ann. 854; *Andrews v. Keenan*, 14 La. Ann. 705. **Mass.**—*Bass v. Bass*, 6 Pick. 362. **Minn.**—*Taylor v. Parker*, 17 Minn. 469. **Miss.**—*Madison County v. Collier*, 79 Miss. 220, 30 So. 610; *Phillips v. Cage*, 12 Smed. & M. 141. **Ore.**—*Purvis v. Kroner*, 18 Ore. 414, 23 Pac. 260. **Tex.**—*Whitlesey v. Spofford*, 47 Tex. 13.

The court in *Kramer v. Gardner*, 104 Minn. 370, 116 N. W. 925, says: "The expression 'outstanding and open account' has a well-defined and well-understood meaning. In legal and commercial transactions it is an unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions, not reduced to writing and subject to future settlement and adjustment. *Taylor v. Parker*, 17 Minn. 469 (Gil. 447); *Jones v. Trust Co.*, 67 Minn. 410, 69 N. W. 1108; *Dowdney v. Volkening*, 37 N. Y. Super. 313."

18. **U. S.**—*Chicago, M. & St. P. R. Co. v. Clark*, 92 Fed. 968, 986, 35 C. C. A. 120. **Dak.**—*First Nat. Bank v.*



option<sup>19</sup> (generally speculative), outstanding,<sup>20</sup> partial,<sup>21</sup> rendered,<sup>22</sup>

Honeyman, 6 Dak. 275, 42 N. W. 771, 772. Ia.—Morse v. Minton, 101 Iowa 603, 70 N. W. 691. N. Y.—Clark v. Mechanics' Nat. Bank, 11 Daly 239. Vt.—Gibson v. Sumner, 6 Vt. 163, 164. W. Va.—McGraw v. Traders Nat. Bank, 64 W. Va. 509, 63 S. E. 398; McCarty v. Chalfant, 14 W. Va. 531.

The court in *McNeel v. Baker*, 6 W. Va. 153, 165, quoting from Story's Equity Pleading, § 98, says: "A stated account properly exists only where accounts have been examined, and the balance admitted as the true balance between the parties, without having been paid. When the balance thus admitted is paid, the account is deemed a settled account."

Use of "Unsettled" in Sense of "Unpaid."—In *Auzerais v. Naglee*, 74 Cal. 60, 15 Pac. 371, the plaintiff combined three causes of action,—one upon the account stated as of specified date, and the others for goods, wares and merchandise sold and delivered to the defendant subsequently to the date specified. The plaintiff wrote the following letter to the defendant:

"Gen. H. M. Naglee: We would call your attention to your unsettled account, the balance due us being \$2,326.35. Please call and settle same, and oblige, Yours very truly, Auzerais & Pomeroy."

The evidence showed that the unsettled account referred to in the letter was the very account which the plaintiff had claimed and testified as settled. On the redirect examination the witness was permitted to explain that he used the term "unsettled" in the sense of "unpaid," and the term "settle" in the sense of "pay."

19. *Dows v. Gaspel*, 4 N. D. 251, 60 N. W. 60, 64.

This expression contemplates fictitious transactions, and that speculation may be thus carried on the account is called an option account. *Dow v. Gaspel*, 4 N. D. 251, 60 N. W. 60, 64.

20. *Kramer v. Gardner*, 104 Minn. 370, 116 N. W. 925; *McCulsky v. Klosterman*, 20 Ore. 108, 25 Pac. 366, 10 L. R. A. 785.

In *McCulsky v. Klosterman*, 20 Ore. 108, 25 Pac. 366, 10 L. R. A. 785, it was

sought to be shown by extrinsic evidence that the words "outstanding accounts," as used in the contract before the court in that case, meant those accounts from which the bad accounts had been segregated and charged to profit and loss. This was permitted and the court held that it was no error. The court in its opinion says, after citing *Pederson v. Eugster*, 14 Fed. 422: "In that case the meaning of the term was sought to be dwarfed from its accepted signification, alike in commerce and law, contrary to its settled sense,—a sense that could only be overcome by positive and definite language in the contract overruling it. No such settled sense alike attends the use of the words 'outstanding accounts' without regard to the circumstances of its employment. They have a definite signification when employed to ascertain net profits by the usages of trade, unless the meaning is otherwise expressly intended, and the argument admits it. In such case, when the contract involves their employment for the purpose of computing net profits, the tacit assumption is that they were used in the sense of such usage, unless there is something in conflict with it."

21. Ill.—*Marshall v. Coleman*, 187 Ill. 556, 58 N. E. 628, 632. Pa.—*Appeal of Leslie*, 63 Pa. 355. W. Va.—*Shriver v. Garrison*, 30 W. Va. 456, 469, 4 S. E. 660, 668.

**Partial Account.**—The term "partial account" is used to denote what is not a complete account of the transaction, and to indicate that a later account is to be made. *Marshall v. Coleman*, 187 Ill. 556, 58 N. E. 628; *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660.

22. U. S.—*Wiggins v. Burkham*, 10 Wall. 129, 19 L. ed. 884; *Butler v. United States*, 87 Fed. 655, 668. Ind.—*Field v. Brown*, 146 Ind. 293, 45 N. E. 464. Kan.—*Southern Kan. R. Co. v. Gould*, 44 Kan. 68, 24 Pac. 352. Miss.—*Stebbins v. Niles*, 3 Cushm. 267. N. Y.—*Lockwood v. Thorne*, 18 N. Y. 285, 289.

An account rendered is one which has been presented for payment or for examination by the party against whom it is made. It is usually the incipient step to an account stated. U. S.—*Wiggins v. Burkham*, 10 Wall. 129, 131,

running,<sup>22</sup> store,<sup>24</sup> true,<sup>25</sup> unliquidated,<sup>26</sup> and verified accounts;<sup>27</sup> all of

19 L. ed 884; *Butler v. United States*, 87 Fed. 655, 668. Ind.—*Field v. Brown*, 146 Ind. 293, 45 N. E. 464. Miss.—*Stebbins v. Niles*, 3 Cushm. 267. N. Y.—*Lockwood v. Thorne*, 18 N. Y. 285, 289.

23. U. S.—*Leonard v. United States*, 18 Ct. Cl. 382, 385. Ark.—*Pickett v. Merchants' Nat. Bank*, 32 Ark. 346, 355. Ind.—*Brackenridge v. Baltzell*, 1 Ind. 333, 335. Kan.—*Southern Kan. R. Co. v. Gould*, 44 Kan. 68, 24 Pac. 352. N. Y.—*Picker v. Fitzelle*, 28 App. Div. 519, 51 N. Y. Supp. 205.

A "running account" is an open, unsettled account between the parties to the transaction and one which contemplates the future continuous dealing. It often occurs in statutes of limitations and against which the statute begins to run from the time of the last item. U. S.—*Leonard v. United States*, 18 Ct. Cl. 382, 385. Ark.—*Pickett v. Merchants' Nat. Bank*, 32 Ark. 346, 355. Ind.—*Brackenridge v. Baltzell*, 1 Ind. 333. N. Y.—*Picker v. Fitzelle*, 28 App. Div. 519, 51 N. Y. Supp. 205, 206.

24. *Salomon v. Pioneer Co-Operative Co.*, 51 Fla. 374, 58 Am. Rep. 667; *Ellett v. Moore*, 6 Tex. 243.

The words "store account" are taken to mean only commodities bought and sold in stores or shops, the sale of goods, wares and merchandise by wholesale or at retail. *Ellett v. Moore*, 6 Tex. 243.

25. *Cushing v. Ayer*, 25 Ma. 383, 387; *Black v. Appolonio*, 1 Mont. 342, 346.

The word "true" often occurs in statutes providing for a mechanic's lien and the term generally employed is "a just and true account." This is construed to mean an honest statement of the account by the party claiming the lien. It is here used in contradistinction to "false or dishonest."—*Black v. Appolonio*, 1 Mont. 342, 346.

26. *Hairston v. Sumner*, 106 Ala. 381, 17 So. 709; *Stiles v. Donaldson*, 2 Yeates (Pa.) 105.

An unliquidated account is really synonymous with open account and is used to designate a claim in reference

to which the amount due has not been fixed by the parties. Ala.—*Hairston v. Sumner*, 106 Ala. 381, 17 So. 709. Mo.—*Haggard v. City of Carthage*, 168 Mo. 129, 67 S. W. 567. Tex.—*Jones v. Hunt*, 74 Tex. 657, 12 S. W. 832. Wis.—*Ives v. Supervisors of Jefferson Co.*, 18 Wis. 166.

It is also contradistinguished from an account stated in that the latter bears interest while the former usually does not. Ala.—*Glidden v. Street*, 68 Ala. 600. Cal.—*Brady v. Wilcoxson*, 44 Cal. 239. Ga.—*Anderson v. State*, 2 Ga. 370. Ill.—*Buckmaster v. Grundy*, 8 Ill. 626. Ky.—*Richardson v. Parrott's Heirs*, 7 B. Mon. 379; *Burnham v. Best*, 10 B. Mon. 227. La.—*Nicolet & Als v. Insurance Co.*, 3 La. 366, 23 Am. Dec. 458.

27. *Guarantee Co. v. Mechanics' Sav. Bank & Tr. Co.*, 80 Fed. 766, 777, 26 C. C. A. 146; *Patterson v. City of Brooklyn*, 6 App. Div. 127, 40 N. Y. Supp. 581.

A verified account is one which has been sworn to in the manner provided by law. Ala.—*Gainer v. Pollock*, 96 Ala. 554, 11 So. 539; *Elyton Land Co. v. Morgan*, 88 Ala. 434, 7 So. 249; *Jordan v. Owen*, 27 Ala. 152. Cal.—*Cook v. Burnham*, 44 Pac. 447. Del.—*Walker's Admr. v. Chambers*, 5 Har. 311. Ga.—*Howard v. Munford*, 80 Ga. 166, 4 S. E. 907. Md.—*Mayor & C. C. v. Ideson*, 47 Md. 542. Mich.—*McGowan v. Lamb*, 66 Mich. 615, 33 N. W. 881; *Locke v. Farley*, 41 Mich. 405, 1 N. W. 955. N. Y.—*Patterson v. City of Brooklyn*, 6 App. Div. 127, 40 N. Y. Supp. 581. Ore.—*Robbins v. Benson*, 11 Ore. 514, 6 Pac. 69; *Flanders v. Ish*, 2 Ore. 320. Tenn.—*Forsee v. Matlock*, 7 Heisk. 421.

It is generally used in connection with actions on accounts in which the account itself, upon which suit had been brought, has been verified. The requisites of such verified account are prescribed by local statute. N. C.—*Knight v. Taylor*, 131 N. C. 84, 42 S. E. 537. Okla.—*Myers v. First Presbyterian Church*, 11 Okla. 544, 69 Pac. 874. S. C.—*Roberts v. Pawley*, 50 S. C. 491, 27 S. E. 913. Tenn.—*Foster v. Scott County*, 107 Tenn. 693, 65 S. W. 22.



which, for the purposes of suit, may be included under one or another of three classes: the first being that of stated account,<sup>28</sup> the second that of open account,<sup>29</sup> and the third that of complicated account.<sup>30</sup>

# C. DEFINITIONS OF CLASSES OF ACCOUNTS.—1. Stated Account.

a. *In General*.—A stated account is one in which the items composing it have been agreed upon by the parties to be correct.<sup>31</sup>

28. Ala.—*Loventhal v. Morris*, 103 Ala. 332, 15 So. 672. Conn.—*Zacarino v. Pallotti*, 49 Conn. 36. Kan.—*Clark v. Marbourg*, 33 Kan. 471, 6 Pac. 548, 551. N. Y.—*Stenton v. Jerome*, 54 N. Y. 480; *Williams v. Glenny*, 16 N. Y. 389, 391; *Lockwood v. Thorne*, 11 N. Y. 170, 174, 62 Am. Dec. 81. Ore.—*Holmes v. Page*, 19 Ore. 232, 23 Pac. 961, 962. S. D.—*Hale v. Hale*, 14 S. D. 644, 86 N. W. 650, 651. Tex.—*McCamant v. Batsell*, 59 Tex. 363, 369.
29. *Loventhal v. Morris*, 103 Ala. 332, 15 So. 672; *Gayle's Admr. v. Johnston*, 72 Ala. 254, 47 Am. Rep. 405; *Tucker v. Quimby*, 37 Iowa 17.
30. *Beggs v. Edison Electric Illum. Co.*, 96 Ala. 295, 11 So. 381, 38 Am. St. Rep. 94; *Kerkman v. Vanlier*, 7 Ala. 217.
31. U. S.—*United States v. Cherokee Nation*, 202 U. S. 101, 26 Sup. Ct. 588, 50 L. ed. 949; *Wiggins v. Burkham*, 10 Wall. 129, 19 L. ed. 884; *Freeland v. Heron*, 7 Oranch 147, 3 L. ed. 297; *White v. Macon*, 3 Cranch C. C. 250, 29 Fed. Cas. No. 17,553; *Eickel v. Sawyer*, 44 Fed. 845; *Martin v. Acker*, 1 Blatchf. & H. 279, 16 Fed. Cas. No. 9,155; *Cherokee Nation v. United States*, 40 Ct. Cl. 252. Ala.—*Jasper Tr. Co. v. Lampkin*, 50 So. 337; *Moore v. Maxwell*, 155 Ala. 299, 46 So. 755; *Comer v. Way*, 107 Ala. 300, 19 So. 966, 54 Am. St. Rep. 93; *Ware v. Manning*, 86 Ala. 238, 5 So. 682; *Lott v. Mobile Co.*, 79 Ala. 69. Ark.—*St. Louis, etc. R. Co. v. Camden Bank*, 47 Ark. 541, 1 S. W. 704. Cal.—*Hendy v. March*, 75 Cal. 566, 576, 17 Pac. 702. Conn.—*Zacarino v. Pellotti*, 49 Conn. 36. Ga.—*Borders v. Gay*, 6 Ga. App. 734, 65 S. E. 788. Ill.—*Seal Lock Co. v. Chicago Mfg. & O. Co.*, 98 Ill. App. 637. Ind.—*Bouslog v. Garrett*, 39 Ind. 338; *State Life Ins. Co. v. Postal (Ind. App.)*, 84 N. E. 156; *McDowell v. North*, 24 Ind. App. 435, 55 N. E. 789, 791. Ky.—*J. S. Phelps & Co. v. Plum*, 17 Ky. L. Rep. 817, 32 S. W. 753. La.—*Darby v. Lastrapes*, 28 La. Ann. 605; *James v. Fellowes & Co.*, 20 La. Ann. 116. Me.—*McLellan v. Crofton*, 6 Greenl. 307, 337. Mass.—*Buxton v. Edwards*, 134 Mass. 567; *Union Bank v. Knapp*, 3 Pick. 96, 15 Am. Dec. 181. Mich.—*Wheeler v. Baker*, 132 Mich. 507, 93 N. W. 1069, 9 Det. Leg. News 677; *Chicago, etc. R. v. Peters*, 45 Mich. 636, 8 N. W. 584. Miss.—*Tennessee Brew. Co. v. Hendricks*, 77 Miss. 491, 27 So. 526; *Anding v. Levy*, 57 Miss. 51, 34 Am. Rep. 435; *Reinhardt v. Hines*, 51 Miss. 344; *Stebbins v. Niles*, 3 Cushman. 267; *Fox v. Fish*, 6 How. 328, 348; *Davis v. Tiernan & Co.*, 2 How. 786. Mo.—*McCormick v. City of St. Louis*, 166 Mo. 315, 65 S. W. 1038; *May v. Kloss*, 44 Mo. 300; *Powell v. Pacific R. Co.*, 65 Mo. 658; *Vogel v. Kennedy*, 127 Mo. App. 228, 104 S. W. 1151; *Marmou v. Waller*, 53 Mo. App. 610; *Silver v. St. Louis, etc. R. Co.*, 5 Mo. App. 381. Neb.—*Haish v. Dillon*, 71 Neb. 290, 98 N. W. 818; *McKinster v. Hitchcock*, 19 Neb. 100, 26 N. W. 705; *Claire v. Claire*, 10 Neb. 54, 4 N. W. 411. Nev.—*Quinn v. White*, 26 Nev. 42, 62 Pac. 995, 64 Pac. 818. N. J.—*Johnson v. Tennessee Oil Co. (N. J. Eq.)*, 69 Atl. 788. N. Y.—*Samson v. Freedman*, 102 N. Y. 699, 7 N. E. 419; *Smith v. Marvin*, 27 N. Y. 137; *Lockwood v. Thorne*, 18 N. Y. 285, 288; *Sariol v. James P. McDonald Co.*, 127 App. Div. 648, 111 N. Y. Supp. 796; *Rand v. Whipple*, 71 App. Div. 62, 75 N. Y. Supp. 740; *Leiser v. McDowell*, 69 App. Div. 444, 74 N. Y. Supp. 1021; *Schutz v. Morette*, 81 Hun 518, 31 N. Y. Supp. 39; *McClain v. Schofield*, 74 Hun 437, 26 N. Y. Supp. 700; *Holler v. Apa*, 17 N. Y. Supp. 504, 43 N. Y. St. 529; *Avery v. Leach*, 9 Hun 106. Ore.—*Crawford v. Hutchinson*, 38 Ore. 578, 65 Pac. 84; *Vanbember v. Plunkett*, 26 Ore. 562, 38 Pac. 707, 27 L. R. A. 811; *Fleischner v. Kubli*, 20 Ore. 328, 25 Pac. 1086. Pa.—*Hall v. Sloan*, 9 Phila. 138. S. D.—*Krueger v. Dodge*, 15 S. D. 159, 87 N. W. 965. Tex.—*Heidenheimer v. Ellis*, 67 Tex. 426, 3 S. W. 666. Utah.—*Oberndorfer v. Moyer*, 30 Utah 325, 84 Pac. 1102;



b. *Character of Agreement.*—The agreement to establish an account stated may be express<sup>32</sup> or implied.<sup>33</sup>

Godbe v. Young, 1 Utah 55. **Vt.**—Parker & Son v. Clemons, 80 Vt. 521, 68 Atl. 646; Powers v. New England F. Ins. Co., 68 Vt. 390, 35 Atl. 331; Tharp v. Tharp, 15 Vt. 105. **Va.**—Camp v. Wilson, 97 Va. 265, 33 S. E. 591; McCormick's Exrs. v. Wright's Exrs., 79 Va. 524; Mertens v. Nottebohm, 4 Gratt. 163; Townes v. Birchett, 12 Leigh 173. **W. Va.**—McNeel v. Baker, 6 W. Va. 153, 165. **Eng.**—David v. Ellice, 5 Barn. & C. 196, 11 E. C. L. 201; Foster v. Allanson, 2 T. R. 479, 100 Eng. Reprint 258.

In Hawkins & Co. v. Long, 74 N. C. 781, appears the following: "What is an account stated? It is nothing but the agreement of both parties that all the articles are true."

**It Is a New Cause of Action.**—McKinster v. Hitchcock, 19 Neb. 100, 26 N. W. 705.

**Signature Not Necessary to Stated Account.**—La.—Freeman v. Howell, 4 La. Ann. 196, 50 Am. Dec. 561. **N. J.**—Brown v. Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250. **N. Y.**—Lockwood v. Thorne, 11 N. Y. 170, 62 Am. Dec. 81.

**Accounts Stated May Be Made by an Agent.**—Sariel v. James P. McDonald Co., 127 App. Div. 648, 111 N. Y. Supp. 796, citing Wiley v. Brigham, 16 Hun (N. Y.) 106; Lloyd v. Carrier, 2 Lans. (N. Y.) 364.

**But the Agent Must Be Authorized to Act for the Principal.**—Moore v. Maxwell, 155 Ala. 299, 46 So. 755; Johnson v. Tennessee Oil, etc. Co. (N. J. Eq.), 69 Atl. 788.

32. **Ala.**—Jasper Tr. Co. v. Lampkin, 50 So. 337; Comer v. Way, 107 Ala. 300, 19 So. 966, 54 Am. St. Rep. 93. **Ill.**—Tompkins v. Gerry, 52 Ill. App. 592. **Kan.**—Harrison v. Henderson, 67 Kan. 202, 72 Pac. 878. **Ore.**—Truman v. Owens, 17 Ore. 523, 21 Pac. 665. **Vt.**—Parker & Son v. Clemons, 80 Vt. 521, 68 Atl. 646. **Wis.**—Segelke & Kohlhaus Mfg. Co. v. Vincent, 135 Wis. 237, 115 N. W. 806.

33. **U. S.**—Morse Dry Dock & R. Co. v. Munson S. S. Line, 155 Fed. 150; Edwards v. Hoeflinghoff, 38 Fed. 635; Hopkirk v. Page, 2 Brock. 20, 12 Fed. Cas. No. 6,697. **Ala.**—Jasper Tr. Co. v. Lampkin, 50 So. 337; Comer v. Way,

107 Ala. 300, 19 So. 966, 54 Am. St. Rep. 93. **Ind.**—Ingle v. Norrington, 126 Ind. 174, 25 N. E. 900; Bouslog v. Garrett, 39 Ind. 338. **Kan.**—Harrison v. Henderson, 67 Kan. 202, 72 Pac. 878. **La.**—Freeman v. Howell, 4 La. Ann. 196, 50 Am. Dec. 561. **Mass.**—Chace v. Trafford, 116 Mass. 529, 532, 17 Am. Rep. 171. **Mich.**—Rossman v. Bock, 97 Mich. 430, 56 N. W. 777. **Neb.**—Hendrix v. Kirkpatrick, 48 Neb. 670, 67 N. W. 759; McKinster v. Hitchcock, 19 Neb. 100, 26 N. W. 705, 706. **N. H.**—Rich v. Eldredge, 42 N. H. 153. **Utah.**—Benites v. Hampton, 3 Utah 369, 3 Pac. 206. **Vt.**—Parker & Son v. Clemons, 80 Vt. 521, 63 Atl. 646. **Va.**—Robertson v. Wright, 17 Gratt. 534.

In Segelke & Kohlhaus Mfg. Co. v. Vincent, 135 Wis. 237, 115 N. W. 806, the complaint was founded upon an account stated between the parties for goods sold the defendant, and the answer filed to the complaint was treated as a general denial. A jury was waived and the court found that there was an account stated, and gave judgment accordingly.

In discussing the question whether or not there was sufficient to authorize a showing of an account stated, the court in the course of its opinion said:

"When the statement was presented by the plaintiff, showing charges for mill work, and the defendant admitted that it was correct, it became an account stated between the parties with respect to the matters embraced therein, even though it did not cover all the transactions between the parties. Graham v. Chubb, 39 Mich. 417; Pierce v. Delameter, 3 How. Prac. (N. Y.) 162. The case last cited is directly in point. There the defendant admitted the correctness of an account that was shown him, but at the same time said he had an offset. The court held that there was sufficient admission to establish the correctness of the plaintiff's claim, and the defendant was bound to prove a set-off on the trial. To the same effect is White v. Whiting, 8 Daly (N. Y.) 23. Nor does the existence of an alleged counterclaim prevent the admitted statement from becoming an account stated. Filer v. Peebles, 8 N.

**2. Open Account.**—a. *In General.*—An open account is one in which the items composing it have not been agreed upon by the parties as correct.<sup>34</sup>

b. *Items of Open Account.*—The items of an open account are always open to controversy when made the ground of an action or defense.<sup>35</sup>

H. 226; *Ware v. Manning*, 86 Ala. 236, 5 South 682."

In *McKinster v. Hitchcock*, 19 Neb. 100, 26 N. W. 705, the court, in discussing what constitutes an account stated, in the course of its opinion says:

"An express promise to pay is not necessary to be alleged or proved. *Claire v. Claire*, 10 Neb. 54; S. C. 4 N. W. Rep. 411. Whether established by express or implied assent, the burden of showing its incorrectness is thrown upon the other party. He may prove fraud, omission, or mistake, and in this respect he is in nowise concluded by the admission implied from his silence after it was rendered. It is conclusive unless some fraud, omission, or inaccuracy is shown, and ordinarily the burden is upon him to do so. But he is not estopped from doing so, even though it is signed by him. (Abb. Tr. Ev. 462; 1 Wait, Act. & Def. 193.) Even though he should give a note for the balance. *Morton v. Rodgers*, 14 Wend. 576; *Miller v. Probst*, Add. 344; *Kirkpatrick v. Turnbull*, Id. 260; *Nichols v. Aslop*, 6 Conn. 477; *Perkins v. Hart*, 11 Wheat. 237. See also, Wait, Act. & Def. 195, and cases there cited; 6 Wait, Act. & Def. 480. As to the conclusions of an account stated, see further, *Farnam v. Brooks*, 9 Pick. 212; *Roberts v. Totten*, 13 Ark. 609; *Rembert v. Brown*, 17 Ala. 667; *Bankhead v. Alloway*, 6 Coldw. 56; *Catham v. Niles*, 36 Conn. 403; *La Trobe v. Hayward*, 13 Fla. 190; *Kronenberg v. Binz*, 56 Mo. 121."

**Essential Element of Account Stated.**—First. There must have been a previous indebtedness or liability existing between the parties in order to be made the subject of a settlement. *Robertson v. Wright*, 17 Gratt. (Va.) 534; *Mertens v. Nottebohm*s, 4 Gratt. (Va.) 163; *Townes v. Birchett*, 12 Leigh (Va.) 173; *Lyne v. Gilliat*, 3 Call (Va.) 5; *Chapman v. Liverpool Salt Co.*, 57 W. Va. 395, 50 S. E. 601; *Batson v. Findley*, 52 W. Va. 343, 43 S. E. 142; *Shrewsbury v. Tufts*, 41 W. Va. 212,

23 S. E. 692; *Currey v. Lawler*, 29 W. Va. 111, 11 S. E. 897; *McCarty v. Chalfant*, 14 W. Va. 531; *Ruffner v. Hewitt*, 7 W. Va. 585; *McNeel v. Baker*, 6 W. Va. 153.

Second. The balance must be definitely fixed. Cal.—*Baird v. Crank*, 98 Cal. 293, 33 Pac. 63; *Tuggle v. Minor*, 76 Cal. 96, 18 Pac. 131. N. J.—*Weigel v. Hartman Steel Co.*, 51 N. J. L. 446, 20 Atl. 67. N. Y.—*Carpenter v. Nickerson*, 7 Daly 424. Pa.—*Rehill v. McTague*, 114 Pa. 82, 7 Atl. 224, 60 Am. Rep. 341; *Ferguson v. Wright*, 61 Pa. 258.

Third. There must be a subsisting debt. Mo.—*Rutledge v. Moore*, 9 Mo. 537. N. Y.—*Field v. Knapp*, 108 N. Y. 87, 14 N. E. 829. Pa.—*Mellon v. Campbell*, 11 Pa. 415. Eng.—*Tucker v. Barrow*, 7 B. & C. 623, 14 E. C. L. 103, 1 M. & R. 518, M. & M. 139, 3 C. & P. 85, 89, 14 E. C. L. 219.

Fourth. It is not necessary that the account be signed. U. S.—*York v. Wistar*, 30 Fed. Cas. No. 18,141. Conn.—*Mitchell v. Allen*, 38 Conn. 188. La.—*Darby v. Lastrapes*, 28 La. Ann. 605. Mass.—*Vinal v. Burrill*, 16 Pick. 401. N. J.—*Brown v. Vandyeke*, 8 N. J. Eq. 795, 55 Am. Dec. 250. N. Y.—*Heartt v. Corning*, 3 Paige 566; *Bruen v. Hone*, 2 Barb. 586. Eng.—*Willis v. Jernegan*, 2 Atk. 251, 26 Eng. Reprint 555.

Fifth. The account stated may be merely verbal, or partly verbal and partly in writing. La.—*James v. Fellowes & Co.*, 20 La. Ann. 116. Md.—*Wood v. Gault*, 2 Md. Ch. 433. Mich.—*Watkins v. Ford*, 69 Mich. 357, 37 N. W. 300. Eng.—*Newhall v. Holt*, 6 Mees. & W. 662.

34. *Hartsell v. Masterson*, 132 Ala. 275, 31 So. 616.

35. Ala.—*Hairston v. Sumner*, 106 Ala. 381, 17 So. 709; *Gayle's Admr. v. Johnston*, 72 Ala. 254, 47 Am. St. Rep. 405; *Battle v. Reid*, 68 Ala. 149, 152; *Sheppard v. Wilkins*, 1 Ala. 62, 64. Ga.—*Hargroves v. Cooke*, 15 Ga. 321, 332; *Smith v. Ellington*, 14 Ga. 379, 382; *Anderson v. State*, 2 Ga. 370, 374;

**3. Complicated Account.**—A complicated account is one in which such complication exists that a court of law cannot examine into it with such care as to reach an accurate conclusion as to the exact status of the account.<sup>36</sup>

**II. ACTION OF ACCOUNT.**—A. AT LAW.—1. In General.—An action of account, sometimes called account render, lay in the early common law, only against a guardian in socage,<sup>37</sup> bailiff<sup>38</sup> or receiver,<sup>39</sup> or by one in favor of trade and commerce, naming himself merchant, against another naming himself merchant, and for the executors of a merchant.<sup>40</sup>

*Nisbet v. Lawson*, 1 Ga. 275. Ia.—*Higley v. Burlington*, etc. R. Co., 99 Iowa 503, 68 N. W. 829, 61 Am. St. Rep. 250; *Tucker v. Quimby*, 37 Iowa 17. Minn.—*Taylor v. Parker*, 17 Minn. 469, 473. Ore.—*Purvis v. Kroner*, 18 Ore. 414, 23 Pac. 260. Tex.—*McCamant v. Batsell*, 59 Tex. 363, 368; *Whittlesey v. Spofford*, 47 Tex. 13, 17.

36. U. S.—*Kirby v. Lake Shore*, etc. R. Co., 120 U. S. 130, 7 Sup. Ct. 430, 30 L. ed. 569. Ala.—*Beggs v. Edison Elec. Illum. Co.*, 96 Ala. 295, 11 So. 381, 38 Am. St. Rep. 94; *Kerkman v. Vanlier*, 7 Ala. 217. Del.—*Farmers' & M. Bank v. Polk*, 1 Del. Ch. 167. Ga.—*McLaren v. Steapp*, 1 Ga. 376. Ind.—*Cummins v. White*, 4 Blackf. 356. Ia.—*White v. Hampton*, 10 Iowa 238. Mich.—*Blodgett v. Foster*, 114 Mich. 688, 72 N. W. 1000, 68 Am. St. Rep. 504. Miss.—*Watt v. Conger*, 13 Smed. & M. 412. N. J.—*Bellingham v. Palmer*, 54 N. J. Eq. 136, 33 Atl. 199; *Crane v. Ely*, 37 N. J. Eq. 564; *Seymour v. Long Dock Co.*, 20 N. J. Eq. 396. N. Y.—*Uhlman v. New York L. Ins. Co.*, 109 N. Y. 421, 17 N. E. 303. S. C.—*Devereux v. McCrady*, 46 S. C. 133, 24 S. E. 77. Eng.—*Bliss v. Smith*, 34 Beav. 508, 55 Eng. Reprint 732; *Darthez v. Chomons*, 6 Beav. 165, 49 Eng. Reprint 788; *Phillips v. Phillips*, 9 Hare 471, 68 Eng. Reprint 596; *Foley v. Hill*, 2 H. L. Cas. 28, affirming 1 Phill. Ch. 399; *Taff Vale R. Co. v. Nixon*, 1 H. L. Cas. 111; *Scott v. Liverpool*, 28 L. J. Ch. 230; *Croskey v. European & S. Shipping Co.*, 1 J. & H. 108, 70 Eng. Reprint 682; *Southeastern R. Co. v. Brogden*, 3 Macn. & G. 8, 42 Eng. Reprint 163; *Kimberley v. Dick*, L. R. 13

Eq. 1; *North-Eastern R. Co. v. Martin*, 2 Phill. Ch. 758; *O'Connor v. Spaight*, 1 Sch. & Lef. 305; *Carlisle v. Wilson*, 13 Ves. Jr. 276; *Kennington v. Houghton*, 2 Y. & C. Ch. 620, 63 Eng. Reprint 278.

37. 1 Bac. Abr. 44; Co. Litt. 172a, 90b; F. N. B. 117, E; 2 Inst. 404; 2 Roll. Abr. 161; *McMurray v. Rawson*, 3 Hill (N. Y.) 59.

38. 1 Bac. Abr. 44; Co. 172a, 90b; F. N. B. 117, E; 2 Inst. 404; 2 Roll. Abr. 161; *Lacon v. Davenport*, 16 Conn. 331, 341.

If one constitutes another his bailiff the action may now be maintained in many of the states. Md.—*Hamilton v. Conine*, 28 Md. 635, 640, 92 Am. Dec. 724. N. C.—*Northcott v. Casper*, 41 N. C. 303. Va.—*Paxton v. Gamewell*, 82 Va. 706, 1 S. E. 92; *Early v. Friend*, 16 Gratt. 21 78 Am. Dec. 649.

39. 1 Bac. Abr. 44; Co. Litt. 172a, 90b; F. N. B. 117; 2 Inst. 404; 11 Co. 90a; 2 Roll. Abr. 161; *Sherman v. Ballou*, 8 Cow. (N. Y.) 304; *Bredin v. Diven*, 2 Watts (Pa.) 95.

40. The action of account will not lie at common law between partners. *Beach v. Hotchkiss*, 2 Conn. 425, 430; *McMurray v. Rawson*, 3 Hill (N. Y.) 59.

In the later case, *Bronson, J.*, says: "By statute, it lies against a joint tenant or tenant in common of real estate for receiving more than his just share or proportion. 1 R. S. 750, sec. 9. This statute also gives an action of assumpsit for money had and received. The older statutes from which this revision was taken, required that the defendant should be charged as bailiff. 1 R. L. of 1813, p. 90."



2. Procedure.—The method of procedure in the ancient action of account is shown in the notes.<sup>41</sup>

41. Declaration in Account Render.—In *McMurray v. Rawson*, 3 Hill (N. Y.) 59, at page 61, the court says:

“When the defendant is charged as bailiff, the declaration specifies the particular goods of which he had the care and management; and when the action is brought by one joint tenant or tenant in common against another, the declaration states the relationship between the parties, and alleges that the defendant received more than his just share and proportion. (*Hackwell v. Eustman*, Cro. Jac. 410; *Baxter v. Hozier*, 5 Bing. [N. C.] 288; *Jordan v. Wilkins*, 2 Wash. C. C. R. 482; *Godfrey v. Saunders*, 3 Wils. 73; *Tawdin v. Lavie*, 1 Lil. Mod. Ent. 13; 1 Went. Pl. 81-9; 3 Chit. Pl. 1297; and see *Wheeler v. Horne*, 1 Willes’ R. 208.) When the defendant is charged as *receptor denariorum*, although the writ is general, the count must be special, stating by whose hands the money was received. (Co. Litt. 126 [a]; F. N. B. 118 F.; *Burdet v. Thrule*, 2 Lev. 126; *Horne’s Pleader*, 11, 13; 1 Mod. Ent. 48, 49; 1 Lil. Ab. 20, 22; *Viner’s Ab.*, ‘Account,’ [W.] and [K.]; Com. Dig., ‘Accompt.,’ [A. 4.] and [E. 2]; *James v. Browne*, 1 Dall. 339; *Jordan v. Wilkins*, 2 Wash. C. C. R. 482; *Buller’s N. P.* 217; *Walker v. Holyday*, Com. R. 272; *Andrews v. Thornton*, 1 Lil. Mod. Ent., 12.) But there is said to be an exception to this rule, when the action is between partners. (See *per Powell, J.*, in *Bishop v. Eagle*, 11 Mod. 186.)

“The first count in this declaration charges the defendant as receiver generally, and it is bad for not stating by whose hands the money was received. The second count is bad for the same cause. Although it alleges that the defendant received the money as partner, it is not framed in accordance with any precedent I have met with in the action of account between partners. The third count charges the defendant as *bailiff*, without either specifying the kind or quantity of goods, or alleging that the defendant received more than his share or proportion. If the plaintiff intended to proceed as at the com-

mon law, it seems that the defendant should have been charged as receiver. Lord Coke says: ‘If two joint merchants occupy their stock, goods and merchandizes in common, to their common profit, one of them, naming himself a merchant, shall have an account against the other, naming him a merchant, and shall charge him as *receptor denariorum*,’ etc. (Co. Litt. 172[a].) And to the same effect is F. N. B., 117, D, where the form of the writ is given. But if the defendant may be charged as bailiff, the count is defective for not giving a more particular description of the goods.”

What Must Be Pleaded in Action of Account.—In *Bishop v. Baldwin*, 14 Vt. 145, the plaintiff before the auditors, contended that the defendant was estopped from denying the partnership. The supreme court holding that this point should have been pleaded in bar of the action, discusses fully all those matters that should be pleaded to the declaration and the matters that should be relied on before the auditor. The learned Judge Redfield bases his conclusions upon *Godfrey v. Saunders*, 3 Wils. (Eng.) 94. The following rules taken from this case are here given:

“1. That whatever matter can be pleaded in bar to the action, *must* be so pleaded, or it cannot afterwards be pleaded before the auditors; and *this to avoid trouble and charge to the parties.*”

“2. That if the party is once liable to account, then all defenses must be pleaded before the auditors, except *plene computavit*, and a release, to which I would add, arbitrament and award, former recovery, accord and satisfaction, and the statute of limitations. The propriety of this last defense, as a plea in bar to the action, I know has sometimes been questioned; but it is so pleaded, in the case under consideration, and no intimation is given that it is not properly pleadable.

“3. Nothing can be pleaded before auditors, which was, (or which might have been,) decided before the court, (or by the verdict). There is, properly speaking, no general issue. 1 Chit. Pl. 484. The defendant may plead infancy, or that he never was bailiff or receiver,

**3. Disuse of Account at Common Law.**—In England this action long ago fell into disuse. In the United States it was never adopted to a great extent except in those states in which equity did not take cognizance of a bill for an accounting.<sup>42</sup> It is still recognized, however, in several of the states in a modified form;<sup>43</sup> but it has fallen

or that he was not tenant in common, &c., or that he did not sustain the particular relation to the plaintiff upon which the account is claimed. *Wheeler v. Horne, Willes, 208 Chit. Pl., ubi supra.*

"If defendant suffer judgment to account to pass by *nil dicit*, he thereby waives all defences which he might have pleaded, and so concedes all the facts stated in the declaration, except his being in arrear. The relation upon which the account is claimed is thus conclusively fixed."

**Specific Form of Declaration in Account Rendered.**—In *Hughes v. Woosley, 15 Mo. 492*, the action was account, brought by Hughes against Woosley. Demurrer to the declaration was sustained and the case appealed. There were six counts in the declaration, one of which was as follows:

"E. Hughes complains of Jas. Woosley of a plea, &c: For that, whereas the said defendant, at, &c., had been bailiff to the plaintiff from the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ to the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_

and during that time had the care and management of divers goods and chattels of the plaintiff, to-wit: one undivided half of one hundred head of horses, all of the value of \$10,000, to merchandise and make profit thereof for the plaintiff, and thereof to render the plaintiff the said defendant's reasonable account thereof on demand, yet the said defendant, though requested, hath not rendered his reasonable account thereof, but neglects so to do." This was held sufficient.

**Various Requisites of the Declaration in the Action of Account.**—It should charge in an action against defendant as bailiff the goods held by him. *McMurray v. Rawson, 3 Hill (N. Y.) 59.*

In an action by one tenant in common against another the declaration ought to state that the parties are tenants in common, and that defendant has received more than his share.

*Irvine v. Hanlin, 10 Serg. & R. (Pa.) 219.*

If the action is to recover money which the defendant has received as part of the capital stock of a firm and for which he ought to account, the declaration should charge the defendant as receiver and not as bailiff. *Wood v. Merrow, 25 Vt. 340.*

The declaration should set out distinctly all the grounds upon which plaintiff claims to hold defendant to an accounting. *Ganaway v. Miller, 15 Vt. 152.*

**Judgment in Account Rendered.**—In an action of account rendered there are two judgments, one that defendant account, the other, after the accounting, for the balance found due. *Travers v. Dyer, 16 Blatchf. 178, 24 Fed. Cas. No. 14,150; McPherson v. McPherson, 33 N. C. 391, 53 Am. Dec. 416.*

When the judgment for an accounting is rendered it becomes conclusive upon the right of the parties to have an accounting before auditors. *Porter v. Wheeler, 37 Vt. 281; Hayden v. Merrill, 44 Vt. 336, 8 Am. Rep. 372.*

**Proceedings Before the Auditors.**—When the case is referred to the auditors to ascertain the balance of the account between the parties, all defenses relating to the merits of the controversy are made before them. 1 *Bac. Abr.* pp. 52, 53, and authorities cited.

42. *McMurray v. Rawson, 3 Hill (N. Y.) 59.*

43. *Cal.*—*Pico v. Columbet, 12 Cal. 414, 73 Am. Dec. 550.* *Conn.*—*Starkey v. Peters, 18 Conn. 181; Lacon v. Davenport, 16 Conn. 331; Stannard v. Whittlesey, 9 Conn. 556; Oviatt v. Sage, 7 Conn. 95; Smith v. Chapman, 5 Conn. 14; Griggs v. Dodge, 2 Day 28.* *Ga.*—*Huff v. McDonald, 22 Ga. 131, 68 Am. Dec. 487.* *Me.*—*Cutler v. Currier, 54 Me. 81.* *Md.*—*Hamilton v. Conine, 28 Md. 635, 640, 92 Am. Dec. 724; Green v. Johnson, 3 Gill & J. 389, 394; Gibbs v. Claggett, 2 Gill & J. 14,*

into very general disuse on account of the more efficient remedy in equity.<sup>44</sup>

**B. MODERN ACTIONS OF ACCOUNT.—1. Party Plaintiff.**—In an action on an account any one may be plaintiff who is the legal owner thereof,<sup>45</sup> or the one really interested in the collection thereof.<sup>46</sup>

**Illustrations.**—Cases illustrative of the principle here announced are given in the notes.<sup>47</sup>

**2. Party Defendant.**—The person legally liable to pay the account should be made defendant in the action.<sup>48</sup>

**Illustrations.**—In the notes cases will be found illustrative of this principle.<sup>49</sup>

**3. Common Law Forms of Action.**—a. *Assumpsit or Debt.*—An action of assumpsit<sup>50</sup> or debt may be brought in modern practice on

47. **Mass.**—Fanning v. Chadwick, 3 Pick. 420, 15 Am. Dec. 233; Sargent v. Parsons, 12 Mass. 149; Carver v. Miller, 4 Mass. 559. **New Hampshire.**—Webster v. Calef, 47 N. H. 289. **N. Y.**—Appleby v. Brown, 24 N. Y. 143; McMurray v. Rawson, 3 Hill 59. **N. C.**—Northcott v. Casper, 41 N. C. 303; McPherson v. McPherson, 33 N. C. 391, 53 Am. Dec. 416. **Pa.**—Shearman v. Morrison, 149 Pa. 386, 24 Atl. 313; McLean v. Wade, 53 Pa. 146; Leonard v. Leonard, 1 Watts & S. 342; Long v. Fitzsimmons, 1 Watts & S. 530; Bredin v. Kingsland, 4 Watts 420; Bredin v. Diven, 2 Watts 95; Irvine v. Hanlin, 10 Serg. & R. 219; Griffith v. Willing, 3 Binn. 317. **S. C.**—Hancock v. Day, McMull. Eq. 69, 26 Am. Dec. 293. **Vt.**—Stedman v. Gassett, 18 Vt. 346; Kidder v. Rixford, 16 Vt. 169, 42 Am. Dec. 504; Curtis v. Curtis, 13 Vt. 517; Wiswell v. Wilkins, 4 Vt. 137; Adams v. Corbin, 3 Vt. 372. **Va.**—Paxton v. Gamewell, 82 Va. 706, 1 S. E. 92; Early v. Friend, 16 Gratt. 21, 78 Am. Dec. 649.

44. **Conn.**—Barnum v. Landon, 25 Conn. 137. **Ind.**—Cummins v. White, 4 Blackf. 356. **Ia.**—Stewart v. Kerr, Morris 240. **Ky.**—Neal v. Keel's Exrs., 4 T. B. Mon. 162. **Md.**—Hamilton v. Conine, 28 Md. 635, 92 Am. Dec. 724. **Mich.**—Kramer v. Gardner, 104 Mich. 370, 116 N. W. 925; Millikin v. Ferguson, 56 Mich. 189, 22 N. W. 278. **Miss.**—Hunt v. Gorden, 52 Miss. 194. **N. Y.**—Duncan v. Lyon, 3 Johns. Ch. 351, 8 Am. Dec. 513. **Vt.**—Stevens v. Coburn, 71 Vt. 261, 44 Atl. 354.

45. Burch v. Harrell, 93 Ga. 719, 20

S. E. 212; Lemington v. Blodgett, 37 Vt. 215.

46. **Ala.**—Bradfield v. Patterson, 106 Ala. 397, 17 So. 536. **Colo.**—Walker v. Steel, 9 Colo. 388, 12 Pac. 423; Bassett v. Inman, 7 Colo. 270, 3 Pac. 383. **Mich.**—Millikin v. Ferguson, 56 Mich. 189, 22 N. W. 278.

47. Millikin v. Ferguson, 56 Mich. 189, 22 N. W. 278.

Attorney may sue for fees earned by him in this action (Derringer v. Pugh, 7 Ohio C. C. 158); a physician for his bill (Schmidt v. Quin, 1 Mill [S. C.] 418); the owner of stock for the value thereof (Bradfield v. Patterson, 106 Ala. 397, 17 So. 536); a factor for the balance of an account (11 Rich. Law [S. C.] 466). But the holder of an account. Talbotton R. Co. v. Gibson, 106 tain this action. Wilkinson v. Thulemeyer, 44 Tex. 470. A salaried officer of a corporation whose yearly compensation is fixed may sue on an account. Talbotton R. Co. v. Gibson, 106 Ga. 229, 32 S. E. 151.

48. **Mo.**—Nedvidek v. Meyer, 46 Mo. 600. **Va.**—Richey v. Hathaway, 149 Va. 207, 24 Atl. 191. **Vt.**—Lemington v. Blodgett, 37 Vt. 215.

49. Executors and administrators may be sued in this action. Bremond v. Seeligson, 1 White & W. Civ. Cas. (Tex.) § 636. A member of a club may be sued for "dues" on account annexed. Elm City Club v. Howes, 92 Me. 211, 42 Atl. 392.

50. **Ala.**—Morrisette v. Wood, 128 Ala. 505, 30 So. 630, 631. **Cal.**—Howard v. Donohue, 60 Cal. 264. **Conn.**—Bishop v. Perkins, 19 Conn. 300; Landon v. Sage, 11 Conn. 302; Tousey v.



any form of an account;<sup>51</sup> but not for an equitable accounting, as in the common law action of account render.<sup>52</sup>

Preston, 1 Conn. 175. Fla.—Snell v. Irvine, 17 Fla. 234. Ga.—General Specialty Co. v. Tifton Ice & P. Co., 3 Ga. App. 502, 60 S. E. 121. Ill.—Butler v. Cornell, 148 Ill. 276, 35 N. E. 767. Me.—Rogers v. Davis, 103 Me. 405, 69 Atl. 618, 19 L. R. A. (N. S.) 126. Mass.—Badger v. Titcomb, 15 Pick. 409, 26 Am. Dec. 611; Union Bank v. Knapp, 3 Pick. 96, 15 Am. Dec. 181. N. H.—Porter v. Ayer, 66 N. H. 400, 29 Atl. 1027; Ballou v. Hale, 47 N. H. 347, 93 Am. Dec. 438. N. Y.—Scott v. Guernsey, 48 N. Y. 106; Wright v. Wright, 59 How. Pr. 176; Cochran v. Carrington, 25 Wend. 409; Coles v. Coles, 15 Johns. 159, 8 Am. Dec. 231; Seldon v. Hickock, 2 Caines 166; Worthington v. Worthington, 100 App. Div. 332, 91 N. Y. Supp. 443. Pa.—Kline v. Jacobs, 68 Pa. 57; Borrell v. Borrell, 33 Pa. 492; Gillis v. McKinney, 6 Watts & S. 78; Irvine v. Hanlin, 10 Serg. & R. 219. R. I.—McDermott v. St. Wilhelminia Benev. Aid Soc., 24 R. I. 527, 54 Atl. 58. Eng.—Hunter v. Welsh, 1 Stark. Cas. 224; Brown v. Hodgson, 4 Taunt. 188.

51. Ala.—Price v. Pickett, 21 Ala. 741. Conn.—Richmond v. Connell, 55 Conn. 403, 11 Atl. 853; Fowler v. Fowler, 50 Conn. 256. Me.—Seretto v. Rockland, etc. R. Co., 101 Me. 140, 63 Atl. 651; Hudson v. Coe, 79 Me. 83, 8 Atl. 249, 1 Am. St. Rep. 288; Richardson v. Richardson, 72 Me. 403; Cutler v. Currier, 54 Me. 81; Dyer v. Wilbur, 48 Me. 287, 69 Am. Dec. 62; Moses v. Ross, 41 Me. 360, 66 Am. Dec. 250; Gowen v. Shaw, 40 Me. 56; Buck v. Spofford, 31 Me. 34; Gardiner Mfg. Co. v. Heald, 5 Greenl. 381, 17 Am. Dec. 248. Mass.—Blood v. Blood, 110 Mass. 545; Brown v. Wellington, 106 Mass. 318, 8 Am. Rep. 330; Peck v. Carpenter, 7 Gray 283, 66 Am. Dec. 477; Badger v. Holmes, 6 Gray 118; Munroe v. Luke, 1 Met. 459; Miller v. Miller, 7 Pick. 133, 19 Am. Dec. 264; Fanning v. Chadwick, 3 Pick. 420, 15 Am. Dec. 233; Jones v. Harraden, 9 Mass. 540; Brigham v. Eveleth, 9 Mass. 538. Mich.—Miner v. Lorman, 66 Mich. 530, 33 N. W. 866; McLaughlin v. Salley, 46 Mich. 219, 9 N. W. 256; Fiquet v. Allison, 12 Mich. 328, 86 Am. Dec. 54.

Contra.—Ill.—Crow v. Mark, 52 Ill. 332. Md.—Hamilton v. Conine, 28 Md. 635, 92 Am. Dec. 724. N. C.—Chambers v. Chambers, 10 N. C. 232, 14 Am. Dec. 585. But see Wagstaff v. Smith, 39 N. C. 1. Tenn.—Ferrell v. Murray, 2 Yerg. 384.

In *Seretto v. Rockland, etc. R. Co.*, 101 Me. 140, 63 Atl. 651, the action was debt brought to recover certain sums based on the items of an account annexed, for goods bargained and sold, and money due upon an account stated. The court said: "The general rule is that debt lies wherever indebitatus assumpsit will lie. *Larmon v. Carpenter*, 70 Ill. St. 549; *Van Deusen v. Blum*, 18 Pick. 229; *Veazie v. Bangor*, 51 Me. 509; *Allard v. Belfast*, 40 Me. 369; *McVicker v. Beedy*, 31 Me. 314; *Portland v. Atlantic & St. Lawrence R. R.*, 66 Me. 485; *Norris v. School District*, *supra*. While this action is generally used for the recovery of a precise sum due under simple or special contracts, it may be maintained for a quantum meruit or quantum valebat. *Smith v. First Cong. etc.*, 8 Pick. 178; *Nat. Exchange Bank v. Abell*, 63 Me. 346. It would, therefore, be as available to the defendant to show any fact bearing upon the question of what the work done by the plaintiff was reasonably worth as if the action had been covenant broken or assumpsit. And the issue can be tried in this action whether the plaintiff did general work, or did extra work, and furnished extra materials, under the terms of the contract, to be ascertained as therein agreed, and whether upon the facts proved, there were due to the plaintiff other sums of money at the date of the writ. In determining the sums, if any, due to the plaintiff he is limited in his proof to the specification of his claim, and against these items the defendant had the right to introduce counter proof. *Gooding v. Morgan*, 37 Me. 419."

52. Me.—*Richardson v. Richardson*, 72 Me. 403. N. H.—*Gage v. Gage*, 64 N. H. 543, 14 Atl. 869, 28 L. R. A. 829, 862. New York.—*Caswell v. Districh*, 15 Wend. 379; *Sherman v. Ballou*, 8 Cow. 304. N. C.—*Chambers v. Chambers*, 10 N. C. 232, 14 Am. Dec.

b. *Form of Declaration.*—(I.) *Open or Unliquidated Account in Assumpsit.*—The declaration in an action of assumpsit upon an open or unliquidated account contains the usual common counts found in the ordinary declaration in assumpsit.<sup>53</sup>

*Promise.*—Most of the decisions require an allegation of a promise to pay on the part of the defendant to be made in the declaration in assumpsit at common law.<sup>54</sup>

(II.) *Open or Unliquidated Account in Debt.*—If the action is debt upon an open or unliquidated account, the declaration contains the usual common counts employed in declaring upon simple contracts.<sup>55</sup>

4. *Statutory Forms.*—a. *In General.*—In some states the form of the complaint in actions on account is expressly provided by statute.<sup>56</sup>

585. **Vt.**—*Mattocks v. Lyman*, 16 **Vt.** 113.

53. **Ill.**—*Eggleston v. Buck*, 24 **Ill.** 262; *Cobb v. James H. Rice Co.*, 60 **Ill.** App. 523. **Ky.**—*Snodgrass v. Broadwell*, 2 **Litt.** 353. **Mass.**—*Tremain v. Edwards*, 7 **Cush.** 414. **N. H.**—*Stevens v. Thompson*, 17 **N. H.** 103. **N. Y.**—*Reynolds v. Cleveland*, 4 **Cow.** 282, 15 **Am. Dec.** 369. **N. C.**—*McRae v. Morrison*, 35 **N. C.** 46. **Vt.**—*Clark v. Edgell*, 26 **Vt.** 108.

54. **Ind.**—*Ephraims v. Murdock*, 7 **Blackf.** 10. **Ky.**—*Bruner v. Stout*, **Hard.** 225. **Mich.**—*Hoard v. Little*, 7 **Mich.** 468. **Mo.**—*McNulty v. Collins*, 7 **Mo.** 69. **N. Y.**—*Candler v. Rossiter*, 10 **Wend.** 487. **Pa.**—*People's Mut. F. Ins. Co. v. Groff*, 1 **Pa. Dist.** 685. **S. C.**—*Wingo v. Brown*, 12 **Rich. L.** 279. **Utah.**—*Kilpatrick-Koch Dry Goods Co. v. Box*, 13 **Utah** 494, 45 **Pac.** 629. **Va.**—*Woody v. Flourney*, 6 **Munf.** 506; *Sexton v. Holmes*, 3 **Munf.** 566; *Cooke v. Simms*, 2 **Call** 39; *Winston v. Francisco*, 2 **Wash.** 187.

*Contra*, see **Ala.**—*Kelly v. Owen*, **Minor** 252. **Ga.**—*Bell v. Hobbs*, **Ga. Dec.** 144. **Ill.**—*North v. Kizer*, 72 **Ill.** 172. **Ind.**—*Watkins v. De Armond*, 89 **Ind.** 553. **N. Y.**—*Cropsey v. Sweeney*, 27 **Barb.** 310. **Tenn.**—*Woodson v. Moody*, 4 **Humph.** 303.

*Promise Implied.*—In *City of Newport News v. Potter*, 122 **Fed.** 321, 58 **C. C. A.** 483, the declaration was in assumpsit, to which a demurrer was interposed, one of the grounds of which was that no promise was alleged in the declaration. The court in overruling the demurrer on this ground, said: "In the first and second counts the allegation of the promise to pay is made. This ground therefore relates only to

the third count, which is the common count of *indebitatus* for services rendered, omitting the usual allegation of a promise to pay. Under the strict rule of the common law, this allegation is necessary. 1 *Chitty. Pl.* (16th **Am. Ed.**), pp. 392, 394; 4 *Minor's Insts.* (3d ed.) p. 697; *Cooke v. Simms*, 2 **Call** 39; *Winston v. Francisco*, 2 **Wash. (Va.)** 188; *Sexton v. Holmes*, 3 **Munf.** 566; *Woody v. Flourney*, 6 **Munf.** 506. But *contra*, *Andrews' Stephens*, **Pl. note**, pp. 110, 111. However, section 3272, **Code Va.** 1887, reads: 'On a demurrer \* \* \* \* the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has been heretofore deemed misleading or insufficient pleading or not, unless there be omitted something so essential to the action or defence, that judgment according to law and the very right of the cause, cannot be given. \* \* \*'

"This statute, taken from 27 **Eliz. c.** 5, first appeared in the code of 1819 (1 **Rev. Code** 1819, p. 511, c. 128, § 101), subsequent to the institution of the cause of *Woody v. Flourney*, *supra*. Our attention has not been called to, nor have we found, any Virginia case decided since this statute was enacted which holds that a promise to pay must be alleged in the common count of *indebitatus assumpsit*.

"When the plaintiff alleges that the defendant is indebted to him for services rendered at the request of the defendant he has said enough to imply a promise by the defendant to pay for the services."

55. *Somerville v. Grim*, 17 **W. Va.** 803; 1 *Chit. Pl.* (8th **Am. Ed.**) 361.

56. **Ga.**—*Talbotton R. Co. v. Gibson*, 106 **Ga.** 229, 32 **S. E.** 151. **Ia.**—

**b. Statutory Form Must Be Followed.**—In those states which prescribe the form of the plaintiff's original pleading in an action on an account, the statute must be substantially complied with.<sup>57</sup>

**5. Under the Code.**—The common counts in assumpsit are sufficient under the code system,<sup>58</sup> or the usual form showing such facts

*Buford & Co. v. Funk*, 4 Greene 493. Neb.—*Fletcher v. Co-operative Pub. Co.*, 58 Neb. 511, 78 N. W. 1070; *Chadron First Nat. Bank v. Engelbercht*, 57 Neb. 270, 77 N. W. 685; *McArthur v. H. T. Clarke Drug Co.*, 48 Neb. 899, 67 N. W. 861; *Collingwood v. Merchants' Bank*, 15 Neb. 118, 17 N. W. 359; *Stubendorf v. Sonnenschein*, 11 Neb. 235, 9 N. W. 91. Ohio.—*Cincinnati v. Cameron*, 33 Ohio St. 336.

See also *Shilling v. Templeton*, 66 Ind. 585; *Dudley v. Poland Paper Co.*, 90 Mo. 257, 38 Atl. 157.

57. *Beck v. Ball*, 4 Ohio Dec. 233; *Archer v. Moore Combination Desk Co.*, 9 Ohio Dec. 225.

58. Ark.—*Ball v. Fulton County*, 31 Ark. 379. Cal.—*De La Guerra v. Newhall*, 55 Cal. 21; *Pavisich v. Bean*, 48 Cal. 364; *Merritt v. Glidden*, 39 Cal. 559, 2 Am. Rep. 479; *Abadie v. Carrillo*, 32 Cal. 172; *Wilkins v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64. Ind.—*Humphrey v. Fair*, 79 Ind. 410; *Comrs. of Jennings County v. Verbag*, 63 Ind. 107; *Curran v. Curran*, 40 Ind. 473; *Bouslog v. Garrett*, 39 Ind. 338; *Johnson v. Kilgore*, 39 Ind. 147; *Wolf v. Schofield*, 38 Ind. 175; *Brown v. Perry*, 14 Ind. 32. Kan.—*Emslie v. City of Leavenworth*, 20 Kan. 562; *Meagher v. Morgan*, 3 Kan. 372, 87 Am. Dec. 476; *Clark v. Fensky*, 3 Kan. 385, 389. Mo.—*Stout v. St. Louis Tribune Co.*, 52 Mo. 342; *Carroll v. St. Paul's Admr.*, 16 Mo. 226. Mont.—*Higgins v. Germaine*, 1 Mont. 230. N. Y.—*Hurst v. Litchfield*, 39 N. Y. 377; *Hosley v. Black*, 28 N. Y. 438; *Farron v. Sherwood*, 17 N. Y. 227; *Allen v. Patterson*, 7 N. Y. 476, 59 Am. Dec. 542; *Goeith v. White*, 35 Barb. 76; *Evans v. Harris*, 19 Barb. 416; *Bates v. Cobb*, 5 Bosw. 29; *Cudlipp v. Whipple*, 4 Duer 610, 1 Abb. Pr. 106; *Adams v. Holley*, 12 How. Pr. 326. N. C.—*Jones v. Mial*, 82 N. C. 252. Wis.—*Grannis v. Hooker*, 29 Wis. 65.

In Connecticut, however, the common counts can only be used as an entire complaint. *McNamara v. McDonald*, 69 Conn. 484, 38 Atl. 54, 61 Am. St.

Rep. 48; *New York Breweries Corp. v. Baker*, 68 Conn. 337, 36 Atl. 785.

**Common Counts Sufficient.**—In *Pleasant v. Samuels*, 114 Cal. 34, 45 Pac. 998, the court, in passing upon the objection to the form of the declaration and its sufficiency, says: "The objection that the common counts are inconsistent with the provision of the Code that a complaint must state the facts constituting the cause of action in ordinary and concise language, and are therefore insufficient, is not tenable. It was held in this state at an early day, and has since been repeatedly held, that the common counts may be used to state a cause of action, notwithstanding the provision referred to, which was found in the old statutes, and was adopted into the Code. (*Freeborn v. Glazer*, 10 Cal. 337; *Abadie v. Carrillo*, 32 Cal. 171; *Farwell v. Murray*, 104 Cal. 464.) And this rule has been recognized and acted upon in most of the states where the Code practice has been adopted. (*Allen v. Patterson*, 7 N. Y. 476, 57 Am. Dec. 542; *Cudlipp v. Whipple*, 4 Duer, 610; *Grannis v. Hooker*, 29 Wis. 65; *Ball v. Fulton Company*, 31 Ark. 379; *Pomeroy's Code Remedies*, §§ 542, 543.) The first count was, therefore, not subject to a general demurrer. Was it then ambiguous, unintelligible, or uncertain in any material respect? It was not necessary to state *when* the plaintiff paid, laid out, expended, loaned, or advanced to and for the defendant the moneys sued for, or when defendant became indebted to plaintiff therefor, or when defendant requested plaintiff to make such payments, expenditures, loans, or advancements. Nor was it necessary to set forth the items of the account. The statute expressly provides that the items of an account need not be set forth in a pleading, but a bill of particulars must be furnished on demand. (*Code Civ. Proc.* § 454.) If, therefore, the defendant desired more particular information as to the account, he should have resorted to the remedy provided



as entitle the plaintiff to recover. It is not sufficient to allege that an account was furnished and payments made.<sup>59</sup>

**6. Amendment of Declaration or Complaint.**—As in other actions at law, the declaration<sup>60</sup> or complaint<sup>61</sup> may be amended in an action on account. Illustrations of the right to amend and the extent thereof are given in the notes.<sup>62</sup>

**7. Annexed Account Under Statute.**—In some jurisdictions the common counts in assumpsit are not employed, as at common law, in an action upon account;<sup>63</sup> but recovery may be had, though the declaration<sup>64</sup> or complaint be for some matter independent of an account, if a statement of the account be annexed to the pleading of the plaintiff.<sup>65</sup>

for by the statute, and not to a demurrer. (*Wise v. Hogan*, 77 Cal. 184; *Burns v. Cushing*, 96 Cal. 669; *Rogers v. Duff*, 97 Cal. 66; *Farwell v. Murray*, *supra*.)”

59. *Ga.*—*McNeil v. Ellis*, 4 Ga. App. 530, 61 S. E. 1050. *Kan.*—*Meagher v. Morgan*, 3 Kan. 372, 87 Am. Dec. 476. *Minn.*—*Griggs v. City of St. Paul*, 9 Minn. 246. *N. Y.*—*Sparks v. Ducas*, 123 App. Div. 507, 108 N. Y. Supp. 546.

**Form of Complaint.**—In *Sparks v. Ducas*, 123 App. Div. 507, 108 N. Y. Supp. 546, the complaint failed to state the value of the goods sold or the amount of money advanced. The court held that these were fatal defects. In the course of its opinion the court said:

“In an action for goods sold and delivered the complaint must allege the agreed price or the value of the goods. *Samson v. Grand Rapids School Furniture Co.*, 55 App. Div. 163, 66 N. Y. Supp. 815. In such an action the one or the other must be proved, and hence must be alleged. Money is presumed to be of its face value, and therefore only the amount advanced need be stated. An allegation that a certain sum remains due is an allegation of a conclusion of law only, and not of a fact. *Tate v. American Woolen Co.*, 114 App. Div. 106, 99 N. Y. Supp. 678. The complaint was therefore open to the demurrer that it failed to state facts sufficient to constitute a cause of action. It is urged that at least a cause of action is stated for a fur coat furnished to the child, and for which the defendant agreed to pay. Neither the agreed price nor the value of this article is alleged; and

hence the allegation is open to the same criticism as the body of the complaint. The allegation that an itemized account was furnished to defendant, and that he made partial payments thereon, does not cure the defect. The complaint is not framed upon an account stated, and the respondent by his brief expressly disclaims that such is his form of action.”

60. *Tassey v. Church*, 4 Watts & S. (Pa.) 141, 39 Am. Dec. 65.

61. *Wrought Iron Range Co. v. Young*, 85 Ark. 217, 107 S. W. 674.

62. *Wrought Iron Range Co. v. Young*, 85 Ark. 217, 107 S. W. 674.

63. *Chaplin v. Harbeck*, 156 Mass. 339, 31 N. E. 288; *Manilla v. Houghton*, 154 Mass. 465, 28 N. E. 784; *Hilton v. Burley*, 2 N. H. 193.

64. *Buehler v. Reed*, 11 Iowa 182.

65. *Elm City Club v. Howes*, 92 Me. 211, 42 Atl. 392; *Tukey v. Gerry*, 63 Me. 151; *Chapman v. Rich*, 63 Me. 588; *Gray v. Farmer*, 55 Me. 487; *Quin v. Bay State Dist. Co.*, 171 Mass. 283, 50 N. E. 637; *Bowen v. Proprietors of South Building*, 137 Mass. 274; *Boston & Fairhaven Iron Wks. v. Montague*, 135 Mass. 319; *Lovell v. Earle*, 127 Mass. 546; *Brown v. Abington Sav. Bank*, 119 Mass. 69; *Lowe v. Pimental*, 115 Mass. 44; *Turner v. Langdon*, 112 Mass. 265; *Raymond v. Eldridge*, 111 Mass. 390; *Morse v. Sherman*, 106 Mass. 430; *Warden v. Marshall*, 99 Mass. 305; *Hall v. Wood*, 9 Gray 60; *Stearns v. Washburn*, 7 Gray 187; *Richardson v. Crooker*, 7 Gray 190; *Morse v. Potter*, 4 Gray 292.

**Sufficiency of Complaint.**—It is held in *Fox & Jewell v. Barksdale*, 118 La. 339, 42 So. 957, that a cause of action

3. *Items of Account.*—*a. In the Declaration.*—In most jurisdictions the items composing the account, as a general rule, may be set forth in the declaration without filing a separate account with it.<sup>66</sup>

*b. Not Described in Declaration.*—If not described in the declaration, statutes require that an itemized account shall be filed therewith<sup>67</sup> or annexed thereto,<sup>68</sup> or furnished the defendant on demand.<sup>69</sup>

*c. Purpose and Effect of Account.*—The object of an account or bill of particulars is to more minutely specify the claim or defense set up in the cause,<sup>70</sup> and to confine the proof to the items thus disclosed.<sup>71</sup>

*d. Items of Account as Part of Declaration.*—In some jurisdictions the account is regarded as a part of the declaration or complaint and

on an open account is set forth with sufficient certainty, where the petition alleges that the defendant owed the plaintiff so much, stating the amount, for the price of merchandise sold on credit to the defendant in the accounts designated and at the dates set out in a detailed account and annexed to the petition for reference.

66. Conn.—*Vila v. Weston*, 33 Conn. 42; *Bishop v. Perkins*, 19 Conn. 300, 309. Fla.—*Waterman v. Mattail*, 5 Fla. 211. Ga.—*Ward v. Stewart*, 103 Ga. 260, 29 S. E. 872. Mass.—*Tebbetts v. Pickering*, 5 Cush. 83, 51 Am. Dec. 48. Mo.—*Mangelsdorf Bros. Co. v. Harnden Seed Co.*, 132 Mo. App. 507, 112 S. W. 15. N. Y.—*People v. Monroe*, 4 Wend. 200.

67. Ala.—*Morrisette v. Wood*, 128 Ala. 505, 30 So. 630. Fla.—*Columbia County v. Branch*, 31 Fla. 62, 12 So. 650. Ga.—*Ward v. Stewart*, 103 Ga. 260, 29 S. E. 872. Mo.—*Mangelsdorf Bros. Co. v. Harnden Seed Co.*, 132 Mo. App. 507, 112 S. W. 15.

In *Window Glass Co. v. Cameron Glass Co.*, 58 W. Va. 477, 52 S. E. 518, the court said: "The statute, section 11, chapter 125, Code, provides that in every action of assumpsit the plaintiff shall file with this declaration an account distinctly stating the several items of his claim, unless it be plainly described in the declaration, and if he fail to do so he shall not be permitted to prove any item not stated in such account on the trial of the case."

68. *Fox & Jewell v. Barksdale*, 118 La. 339, 42 So. 957.

69. *Morrisette v. Wood*, 128 Ala. 505, 30 So. 630; *Doss v. Peterson*, 82 Ala. 253, 2 So. 644.

70. Ala.—*Morrisette v. Wood*, 128 Ala. 505, 30 So. 630. Conn.—*Landon v. Sage*, 11 Conn. 302. W. Va.—*Window Glass Co. v. Cameron Glass Co.*, 58 W. Va. 477, 52 S. E. 518.

71. U. S.—*Williams v. Sinclair*, 3 McLean 289, 29 Fed. Cas. No. 17,737. Ala.—*Morrisette v. Wood*, 128 Ala. 505, 30 So. 630. Conn.—*Dean v. Mann*, 28 Conn. 352, 356; *Landon v. Sage*, 11 Conn. 302. Ind.—*Bank of Westfield v. Inman*, 8 Ind. App. 239, 34 N. E. 21; *Harding v. Griffin*, 7 Blackf. 462. Ky.—*Brown v. Calvert*, 4 Dana 219. Me.—*Seretto v. Rockland, etc. R. Co.*, 101 Me. 140, 63 Atl. 651. Mass.—*Com. v. Giles*, 1 Gray 461; *Com. v. Snelling*, 15 Pick. 321; *Babcock v. Thompson*, 3 Pick. 446, 15 Am. Dec. 235. Mich.—*Tate v. Hamilton*, 81 Mich. 221, 45 N. W. 822. Mo.—*Carroll v. Paul's Admr.*, 16 Mo. 226. N. Y.—*Starkweather v. Kittle*, 17 Wend. 20; *Dubois v. Delaware & H. Canal Co.*, 12 Wend. 334; *Smith v. Hicks*, 1 Wend. 202; *Williams v. Allen*, 7 Cow. 316; *Bowman v. Earle*, 3 Duer 691. Eng.—*Wade v. Beasley*, 4 Esp. 7.

*Proof Under the Account.*—One item of plaintiff's bill of particulars was: "To 12,000 yards of hard-pan excavation \$3,600." The plaintiff was not limited to a compensation of 30 cents per cubic yard, the defendant having come to trial prepared to contest the value of the work. *Dubois v. Delaware & Hudson Canal Co.*, 12 Wend. (N. Y.) 334.

constitutes part of the record,<sup>72</sup> while in other jurisdictions the rule of practice is otherwise.<sup>73</sup>

e. *Nature of Items of Account*.—The account required by statute to be filed in a cause corresponds to the bill of particulars at common law.<sup>74</sup>

f. *Nature of Action in Which Account Must be Filed*.—The filing or furnishing an account is not intended by the statute, unless the action is based on an open account<sup>75</sup> or unless the statute otherwise so provides.<sup>76</sup>

g. *Account Demandable as Matter of Right*.—If the action be one in which an account must be filed or furnished, the defendant may

72. **U. S.**—Chesapeake, etc. Canal Co. v. Knapp, 9 Pet. 541, 9 L. ed. 541. **Colo.**—Phelps v. Spruance, 1 Colo. 414; Ford v. Brown, 1 Colo. 265. **Conn.**—Grether v. Klock, 39 Conn. 133. **Ga.**—Ward v. Stewart, 103 Ga. 260, 29 S. E. 872; Fielder v. Collier, 13 Ga. 496. **Ill.**—Thompson v. Kimball, 55 Ill. App. 249. **Kan.**—Teberg v. Swenson, 32 Kan. 224, 4 Pac. 83; Kansas City, etc. R. Co. v. Hays, 29 Kan. 193; School Dist. No. 73 v. Dudley, 28 Kan. 160; Neifert v. Ames, 26 Kan. 515; Missouri Pac. R. Co. v. Piper, 26 Kan. 58; Hanlin v. Baxter, 20 Kan. 134; Alvey v. Wilson, 9 Kan. 401; Wooster v. McKinley, 1 Kan. 317. **Ky.**—Dodd v. King, 1 Met. 430; Perciful v. Hurd's Heirs, 5 J. J. Marsh. 670. **Me.**—Towle v. Blake, 38 Me. 528. **Mass.**—Babcock v. Thompson, 3 Pick. 446, 15 Am. Dec. 235. **Mich.**—Lester v. Thompson, 91 Mich. 245, 51 N. W. 893; Tate v. Hamilton, 81 Mich. 221, 45 N. W. 822; Mead v. Glidden, 79 Mich. 209, 44 N. W. 596; Collins v. Beecher, 45 Mich. 436, 8 N. W. 97. **Miss.**—Hamer v. Rigby, 65 Miss. 41, 3 So. 137; Summers v. Brady, 56 Miss. 10; McCleary v. Anthony, 54 Miss. 708; Bloom v. McGrath, 53 Miss. 249; Marshall v. Hamilton, 41 Miss. 229. **N. J.**—Tillou v. Hutchinson, 15 N. J. L. 178. **N. Y.**—Case v. Pharis, 106 N. Y. 114, 12 N. E. 431; Spawn v. Veeder, 4 Cow. 503, 15 Am. Dec. 401; Bates v. Wotkins, 2 How. Pr. 18; Melvin v. Wood, 3 Keyes 533, 3 Abb. App. Dec. 272. **Pa.**—Hartel v. Seibert, 1 T. & H. Pr. 424; Bowen v. Blevin, 1 W. N. C. 508. **Wis.**—Cudworth v. Gaynor, 76 Wis. 296, 44 N. W. 1103. **Eng.**—Staples v. Holdsworth, 4 Bing. N. C. 717, 6 D. P. C. 715, 6 Scott 605, 1 Arn. 275.
73. **Colo.**—Fryer v. Breeze, 16 Colo. 323, 26 Pac. 817. **Ill.**—Eggleston v. Buck, 24 Ill. 262. **Ind.**—Thomas v. Griffin, 1 Ind. App. 457, 27 N. E. 754. **Mo.**—State ex rel. Gilbert v. Eldridge, 65 Mo. 584; Matney v. Gregg Bros. Grain Co., 19 Mo. App. 107. **Ohio.**—Burch v. Young, 2 Ohio Dec. 377.
74. Morrisette v. Wood, 128 Ala. 505, 30 So. 630; Doss v. Peterson, 82 Ala. 253, 2 So. 644; Hayes v. Woods, 72 Ala. 92; Robinson's Admr. v. Allison, 36 Ala. 525.
- “Bill of Particulars” and “Account” Are Synonymous.—The court in Morrisette v. Wood, 128 Ala. 505, 30 So. 631, says:
- “We can draw no distinction between the word ‘account’ as used in the statute of limitations of three years (Code § 2799) and as employed in the section as to a bill of particulars. It means the same in both sections. That this is its true meaning is further strengthened by the ordinary and generally accepted meaning of the word. One understands the words ‘bill’ or ‘account,’ according to ordinary commercial usage, to mean ‘claim’ or ‘demand’ growing out of the sale of goods, the performance of services, and the like.”
75. **Ala.**—Comer v. Way, 107 Ala. 300, 19 So. 966, 54 Am. St. Rep. 93. **Ind.**—Biddle v. Reed, 33 Ind. 529. **Ia.**—Winters v. Page County, 70 Iowa 300, 30 N. W. 576; O'Brien v. Chicago, etc. R. Co., 64 Iowa 411, 20 N. W. 738; Buehler v. Reed, 11 Iowa 182. **Tex.**—Wroten Grain, etc. Co. v. Mineola Box Mfg. Co. (Tex. Civ. App.), 95 S. W. 744; Moore v. Powers, 16 Tex. Civ. App. 436, 41 S. W. 707. **Va.**—Robinson v. Burks, 12 Leigh 378.
76. Barkley v. Rensselaer & S. R. Co., 2 N. Y. Civ. Proc. 409.



call for the account as matter of right,<sup>77</sup> and an order will be entered directing the delivery of the account.<sup>78</sup>

*h. Waiver of the Account.*—There are many circumstances under which a party entitled to the filing of an account will be treated as having waived his right thereto.<sup>79</sup>

*i. Sufficiency of Account.*—The account should state the items thereof with reasonable certainty;<sup>80</sup> that is, the nature of the items should appear,<sup>81</sup> the amount<sup>82</sup> and the date.<sup>83</sup>

77. Cal.—*Pleasant v. Samuels*, 114 Cal. 34, 45 Pac. 998. Conn.—*Vila v. Weston*, 33 Conn. 42. Fla.—*Waterman v. Mattair*, 5 Fla. 211. Ore.—*Robbins v. Benson*, 11 Ore. 514, 6 Pac. 69. W. Va.—*Window Glass Co. v. Cameron Glass Co.*, 58 W. Va. 477, 52 S. E. 518; *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. E. 591.

78. Rowan *v. Merritt*, 9 Wend. (N. Y.) 443; *Vermont Academy of Medicine v. Landon*, 2 Wend. (N. Y.) 620; *May v. Richardson*, 4 Cow. (N. Y.) 56; *Hazard v. Henry*, 2 Cow. (N. Y.) 587; *Roosevelt v. Gardinier*, 2 Cow. (N. Y.) 463; *Brewster v. Sackett*, 1 Cow. (N. Y.) 571.

79. Ill.—*Howe v. Frazer*, 117 Ill. 191, 7 N. E. 481; *Eddie v. Eddie*, 61 Ill. 134. Ind.—*Chamness v. Chamness*, 53 Ind. 301. Md.—*Billingslea v. Smith*, 77 Md. 504, 26 Atl. 1077. Mass.—*Adams v. Butts*, 16 Pick. 343; *Turner v. Twing*, 9 Cush. 512. Mich.—*Peninsular Stove Co. v. Osmun*, 73 Mich. 570, 41 N. W. 693. Neb.—*Mulhollan v. Scoggin*, 8 Neb. 202. N. Y.—*Hoag v. Weston*, 10 N. Y. Civ. Proc. 92. Va.—*Central Lunatic Asylum v. Flanagan*, 80 Va. 110. Wis.—*Paine v. Smith*, 32 Wis. 335.

**Going to Trial.**—In *Peninsular Stove Co. v. Osmun*, 73 Mich. 570, 41 N. W. 693, the court decided that defendant is inconsistent who relies upon getting a bill of particulars before pleading, and ignores notice of trial served before such bill is filed, and waives the right to insist that the case was not properly on the docket for trial.

80. Ala.—*Robinson's Admrs. v. Allison*, 36 Ala. 525. Conn.—*Vila v. Weston*, 33 Conn. 42; *Landon v. Sage*, 11 Conn. 302. Ga.—*Busby v. Marshall*, 125 Ga. 645, 54 S. E. 646. Me.—*Turgeon v. Cote*, 88 Me. 108, 33 Atl. 787; *Bennett v. Davis*, 62 Me. 544. Mo.—*Rechnitzer v. Vogelsang*, 117 Mo. App. 148, 93 S. W. 326.

81. Mass.—*Powers v. Manning*, 154 Mass. 370, 28 N. E. 290, 13 L. R. A. 258. Mo.—*Moffitt-West Drug Co. v. Crider*, 124 Mo. App. 109, 100 S. W. 1099; *Rechnitzer v. Vogelsang*, 117 Mo. App. 148, 93 S. W. 326. N. H.—*Gale v. Drake*, 51 N. H. 78.

In *Powers v. Manning*, *supra*, the court said: "The second count is on an account annexed, which contained over twenty items. The defendant objected to several of these items on the ground that the plaintiff sought in each of them to recover for services in several different matters, and the defendant asked the court to rule that the plaintiff could recover for but one matter of charge under each of said items, and also asked the court to rule that there could be no recovery on any of said items. The court found upon the evidence, as a fact, that the different matters mentioned in each of said items constituted one item of charge upon the same subject matter; and refused to give the rulings requested. One of these items is as follows: '1885, Dec. 8. To letter to Payson and Speer, and two-page letter to Brigham, \$3.' If these letters related to the same subject matter, we are unable to see why one charge might not be made, and why, being so charged, they could not be inserted in one item. The other items are similar, and fall within the same rule."

82. *Hughes v. Hampton*, 3 Brev. (S. C.) 544.

83. Ga.—*Overstreet v. Nashville Lumb. Co.*, 127 Ga. 458, 56 S. E. 650; *Busby v. Marshall*, 125 Ga. 645, 54 S. E. 646; *Bland v. Strange*, 52 Ga. 93. N. Y.—*Dowdney v. Volkening*, 5 Jones & S., 313, 318. Tex.—*Love v. Doak*, 5 Tex. 343; *Gulick v. Fortson*, 1 White & W. Civ. Cas. § 425.

It is held in *Overstreet v. Nashville Lumb. Co.*, 127 Ga. 458, 56 S. E. 650, that if a suit is brought on an open

j. *Order To Make Sufficient*.—If the account already filed or furnished on demand be insufficient, an order of court may be obtained directing the plaintiff to furnish one deemed sufficient.<sup>84</sup>

k. *Amendment of Account*.—The account filed may be amended.<sup>85</sup>

account which contains a number of items, but alleges no date except the year, an objection properly made and in due time should be sustained, unless by an amendment the defect is cured. Whether an allegation of an approximate date, with a statement that for reasons set out it is impossible truthfully to make a more definite statement on that subject, would suffice, or whether in all events an exact date must be alleged, although strict proof thereof may not be required, if the account is within the statute of limitations, need not now be determined. In this case, in response to a motion to strike the bill of particulars, counsel merely replied orally that they did not know when the goods were furnished and could not state the month; that they had stated the year and that was as near as they could come to it. No specific ruling was made as to the time or manner of making the objection. See also *Busby v. Marshall*, 125 Ga. 645, 54 S. E. 646.

84. *Yates v. Bigelow*, 9 How. Pr. (N. Y.) 186; *Kellogg v. Paine*, 8 How. Pr. (N. Y.) 329.

85. **U. S.**—*Chesapeake, etc. Canal Co. v. Knapp*, 9 Pet. 541, 9 L. ed. 222. **Colo.**—*Phelps v. Spruance*, 1 Colo. 414; *Ford v. Brown*, 1 Colo. 265. **Conn.**—*Grether v. Klock*, 39 Conn. 133. **Ga.**—*Fielder v. Collier*, 13 Ga. 496. **Kan.**—*Teberg v. Swenson*, 32 Kan. 524, 4 Pac. 83; *Kansas City, etc. R. Co. v. Hayes*, 29 Kan. 193; *School Dist. No. 73 v. Dudley*, 28 Kan. 160; *Neifert v. Ames*, 26 Kan. 515; *Missouri Pac. R. Co. v. Piper*, 26 Kan. 58; *Hanlin v. Baxter*, 20 Kan. 134; *Alvey v. Wilson*, 9 Kan. 401; *Wooster v. McKinley*, 1 Kan. 317. **Me.**—*Towle v. Blake*, 38 Me. 528. **Mass.**—*Babcock v. Thompson*, 3 Pick. 446, 15 Am. Dec. 235. **Mich.**—*Lester v. Thompson*, 91 Mich. 245, 51 N. W. 893; *Tate v. Hamilton*, 81 Mich. 221, 81 N. W. 822; *Mead v. Glidden*, 79 Mich. 209, 44 N. W. 596; *Collins v. Beecher*, 45 Mich. 436, 8 N. W. 97. **Miss.**—*Summers v. Brady*, 56 Miss. 10; *McCleary v. Anthony*, 54 Miss. 708; *Bloom v. McGrath*, 53 Miss. 249. **N. J.**—*Tillou v. Hutch-*

*inson*, 15 N. J. L. 178. **N. Y.**—*Case v. Pharis*, 106 N. Y. 114, 12 N. E. 431; *Spawn v. Veeder*, 4 Cow. 503, 15 Am. Dec. 401; *Bates v. Wotkins*, 2 How. Pr. 18; *Melvin v. Wood*, 3 Keyes 533, 3 Abb. App. Dec. 272. **Pa.**—*Hartel v. Seibert*, 1 T. & H. Pr. 424; *Bowen v. Blevin*, 1 W. N. C. 508. **W. Va.**—*Anderson v. Kanawha Coal Co.*, 12 W. Va. 526. **Wis.**—*Cudworth v. Gaynor*, 76 Wis. 296, 44 N. W. 1103. **Eng.**—*Staples v. Holdsworth*, 4 Bing. N. C. 717, 33 E. C. L. 507.

**Amendment on Appeal**.—In *Rechnitzer v. Vogelsang*, 117 Mo. App. 148, 93 S. W. 326, a case which arose before a justice of the peace, and which was taken by appeal to the circuit court, the court said:

"There appears to be some discrepancy among the decisions regarding the right to amend such a statement in the circuit court. We find that in some instances judgments have been reversed when the accounts filed were insufficient and no opportunity afforded to amend. This course was taken on the theory that the account gave the justice no jurisdiction over the subject-matter of the action, and hence there was nothing to amend. *McCrary v. Good*, and *Moffit-West Drug Co. v. Johnson*, *supra*; *Rechnitzer v. Candy Co.*, 82 Mo. App. 311. In other instances the cause was remanded, with a direction to permit an amendment. *Boughton v. Railroad*, *Doggett v. Blanke*, and *Butts v. Phelps*, *supra*; *Hill v. Ore & Steel Co.*, 90 Mo. 103, 2 S. W. 289. Attention was given to this question in *Doggett v. Blanke*, wherein an account or statement like the one we are dealing with was held to state no cause of action and the cause was remanded with the direction to permit an amendment. The Supreme Court decisions appear to sanction that view. It is provided by the statutes that in cases appealed from a justice of the peace, the bill of items of the account sued on, or the statement of the cause of action filed before the justice, may be amended in the circuit court, to supply any deficiency or omission, when substantial justice will be promoted thereby and the amendment



1. *Time Within Which Account Must Be Filed.*—Statutes requiring accounts to be furnished within a prescribed time after demand are construed as directory. So, if not filed or furnished within the time designated by statute, the court will not refuse the plaintiff the privilege of offering evidence in support of it.<sup>86</sup>

m. *Time of Objections to Defective Account.*—In those jurisdictions authorizing objections to be made to defective accounts at any time before trial, objection cannot be offered to such account for the first time after the trial has begun.<sup>87</sup>

*Objections After Verdict.*—Of course, that no account has been filed with the declaration,<sup>88</sup> or that the one filed was defective,<sup>89</sup> cannot be objected for the first time after verdict.<sup>90</sup>

n. *Manner of Objection to Defective Account.*—The manner of raising an objection to an account considered insufficient is not the same in all jurisdictions. In those in which it is treated as a part of the declaration or complaint, it is made by demurrer.<sup>91</sup> In others

will not introduce any new item or cause of action. Rev. St. 1899, § 4079. While we think the account filed by plaintiff shows no cause of action and is inadequate to support the judgment in his favor, we think, too, that he ought to be permitted to file an amended statement in the circuit court, though we do not say that all the decisions can be reconciled with this ruling. Those which control this court support it."

86. *McCarthy v. Mt. Tecarte Land etc. Co.*, 110 Cal. 687, 43 Pac. 391; *Robbins v. Butler*, 13 Colo. 496, 22 Pac. 803. See also *Sullivan v. Blythe*, 14 S. C. 621.

87. *Ala.*—*Pryor v. Johnson*, 32 Ala. 27. *Cal.*—*McCarthy v. Mt. Tecarte L. & W. Co.*, 110 Cal. 687, 43 Pac. 391; *Dennison v. Smith*, 1 Cal. 437. *Ill.*—*Howe v. Frazier*, 117 Ill. 191, 7 N. E. 481. *Me.*—*Harrington v. Tuttle*, 64 Me. 474. *Mass.*—*Preston v. Neale*, 12 Gray 222; *Turner v. Twing*, 9 Cush. 512. *Mich.*—*Buckeye Tp. v. Clark*, 90 Mich. 432, 51 N. W. 528. *Neb.*—*Mulholland v. Scoggin*, 8 Neb. 202. *Va.*—*Norfolk & W. R. Co. v. Carter*, 91 Va. 587, 22 S. E. 517; *Central Lunatic Asylum v. Flanagan*, 80 Va. 110. *Wash.*—*Isham v. Parker*, 3 Wash. St. 755, 29 Pac. 835.

In *Central Lunatic Asylum v. Flanagan*, 80 Va. 110, the defendant moved that plaintiff be required to file a bill of particulars. This was denied, but at the next term was allowed and plaintiff filed his bill and the trial proceeded

without defendant asking at the time to consider of his defense. It was held that, having entered upon the trial without further objection, the defendant waived his right for further time to consider or examine the bill of particulars.

88. *Ind.*—*Darnall v. Simpkins*, 10 Ind. App. 469, 3 N. E. 219. *Miss.*—*Bank of Louisiana v. Ballard*, 7 How. 371. *Tex.*—*Burnley v. Rice*, 18 Tex. 481.

89. *Davis v. Jenkins*, 14 Ind. 572; *Lewiston Steam Mill Co. v. Easter*, 78 Me. 107, 2 Atl. 882.

90. *Ind.*—*Davis v. Jenkins*, 14 Ind. 572; *Darnell v. Simpkins*, 10 Ind. App. 469, 3 N. E. 219. *Me.*—*Lewiston Steam Mill Co. v. Easter*, 78 Me. 107, 2 Atl. 882. *Miss.*—*Bank of Louisiana v. Ballard*, 7 How. 371. *Tex.*—*Burnley v. Rice*, 18 Tex. 481.

91. *Cal.*—*Goldsmith v. Sawyer*, 46 Cal. 209. *Ia.*—*Farwell v. Tyler*, 5 Iowa 535. *Me.*—*Turgeon v. Cote*, 88 Me. 108, 33 Atl. 787.

*Demurrer to Account.*—"Items of account running through several years, attached to the petition in a suit by a tenant against a landlord for labor done, materials furnished, and improvements made upon the rented premises, which bear no date and which are otherwise defectively set forth, are open to attack by special demurrer calling for more specific information; and where these defects are not cured by amendment, the demurrer should be sustained and the items so defectively



it is by motion to require a sufficient account to be furnished.<sup>91</sup>

o. *Effect of Failure to File Account.*—In many jurisdictions a failure to file or furnish the account precludes the plaintiff from introducing his evidence in support of it,<sup>92</sup> unless of course the items claimed are plainly described in the declaration or complaint.<sup>93</sup> In other jurisdictions the right to offer evidence in support of the claim or demand is not lost unless due and timely objection has been made to the party's failure to file the account.<sup>95</sup>

p. *Judgment by Default.*—In some jurisdictions judgment by default may not be rendered if the account sued on has not been filed.<sup>96</sup>

q. *Verification of Account.*—The object of the verification of an account depends upon the intent of the statute prescribing the affidavit. If the statute requires the statement of the account to be verified in order that it may be properly filed, the affidavit goes to the sufficiency of the account,<sup>97</sup> but if not so required it is usually received as an instrument of evidence.<sup>98</sup>

r. *Nature of Account Which May Be Verified.*—The character of the account which may be made the subject of verification by affidavit, so as to make such verified account *prima facie* evidence of its correctness, depends upon the scope and meaning of the statute authorizing the use of an affidavit.<sup>99</sup>

set forth should be stricken." Busby v. Marshall, 125 Ga. 645, 54 S. E. 646.

92. Meyer v. Chambers, 68 Mo. 626; Hart v. Speet, 62 Cal. 187.

93. Ala.—Morrisette v. Wood, 128 Ala. 505, 30 So. 630, 632. Cal.—Auzerais v. Naglee, 74 Cal. 60, 15 Pac. 371; Connor v. Hutchinson, 17 Cal. 279. Fla.—Columbia County v. Branch, 31 Fla. 62, 12 So. 650; Coons v. Harllee, 17 Fla. 484. Me.—Parker v. Emery, 28 Me. 492. Mich.—Peterson v. Tilden, 44 Mich. 168, 6 N. W. 217. W. Va.—Window Glass Co. v. Cameron Glass Co., 58 W. Va. 477, 480, 52 S. E. 518.

94. Kuhn v. Gustafson, 73 Iowa 633, 35 N. W. 660; Thillman v. Shadrick, 69 Md. 528, 16 Atl. 138.

95. Farwell v. Tyler, 5 Iowa 535.

96. Jewell v. Brown, 33 Me. 250; Burwell v. Burgess, 32 Gratt. (Va.) 472.

See the title "Judgment."

97. Cal.—Dennison v. Smith, 1 Cal. 437. N. Y.—McCarron v. Sire, 14 N. Y. Civ. Proc. 252. Wis.—Paine v. Smith, 32 Wis. 335.

98. Ala.—Baker v. Haynes, Henson & Co., 146 Ala. 520, 40 So. 968; Fulton v. Sword Medicine Co., 145 Ala. 331, 40 So. 393; Hyde v. Adams, 80 Ala. 111. Ga.—Rockmore v. Cullen, 94 Ga.

648, 21 S. E. 845. Miss.—Romoned v. Jackson, 93 Miss. 92, 46 So. 258; Ware v. McQuillan, 54 Miss. 703; Rose v. Watson, 54 Miss. 673. N. C.—Claus-Shear Co. v. E. Lee Hdw. House, 140 N. C. 552, 53 S. E. 433, 6 Ann. Cas. 243; Knight v. Taylor, 131 N. C. 84, 42 S. E. 537. N. M.—Richardson v. Pierce, 14 N. M. 334, 93 Pac. 715. Pa.—McDermott v. Woods, 147 Pa. 356, 23 Atl. 435. Tenn.—William v. Lenoir, 8 Baxt. 395; Stockwell v. Ryan, 1 Baxt. 476; Cave v. Baskett, 3 Humph. 340. Tex.—Wood v. Kieschbaum (Tex. Civ. App.), 31 S. W. 326; Theus v. Jipson, 3 Wills. Civ. Cas. § 189.

99. Jacksboro Stone Co. v. Fairbanks Co., 48 Tex. Civ. App. 639, 107 S. W. 567.

*Single Item of Charge.*—In Jacksboro Stone Co. v. Fairbanks Co., 48 Tex. Civ. App. 639, 107 S. W. 567, it was sought to bring an isolated transaction within the law of verified accounts, dispensing with proof on the part of the seller, suing for the price thereof. On this part of the case the court says:

"The transaction between plaintiff in error and defendant in error, representing, as it did, an isolated transaction by which a single article was sold upon the one hand and purchased upon

**Illustrations.**—The instances given in the notes illustrate this principle.<sup>1</sup>

s. *Effect of Verified Account.*—In those states where an account may be verified by affidavit, the effect of such verification operates as proof of the account until a proper counter affidavit has been filed,<sup>2</sup> and no evidence controverting the account can be received in the absence of such counter affidavit.<sup>3</sup>

t. *Requisites of the Affidavit.*—The requisites of an affidavit verifying an account are those prescribed by the particular statute of the state in which the suit is brought.<sup>4</sup>

9. **Defenses to Actions on Account.**—a. *In Assumpsit.*—If the form of action be at common law in assumpsit, the defense is usually made under the general issue of *non assumpsit*.<sup>5</sup> Under this plea all

the other at an agreed price, was not such an account between the parties as could be verified under the statute in such way as to dispense with proof upon the part of defendant in error. *Woten Grain & Lumber Co. v. Mineola Box Mfg. Co.* (Tex. Civ. App.), 95 S. W. 744, and authorities there cited.”

1. Under a statute making an itemized statement *prima facie* evidence of the account, such a statement complies with the requirements though it contains trade abbreviations. *Claus-Shear Co. v. E. Lee Hardware House*, 140 N. C. 552, 53 S. E. 433. See also, as construing similar statutes, *Ala.*—*Baker v. Haynes, Henson & Co.*, 146 Ala. 520, 40 So. 968. *Kan.*—*Lucas v. Board of Comrs.*, 67 Kan. 418, 73 Pac. 56. *Miss.*—*Bonner v. White*, 78 Miss. 653, 29 So. 402. *Tex.*—*Coleman v. Anheuser-Busch Brew. Assn.* (Tex. Civ. App.), 39 S. W. 1088.

2. *Ala.*—*Owensboro Wagon Co. v. Hall*, 149 Ala. 210, 43 So. 71. *Ga.*—*McNeil v. Ellis*, 4 Ga. App. 530, 61 S. E. 1050. *Miss.*—*Tichenor v. Woodburn Sarven W. Co.*, 54 Miss. 589; *Bower v. Henshaw*, 53 Miss. 345; *Reinhardt v. Carter*, 49 Miss. 315. *N. M.*—*Richardson v. Pierce*, 14 N. M. 334, 93 Pac. 715. *Tex.*—*Rust v. Sanger Bros.* (Tex. Civ. App.), 105 S. W. 66. See 1 *ENCYCLOPAEDIA OF EVIDENCE* 153, where this subject is fully treated.

3. *Ala.*—*Baker v. Haynes*, 146 Ala. 520, 40 So. 968. *Ga.*—*General Specialty Co. v. Tifton Ice & P. Co.*, 3 Ga. App. 502, 60 S. E. 121. *Miss.*—

*Tichenor v. Woodburn Sarven W. Co.*, 54 Miss. 589. See further, 1 *ENCYCLOPAEDIA OF EVIDENCE*, 153 and 154, where this subject is discussed, the authorities cited and illustrations given.

4. See 1 *ENCYCLOPAEDIA OF EVIDENCE* 153, and the many cases there cited.

**Illustrations.**—Under Oklahoma statute, 1893 § 3986, it is not sufficient to verify the petition generally; the account must be verified and attached to the petition, and the latter should allege the correctness of the account. *Myers v. First Presbyterian Church*, 11 Okla. 544, 69 Pac. 874.

Under Tennessee Code, § 5561, a bookkeeper's affidavit to a firm account is insufficient. *Foster v. Scott County*, 107 Tenn. 693, 65 S. W. 22.

It is held in *Davidson v. McCall Co.* (Tex. Civ. App.), 95 S. W. 32, that an account verified by the affidavit of plaintiff's treasurer is sufficient though he is not described as agent.

5. *Edwards v. Nichols*, 8 Fed. Cas. No. 4,296; *Varner v. Core*, 20 W. Va. 47; 14 *ENCYCLOPAEDIA OF EVIDENCE* 764, 765, where the authorities are fully cited.

Assumpsit as well as account lies for goods delivered to be sold and accounted for in currency. *Pope v. Robinson*, 1 Stew. (Ala.) 415.

That account will lie is no objection to bringing assumpsit, if the defendant is not thereby deprived of any right or subjected to any inconvenience. *Tousey v. Preston*, 1 Conn. 175.

See the title “Assumpsit.”

defenses may be interposed,<sup>6</sup> except those of the statute of limitations,<sup>7</sup> tender,<sup>8</sup> set-off,<sup>9</sup> and bankruptcy.<sup>10</sup>

b. *In Debt*.—If debt be brought on an account, practically the same defenses may be made under the general issue of *nil debet* as may be made in assumpsit under the general issue in that action.<sup>11</sup>

c. *Under the Code System*.—If the action be brought under the code system, where the account is contained in the complaint<sup>12</sup> or is filed with or annexed thereto,<sup>13</sup> the answer must deny such part of the claim as the defendant intends to controvert.<sup>14</sup> All parts of the account not so denied are admitted to be true.<sup>15</sup>

d. *Demurrer*.—The sufficiency of the pleadings is tested by demurrer.<sup>16</sup>

e. *Defenses of Confession and Avoidance Under the Code System*.—If the defense under the code system be other than a denial of the account, it must be specially pleaded.<sup>17</sup>

f. *Statute of Limitations*.—(I.) *In General*.—If the statute of limitations is relied on as a defense to an action on an account, as it may be,<sup>18</sup> it should generally be pleaded in an action at law,<sup>19</sup> though in many jurisdictions having the code system of procedure it may be

6. See 14 ENCYCLOPAEDIA OF EVIDENCE 764, 765.

**Illegality of Consideration.**—Neustadt v. Hall, 58 Ill. 172; Skeels v. Phillips, 54 Ill. 309.

7. See 14 ENCYCLOPAEDIA OF EVIDENCE 766, 767, where the authorities are collected.

8. See 14 ENCYCLOPAEDIA OF EVIDENCE, 766, 767, and the cases cited.

9. See 14 ENCYCLOPAEDIA OF EVIDENCE, 766, 767.

10. See 14 ENCYCLOPAEDIA OF EVIDENCE 766, 767.

11. See 14 ENCYCLOPAEDIA OF EVIDENCE, 767, 768.

12. Ala.—Hartsell v. Masterson, 132 Ala. 275, 31 So. 616. Ind.—Curran v. Curran, 40 Ind. 473. N. Y.—Seed v. Fairchild, 83 App. Div. 629, 82 N. Y. Supp. 490.

13. Ga.—McClendon v. Hernando Phosphate Co., 100 Ga. 219; 28 S. E. 152. Mich.—Morrill v. Bissell, 99 Mich. 409, 58 N. W. 324. N. Y.—Seed v. Fairchild, 83 App. Div. 629, 82 N. Y. Supp. 490.

14. Ky.—Collins v. Fenley, 21 Ky. L. Rep. 958, 53 S. W. 667. La.—Normand v. Edwards, 23 La. Ann. 142. Mich.—Morrill v. Bissell, 99 Mich. 409, 58 N. W. 324. Miss.—Tichenor v. Woodburn Sarven Wheel Co., 54 Miss. 589.

15. Rodefer v. Myers, 56 Iowa 227, 9 N. W. 186.

16. Owensboro Wagon Co. v. Hall, 149 Ala. 210, 43 So. 71. See the title "Demurrer."

17. Crane Bros. Mfg. Co. v. Morse, 49 Wis. 368, 5 N. W. 815.

18. Ala.—Bryan v. Ware, 20 Ala. 687. Ark.—Parker v. Carter, 120 S. W. 836. Cal.—National Cycle Mfg. Co. v. San Diego Cycle Co., 9 Cal. App. 111, 98 Pac. 64. Colo.—Walsh v. Welsh, 46 Colo. 344, 104 Pac. 399. Ia.—Higley v. Burlington, etc. R. Co., 99 Iowa 503, 68 N. W. 829, 61 Am. St. Rep. 250. S. D.—McPherson v. Swift, 116 N. W. 76. Va.—Radford v. Fowlkes, 85 Va. 820, 8 S. E. 817.

19. U. S.—Norton v. Meader, 4 Sawy. 603, 18 Fed. Cas. No. 10,351; Brown v. Jones, 2 Gall. 477, 4 Fed. Cas. No. 2,017. Ala.—Espy v. Comer, 76 Ala. 501. Cal.—People v. Broadway Wharf Co., 31 Cal. 33. Ga.—Parker v. Irvin, 47 Ga. 405. Ind.—Wood v. Hughes, 138 Ind. 179, 37 N. E. 588; McCallam v. Pleasants, 67 Ind. 542; City of Lebanon v. Twiford, 13 Ind. App. 384, 41 N. E. 844. Ia.—Sleeth v. Murphy, 1 Morris 321, 41 Am. Dec. 232. Ky.—Hayden v. Stone, 1 Duv. 396; Jones v. Chiles, 4 J. J. Marsh. 610. La.—Broadway's Heirs v. Pool, 19 La. 258; Dunbar v. Nichols, 10 Mart. (O. S.) 184; Beard v. Pritchard, 9 Rob. 464; Lejeune v. Hebert, 6 Rob. 419; Ashbey v. Ashbey, 41 La. Ann. 102, 5 So. 539. Me.—Ware v. Webb,



raised by demurrer when it actually appears from the face of the pleading that the claim is barred.<sup>20</sup>

(II.) **When Statute Begins to Run.**—In some states the statute of limitations begins to run from the date of the last item,<sup>21</sup> while in other states it runs from the date of each item.<sup>22</sup>

(III.) **Acknowledgment To Remove Bar of Statute.**—What is a sufficient acknowledgment to remove the bar of the statute of limitations depends upon the character of the local statute.<sup>23</sup>

(IV.) **Written Acknowledgment of Claim Barred by Statute.**—In many of the states the acknowledgment must be in writing.<sup>24</sup>

(V.) **Partial Payment.**—In several of the states a partial payment on the account is sufficient to remove the bar of the statute of limitations.<sup>25</sup>

(VI.) **Accounts Between Merchant and Merchant.**—In many of the states statutes have been enacted, based upon a similar statute adopted

32 Me. 41. **Md.**—Hepburn's Case, 3 Bland 95; Chambers v. Chambers, 4 Gill & J. 420, 23 Am. Dec. 572; Oliver v. Gray, 1 Har. & G. 204. **Minn.**—Davenport v. Short, 17 Minn. 24. **Mo.**—Boyce v. Christy, 47 Mo. 70. **Neb.**—Atchison & N. R. Co. v. Miller, 16 Neb. 661, 21 N. W. 451. **N. Y.**—Van Hook v. Whitlock, 2 Edw. Ch. 304; Ainslie v. City of New York, 1 Barb. 168. **N. C.**—Albertson v. Terry, 109 N. C. 8, 13 S. E. 713; Randolph v. Randolph, 107 N. C. 506, 12 S. E. 374. **Ohio.**—Towsley v. Moore, 30 Ohio St. 184, 27 Am. Rep. 434. **Pa.**—Heath v. Page, 48 Pa. 130. **R. I.**—White v. Eddy, 19 R. I. 108, 31 Atl. 823. **S. C.**—Jones v. Massey, 9 S. C. 376. **Tenn.**—Merriman v. Cannovan, 9 Baxt. 93; Maury v. Lewis, 10 Yerg. 115. **Va.**—Hickman v. Stout, 2 Leigh 6. **W. Va.**—Humphrey v. Spencer, 36 W. Va. 11, 14 S. E. 410. **Wis.**—Lockhart v. Fessenich, 58 Wis. 588, 17 N. W. 302; Peck v. Cheney, 4 Wis. 249; Parker v. Kane, 4 Wis. 1, 65 Am. Dec. 283.

*Contra*, Riley v. Norman, 39 Ark. 158; Miller v. Grosvenor, 2 Root (Conn.) 208.

20. Parker v. Carter (Ark.), 120 S. W. 836; McNeil v. Garland, 27 Ark. 343; Higgs v. Warner, 14 Ark. 192.

21. National Cycle Mfg. Co. v. San Diego Cycle Co., 9 Cal. App. 111, 98 Pac. 644. **Colo.**—Walsh v. Welsh, 46 Colo. 344, 104 Pac. 399. **Me.**—Rogers v. Davis, 103 Me. 405, 69 Atl. 618, 19 L. R. A. (N. S.) 126. **Mo.**—Vogel v. Kennedy, 127 Mo. App. 228, 104 S. W. 1151. **Vt.**—Wood v. Barney, 2 Vt. 369.

In Vogel v. Kennedy, 127 Mo. App.

228, 104 S. W. 1151, the court in the course of its opinion says: "If it is true, and the jury had the right to believe it, the first items of the counterclaim are no more barred than the last; for the statute of limitations does not begin to run on an open, mutual, and running account until the date of the last item. Chadwick v. Chadwick, 115 Mo. 581, 22 S. W. 479; Boylan v. Steamboat Victory, 40 Mo. 244; Penn's Admr. v. Watson, 20 Mo. 13."

22. **Cal.**—Auzerais v. Naglee, 74 Cal. 60, 15 Pac. 371; Smith v. Richmond, 19 Cal. 476; Smith v. Hall, 19 Cal. 85; Harringer v. Warden, 12 Cal. 311. **Ia.**—Moulton v. Walsh, 30 Iowa 361. **Tex.**—Hudson v. Wheeler, 34 Tex. 356; Coles v. Kelsey, 2 Tex. 541, 47 Am. Dec. 661; Lacerett v. Wherry (Tex. Civ. App.), 15 S. W. 121. **W. Va.**—Varner v. Core, 29 W. Va. 472.

23. **Ala.**—Jasper Trust Co. v. Lampkin, 50 So. 337, 24 L. R. A. (N. S.) 1237. **Ark.**—Parker v. Carter, 120 S. W. 836; Harlan v. Bernie, 22 Ark. 217, 76 Am. Dec. 428; Beebe v. Block, 12 Ark. 595; Smith v. Talbot, 11 Ark. 666.

**Me.**—Rogers v. Davis, 103 Me. 405, 69 Atl. 618, 19 L. R. A. (N. S.) 126.

24. Parker v. Carter (Ark.), 120 S. W. 836; Beebe v. Block, 12 Ark. 595; Smith v. Talbot, 11 Ark. 666, 76 Am. Dec. 428; Chace v. Trafford, 116 Mass. 529, 17 Am. Rep. 171.

25. Jasper Trust Co. v. Lampkin (Ala.), 50 So. 337, 24 L. R. A. (N. S.) 1237.

See for the full consideration of the subject here presented the title "Limitation of Actions."

in England,<sup>26</sup> providing that the right of action upon "mutual, open and current account," known generally as accounts "between merchant and merchant," shall be deemed to have accrued from the time of the last item proved in the account on either side.<sup>27</sup>

g. *Account Stated*.—As a defense to an action at law upon an open account, an account stated may be interposed. But under the code system it must be specially pleaded.<sup>28</sup> The rule is otherwise at common law.<sup>29</sup>

h. *Admission of Correctness by the Plea*.—In some cases the correctness of the account may be admitted by the character of the plea.<sup>30</sup>

10. *Replication*.—If the plaintiff would controvert the matters contained in the defendant's plea, or confess and avoid them, he must do so by means of a replication.<sup>31</sup>

11. *Right to Jury Trial*.—In an action at law a trial by jury is demandable as matter of right,<sup>32</sup> except in those states in which a compulsory reference is prescribed by statute.<sup>33</sup>

26. 21 Jac. I., c. 16, § 3.

27. *Norton v. Larco*, 30 Cal. 126, 89 Am. Dec. 70.

28. *Commissioners of Mower County v. Smith*, 22 Minn. 97.

29. *Varner v. Core*, 20 W. Va. 472.

30. *Ga.*—*Smith v. Holbrook*, 99 Ga. 256, 25 S. E. 627, where it was held, under the pleading of act of 1893, that a plea of "not indebted" did not controvert distinct averments of the petition. *Ky.*—*Collins v. Fenley*, 21 Ky. L. Rep. 958, 53 S. W. 667. *La.*—*Normand v. Edwards*, 23 La. Ann. 142 (where, in a suit upon an open account, it was held that a plea of compensation and reconvention admitted the correctness of the account); *Gervin v. Beaird*, 26 La. Ann. 630 (where it was held that after pleading payment the defendant could not deny the account). *Nev.*—*Skinner v. Clute*, 9 Nev. 343. *Tex.*—*Low v. Griffin* (Tex. Civ. App.), 41 S. W. 73.

31. *Owensboro Wagon Co. v. Hall*, 149 Ala. 210, 43 So. 71; *Richardson v. Pierce*, 14 N. M. 334, 93 Pac. 715.

32. *U. S.*—*United States v. Rathbone*, 2 Paine 578, 27 Fed. Cas. No. 16,121; *Howe Mach. Co. v. Edwards*, 15 Blatchf. 402, 12 Fed. Cas. No. 6,784; *Field v. Schell*, 4 Blatchf. 435, 9 Fed. Cas. No. 4,771. *Cal.*—*Grim v. Norris*, 19 Cal. 140, 79 Am. Dec. 206. *Colo.*—*Terpening v. Holton*, 9 Colo. 306, 12 Pac. 189. *Kan.*—*Alford v. Buford Impl. Co.*, 7 Kan. App. 754, 53 Pac. 530. *Mo.*—*Creve Coeur Lake Ice Co.*

*v. Tamm*, 138 Mo. 385, 39 S. W. 791; *Caruth-Byrnes Hdw. Co. v. Wolter*, 91 Mo. 484; 3 S. W. 86; *Caulk v. Blyth*, 55 Mo. 293; *Martin v. Hall*, 26 Mo. 386. *Neb.*—*Lamaster v. Scofield*, 5 Neb. 148. *N. J.*—*American Saw Co. v. Trenton First Nat. Bank*, 58 N. J. L. 438, 34 Atl. 1. *N. Y.*—*Camp v. Ingersoll*, 86 N. Y. 433; *Jacquelin v. Manhattan R. Co.*, 12 Misc. 330, 33 N. Y. Supp. 655; *Peabody v. Cortada*, 21 N. Y. Supp. 680, 50 N. Y. St. 743. *Pa.*—*Stranahan v. Stranahan*, 146 Pa. 44, 23 Atl. 253; *Reed v. Long*, 10 Pa. Co. Ct. 253. *S. C.*—*Wilson v. York Tp.*, 43 S. C. 299, 21 S. E. 82; *Smith v. Bryce*, 17 S. C. 538. *S. D.*—*Betts v. Letcher*, 1 S. D. 182, 46 N. W. 193. *Wis.*—*Mead v. Walker*, 17 Wis. 189.

33. *Ia.*—*Burt v. Harrah*, 65 Iowa 643, 22 N. W. 910; *McMartin v. Bingham*, 27 Iowa 234, 1 Am. Rep. 265 (where a reference was held improper). *Kan.*—*Hoffman v. Farmers' Co-operative Shipping Assn.*, 78 Kan. 561, 97 Pac. 440. *Mo.*—*Creve Coeur Lake Ice Co. v. Tamm*, 138 Mo. 385, 39 S. W. 791; *Wentzville Tobacco v. Walker*, 123 Mo. 662, 27 S. W. 639; *Kenneth Investment Co. v. National Bank*, 96 Mo. App. 125, 70 S. W. 173; *Snyder v. Crutcher*, 137 Mo. App. 121, 118 S. W. 489. *N. Y.*—*Sands v. Kimbark*, 27 N. Y. 147; *Barber v. Ellingwood*, 130 App. Div. 555, 115 N. Y. Supp. 43; *Lee v. Tillotson*, 24 Wend. 337. *S. D.*—*Ewart v. Kass*, 7 S. D. 220, 95 N. W. 915; *Bether v. Grant County*, 9 S. D. 82, 68 N. W.

**12. Evidence.**—*a. Burden of Proof.*—In an action upon an open account, the burden of proof is upon the plaintiff;<sup>34</sup> and if the account is not verified there must be proof of it to authorize a judgment.<sup>35</sup>

*b. Proof of the Account.*—As to the evidence that may be introduced to establish the account in suit reference to authority is made in the notes.<sup>36</sup>

**13. Variance.**—*a. In General.*—In actions on open accounts the general rule applies that the evidence must correspond to the pleadings.<sup>37</sup>

**Relation of Proof to Pleadings.**—If the pleadings do not authorize it, the proof cannot be received.<sup>38</sup>

163. Wis.—Chicago & N. W. R. Co. v. Faist, 87 Wis. 360, 58 N. W. 744; Andrus v. Home Ins. Co., 73 Wis. 642, 41 N. W. 956; Monitor Iron Works Co. v. Ketchum, 47 Wis. 177, 2 N. W. 80; Carns v. O'Brienness, 40 Wis. 469; Mead v. Walker, 17 Wis. 189.

See also the title "Reference."

**Action by receiver,** where it was held that neither the length of the account nor the number of items, debit and credit, constituted any ground for invoking equity jurisdiction. Faville v. Lloyd, 140 Iowa 501, 118 N. W. 871, construing Iowa Code, § 3735 providing for compulsory reference.

**Examination of "Long Accounts"**  
**Not Involved.**—See Creve Coeur Lake Ice Co. v. Tamm, 138 Mo. 385, 39 S. W. 791, construing Rev. St. 1889, § 2138, providing for compulsory reference.

**Cause Properly Referred.**—See Burt v. Harrah, 65 Iowa 643, 22 N. W. 910, where an involved claim against an estate and counter-claim for services and expenses, was held properly referred by the court on its own motion.

34. La.—Fluke v. Martin, 26 La. Ann. 279. Miss.—Moore v. Joyce, 1 Cushm. 584. Mo.—Silver v. St. Louis, etc. R. Co., 5 Mo. App. 381. Tex.—Rust v. Sanger Bros. (Tex. Civ. App.), 105 S. W. 66.

35. Romoneda Bros. v. Jackson (Miss.), 46 So. 258.

36. See 1 ENCYCLOPAEDIA OF EVIDENCE, pp. 155-158 and authorities cited, and the following cases: Ala.—Baker v. Haynes, 146 Ala. 520, 40 So. 968; Sullivan Timber Co. v. Brushagel, 111 Ala. 114, 20 So. 498; Rice v. Schloss, 90 Ala. 416, 7 So. 802; Pryor v. Johnson, 32 Ala. 27; Johnson v. Kelley, 2 Stew. 490. Colo.—Plummer v. Struby, Estabrooke Merc. Co., 23 Colo. 190, 47 Pac. 294. Ind.—Coats v. Gregory, 10 Ind.

345. Ky.—Wallace v. Bradshaw, 6 Dana 382. Md.—Jackson v. West, 22 Md. 71. Mo.—Baer v. Pfaff, 44 Mo. App. 35. N. J.—Bonnell v. Mawha, 37 N. J. L. 198. Tex.—Ward v. Wheeler, 18 Tex. 249; Muse v. Burns, 3 Wills. Civ. Cas. § 73. Wis.—Duffy v. Hickey, 63 Wis. 312, 23 N. W. 707.  
**Instruction.**—Wrought Iron Range Co. v. Young, 85 Ark. 217, 107 S. W. 674.

37. Cal.—Wise v. Wakefield, 118 Cal. 107, 50 Pac. 310; Hopkins v. Orentt, 51 Cal. 537. Colo.—Ohio Creek Anthracite Coal Co. v. Hinds, 15 Colo. 173, 25 Pac. 502. Del.—Truitt v. Fahey, 3 Penna. 573, 52 Atl. 339; Shea v. Kerr, 1 Penna. 530, 43 Atl. 843. Ind.—Areana Gas Co. v. Moore, 8 Ind. App. 482, 36 N. E. 46. La.—Moore v. Gordon, 26 La. Ann. 167. Mass.—Jones v. Hsley, 1 Allen 273; Jackson v. Hall, 14 Pick. 151. Mich.—Cummin v. Wilcox, 47 Mich. 501, 11 N. W. 289. Mo.—Sandeem v. Kansas City, St. J. & C. B. R. Co., 79 Mo. 278. Ohio.—Ralston v. Kohl's Admr., 30 Ohio St. 92. S. C.—General Elec. Co. v. Blacksburg Imp. Co., 46 S. C. 75, 24 S. E. 43. Va.—Fitch v. Leitch, 11 Leigh 471.

38. Wolff v. Matthews, 39 Mo. App. 376. This is illustrated by the following cases: Ark.—Allen-West Commission Co. v. Hudgins & Bro., 74 Ark. 468, 86 S. W. 289, where it was held there could be no recovery as on an account stated when the plaintiff alleged indebtedness on an open account. Cal.—Wise v. Wakefield, 118 Cal. 107, 50 Pac. 310, denying recovery on additional items without amendment. Ga.—Loyd v. Anderson, 119 Ga. 875, 47 S. E. 208; Wagener v. Steele, 117 Ga. 145, 43 S. E. 403; Roberts v. Leak, 108 Ga. 806, 33 S. E.



b. *Failure to Prove All the Items.*—If the account sued on be composed of several items, the failure to prove all of them does not constitute a variance.<sup>39</sup>

14. **Verdict.**—The verdict should, as in other actions, respond to the issues made by the pleadings<sup>40</sup> and ascertain and fix the sum due on the account.<sup>41</sup>

15. **Judgment.**—a. *Without Proof.*—In cases where the defendant has not appeared, whether judgment can be taken without proof

995. **Mass.**—Howard *v.* Hayward, 15 Gray 354.

See also 13 **ENCYCLOPAEDIA OF EVIDENCE**, 754 *et seq.*

39. See Belcher *v.* Grey, 16 Ga. 208, and 1 **ENCYCLOPAEDIA OF EVIDENCE**, 158 and cases cited.

40. **U. S.**—Patterson *v.* United States, 2 Wheat. 221, 4 L. ed. 224. **Ala.**—Moody *v.* Keener, 7 Port. 218. **Conn.**—Kilbourn *v.* Waterous, Kirby 424. **Ga.**—Wood *v.* McGuire, 17 Ga. 361, 63 Am. Dec. 246. **Miss.**—Groves *v.* Bailey, 2 Cushman. 588. **Mo.**—Parker's Admr. *v.* Moore, 29 Mo. 218; Hickman *v.* Byrd, 1 Mo. 495; Easton *v.* Collier, 1 Mo. 421; Fenwick *v.* Logan, 1 Mo. 401. **N. J.**—Middleton *v.* Quigley, 12 N. J. L. 352. **N. C.**—Vines *v.* Brownrigg, 13 N. C. 537. **Tenn.**—Kirkpatrick *v.* Southwestern R. Bank, 6 Humph. 45. **Tex.**—Phillips *v.* Hill, 3 Tex. 397. **Wash.**—Barnett *v.* Watson, 1 Wash. 372. **Wis.**—Ronge *v.* Dawson, 9 Wis. 246.

**Interest.**—An open account does not bear interest. **U. S.**—Williams *v.* Craig, 1 Dall. 313, 1 L. ed. 153; Henry *v.* Risk, 1 Dall. 265, 1 L. ed. 130. **Conn.**—Temple *v.* Belding, 1 Root 314; Broom *v.* Henman, 1 Root 248. **Ill.**—Flake *v.* Carson, 33 Ill. 518. **Ind.**—Shewel *v.* Givan, 2 Blackf. 312. **Ky.**—Adams Express Co. *v.* Milton, 11 Bush. 49; Neal *v.* Keel's Exrs., 4 T. B. Mon. 162; South *v.* Leavy, Hard. 518. **La.**—Buckner *v.* Chapman, 2 Robt. 360. **Miss.**—Houston *v.* Crutcher, 31 Miss. 51. **Nev.**—Flannery *v.* Anderson, 4 Nev. 437. **N. J.**—Polhemus *v.* Annin, 1 N. J. L. 176. **N. Y.**—*In re* Strickland's Estate, 1 Con. Sur. 435, 5 N. Y. Supp. 851; Hadley *v.* Ayres, 12 Abb. Pr. (N. S.) 240; Godfrey *v.* Moser, 3 Hun 218, 5 Thomp. & C. 677; Wood *v.* Hickok, 2 Wend. 501; Farmers' Loan & T. Co. *v.* Mann, 4 Robt. 356; McKnight *v.* Dunlap, 4 Barb. 36. **N. C.**—

Holden *v.* Peace, 39 N. C. 223, 45 Am. Dec. 514. **Pa.**—Appeal of McClintock, 29 Pa. 360. **S. C.**—Edwards *v.* Dargan, 30 S. C. 177, 8 S. E. 858; Devereux *v.* Taft, 20 S. C. 555; Neyle *v.* Chisholm, Harp. 274; Ordinary *v.* Bonner, 2 Hill 468; Knight *v.* Mitchell, 3 Brev. 506; Skirving *v.* Stobo, 2 Bay 233. **Tex.**—Heidenheimer *v.* Ellis, 67 Tex. 426, 3 S. W. 666; Cloud *v.* Smith, 1 Tex. 102. **Vt.**—Raymond *v.* Isham's Admr., 8 Vt. 258. **Va.**—Waggoner *v.* Gray, 2 Hen. & M. 603; McConnico *v.* Curzen, 2 Call 358. **Wis.**—Marsh *v.* Fraser, 37 Wis. 149.

The rule is otherwise, of course, under agreement of the parties. **U. S.**—York *v.* Wistar, 30 Fed. Cas. No. 18,141. **Conn.**—Crosby *v.* Mason, 32 Conn. 482. **Ill.**—Bassett *v.* Noble, 15 Ill. App. 360. **Kan.**—Williams *v.* Hersey, 17 Kan. 18. **Ky.**—Hays *v.* Williams, 10 Ky. L. Rep. 319. **Mich.**—Sweeney *v.* Neely, 53 Mich. 421, 19 N. W. 127. **N. Y.**—Newell *v.* Griswold, 6 Johns. 45; Consequa *v.* Fanning, 3 Johns. Ch. 587; Tucker *v.* Ives, 6 Cow. 193; Van Beuren *v.* Van Gassbeck, 4 Cow. 496; Reid *v.* Rensselaer Glass Factory, 3 Cow. 393; Esterly *v.* Cole, 1 Barb. 235; Wood *v.* Hickok, 2 Wend. 501; Farmers' Loan & T. Co. *v.* Mann, 4 Robt. 356. **N. C.**—Holden *v.* Peace, 39 N. C. 223, 45 Am. Dec. 514. **S. C.**—Knight *v.* Mitchell, 3 Brev. 506; Holmes *v.* Misroon, 3 Brev. 209. **Wash.**—Baxter *v.* Waite, 2 Wash. Ter. 228, 6 Pac. 429. **Wis.**—Yates *v.* Shepardson, 39 Wis. 173; Marsh *v.* Fraser, 37 Wis. 149.

Sometimes also the subject is governed by statute. Howard Supply Co. *v.* Bunn, 127 Ga. 663, 56 S. E. 757; Heidenheimer *v.* Ellis, 67 Tex. 426, 3 S. W. 666; Erb-Springall Co. *v.* Pittsburgh Plate Glass Co. (Tex. Civ. App.), 101 S. W. 1165.

41. Taylor *v.* Hathaway, 29 Ark. 597

of the account is a matter which depends upon the rules of local practice.<sup>42</sup>

b. *Uncontroverted Items*.—As to any items of the account not controverted by the defendant, judgment may be rendered as to such items,<sup>43</sup> reserving the right of the defendant to contest the residue.<sup>44</sup>

c. *Costs*.—The rule is to allow costs to the prevailing party.<sup>45</sup>

### III. BOOK ACCOUNT AND BOOK DEBT.—A. RIGHT OF ACTION.

1. *In General*.—In most jurisdictions an action on an account made in books may be brought in the form of an ordinary action of assumpsit,<sup>46</sup> or where the usual action on an account will lie.<sup>47</sup>

2. *Special Action*.—In a few jurisdictions, by virtue of statute, a special action is provided, known as book debt<sup>48</sup> or book account.<sup>49</sup>

3. *Touchstone of the Action*.—If the charge is one usually made

42. **N. Y.**—*Mills v. Poindexter*, 2 Code Rep. 89. **Ohio**.—*Dallas v. Ferneau*, 25 Ohio St. 635. **Va.**—*Robertson v. Wright*, 17 Gratt. 534.

43. **La.**—*Conrad v. Burbank*, 24 La. Ann. 17. **N. J.**—*Peale v. Shore Electric Co.*, 60 Atl. 46. **N. C.**—*Morgan v. Roper*, 119 N. C. 367, 25 S. E. 952.

44. *Conrad v. Burbank*, 24 La. Ann. 17.

45. *Purvis v. Kroner*, 18 Ore. 414, 23 Pac. 260. See the title, "*Costs*."

46. *Gassett v. Andover*, 21 Vt. 342, 352; *Herrick v. Richardson*, 17 Vt. 375; *Wilkins v. Stevens*, 8 Vt. 214.

47. *Fanning v. Chadwick*, 3 Pick. (Mass.) 420, 15 Am. Dec. 233.

48. **Conn.**—*Reiley v. Torkomian*, 78 Conn. 645, 63 Atl. 516; *Remington v. Noble*, 19 Conn. 383; *Humphrey v. Oviatt*, 8 Conn. 413; *King v. Lacey*, 8 Conn. 498; *Bowers v. Dunn*, 2 Root 59; *Rogers v. Moor*, 2 Root 58; *Stores v. Stores*, 1 Root 139; *Phenix v. Prindle*, Kirby 207; *Punderson v. Shaw*, Kirby 150. **Pa.**—*Hamill v. O'Donnell*, 2 Miles 101. **Tenn.**—*French v. Brandon*, 1 Head 47.

49. **Del.**—*Sayers v. Walker*, 5 Penne. 400, 61 Atl. 973; *Taylor v. Addicks*, 4 Penne. 411, 55 Atl. 1010; *McLaughlin v. Weer*, 1 Marv. 267, 40 Atl. 1122; *Gregory v. Bailey*, 4 Har. 256; *Bailey v. McDowell*, 1 Har. 346. **Ill.**—*Garity v. Hamburger Co.*, 136 Ill. 499, 27 N. E. 11. **N. J.**—*Weill v. Jacoby*, 72 N. J. L. 273, 61 Atl. 389. **Ohio**.—*Page v. Zehring*, 6 Wkly. L. Bul. 299. **Pa.**—*Wissahickon Mut. Fire Ins. Co. v. Wanemacher*, 15 Pa. Super. 580. **R. I.**—*Pawtucket Steam & Gas Pipe Co. v. Briggs*, 21 R. I. 457, 44 Atl. 595. **Vt.**—

*Reynolds-McGinness Co. v. Green*, 78 Vt. 28, 61 Atl. 556; *Barrette v. Laurier*, 69 Vt. 509, 38 Atl. 236; *Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366; *Flint v. Eureka Marble Co.*, 53 Vt. 669; *Huxley v. Carman*, 46 Vt. 462; *Kidder v. Sowles*, 44 Vt. 303; *Parker v. Bryant*, 40 Vt. 291; *Weeks v. Boynton*, 37 Vt. 297; *Woodward v. Cutter*, 33 Vt. 49; *Perry v. Buckman*, 33 Vt. 7; *Duryea v. Whitecomb*, 31 Vt. 395; *Bryant v. Clifford*, 27 Vt. 664; *Scott v. Brigham*, 27 Vt. 561; *Green v. Chapman*, 27 Vt. 236; *Clark v. Edgell*, 26 Vt. 108; *Gleason v. Vermont Cent. R. Co.*, 25 Vt. 37; *Curtiss v. Greenbacks*, 24 Vt. 536; *Dwyer v. Hall*, 22 Vt. 142; *Warren v. Bishop*, 22 Vt. 607; *Scott v. Lance*, 21 Vt. 507; *Smith v. Hyde*, 19 Vt. 54; *Eddy v. Stafford*, 18 Vt. 235; *Wetherell v. Evarts*, 17 Vt. 219; *Tyson v. Doe*, 15 Vt. 571; *Spear v. Peck*, 15 Vt. 566; *Blanchard v. Butterfield*, 12 Vt. 451; *Scott v. Nichols*, 12 Vt. 76; *Albee v. Fairbanks*, 10 Vt. 314; *Keyes v. Carpenter*, 3 Vt. 209; *Stevens v. Richards*, 2 Aik. 81; *Sargeant v. Pettibone*, 1 Aik. 355.

*Origin of Book Account*.—In *Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366, the court says: "When or where this form of action originated is somewhat uncertain. It is supposed that it, or a substitute for it, was brought to New England from Holland, by a dissenting English Minister, not long after the arrival of the Pilgrims. It is said to have existed in all the New England states, except perhaps Rhode Island. *McLaughlin v. Hill*, 6 Vt. 200."

in books in the course of business, the action may be maintained; otherwise not.<sup>51</sup>

**4. Actual Book Charge.**—To authorize the action it is not necessary that the items of the account be actually entered in a book at the time the debt arose.<sup>52</sup> It is sufficient if the items of charge may be properly made the subject of a book account.<sup>53</sup>

**5. Matters Chargeable in Book.**—No positive rule can be announced determining the cases wherein items of charge may be properly entered upon book.<sup>54</sup> It must be decided by the nature of the transaction giving rise to the entry of the account.<sup>55</sup>

**B. ESSENTIALS OF THE CREATION OF BOOK ACCOUNT.—1. In General.**—While no inflexible rule can be invoked to determine whether the entry is properly one of book,<sup>56</sup> there are certain principles that should be observed in deciding the question:<sup>57</sup> First, it must appear that the relation of debtor and creditor has arisen from the transaction giving rise to the account.<sup>58</sup> Second, privity of contract must exist between the parties to the contract upon which the account is

50. *Brewster v. Norwich*, 1 Root (Conn.) 146; *Perry v. Buckman*, 33 Vt. 7; *Walker v. Norton*, 29 Vt. 226; *Scott v. Brigham*, 27 Vt. 561; *Barber v. Britton*, 26 Vt. 112, 60 Am. Dec. 301; *Sargeant v. Sunderland*, 21 Vt. 284; *Wolcott v. Wolcott*, 19 Vt. 37; *Stone v. Pulsipher*, 16 Vt. 428; *Hall v. Eaton*, 12 Vt. 510; *Wilkins v. Stevens*, 8 Vt. 214; *Whiting v. Corwin*, 5 Vt. 451; *May v. Brownell*, 3 Vt. 463; *Sawyer v. Proctor*, 2 Vt. 580; *Barlow v. Butler*, 1 Vt. 146; *Sargeant v. Pettibone*, 1 Aik. (Vt.) 355; *Ames v. Fisher*, *Brayt.* (Vt.) 39; *Field v. Sawyer*, *Brayt.* (Vt.) 39.

51. *Conn.*—*Green v. Pratt*, 11 Conn. 205; *Terrill v. Beecher*, 9 Conn. 344; *Johnson v. Gunn*, 2 Root 130; *Peck v. Jones*, Kirby 289. *Del.*—*Sloan v. Grimshaw*, 4 Houst. 326. *N. J.*—*Wilson v. Wilson*, 6 N. J. L. 95. *Pa.*—*Harbison v. Hawkins*, 81 Pa. 142. *Vt.*—*Smalley v. Soragen*, 30 Vt. 2; *Stearns v. Dillingham*, 22 Vt. 624, 54 Am. Dec. 88.

52. *Easily v. Eakin*, *Cooke* (Tenn.) 388.

53. *Palmer v. Green*, 6 Conn. 14; *Leavensworth v. Phelps*, Kirby (Conn.) 71.

54. *Kingsland v. Adams*, 10 Vt. 201; *May v. Brownell*, 3 Vt. 463.

55. *Clark v. Savage*, 20 Conn. 258; *Hall v. Ives*, 11 Conn. 469; *Terrill v. Beecher*, 9 Conn. 344; *Mills v. St. John*, 2 Root (Conn.) 188; *Bowers v. Dunn*,

2 Root (Conn.) 59; *Stores v. Stores*, 1 Root (Conn.) 139; *Briggs v. Briggs' Estate*, 46 Vt. 571; *Myers v. Baptist Soc.*, 38 Vt. 614; *Woodward v. Cutter*, 33 Vt. 49; *Colleigh v. Stone*, 29 Vt. 525; *Way v. Way*, 27 Vt. 625; *Martin v. Eames*, 26 Vt. 476; *Waterman v. Stimpson*, 24 Vt. 508; *Loomis v. Wainwright*, 21 Vt. 520; *Sargeant v. Sutherland*, 21 Vt. 284; *Blin v. Pierce*, 20 Vt. 25; *Wolcott v. Wolcott*, 19 Vt. 37; *Flower Brook Mfg. Co. v. Buck*, 18 Vt. 238; *Hickok v. Stevens*, 18 Vt. 111; *McLeran v. Stevens*, 16 Vt. 616; *Stone v. Pulsipher*, 16 Vt. 428; *Tyson v. Doe*, 15 Vt. 571; *Rogers v. Miller*, 15 Vt. 431; *Pangborn v. Saxton*, 11 Vt. 79; *Kingsland v. Adams*, 10 Vt. 201; *Leach v. Shepard*, 5 Vt. 363.

56. *May v. Brownell*, 3 Vt. 463.

57. *Terrill v. Beecher*, 9 Conn. 344; *Bradley v. Goodyear*, 1 Day (Conn.) 104; *Winn v. Sprague*, 35 Vt. 243; *Scott v. Brigham*, 27 Vt. 561; *Gleason v. Vermont Cent. R. Co.*, 25 Vt. 37; *Soule v. Dougherty*, 24 Vt. 92; *Tobias v. Blin*, 21 Vt. 544; *Loomis v. Wainwright*, 21 Vt. 520; *Gay v. Rogers*, 18 Vt. 342; *Hall v. Eaton*, 12 Vt. 510; *Nason v. Crocker*, 11 Vt. 463; *Shaw v. Shaw*, 6 Vt. 69; *Farrand v. Gage*, 3 Vt. 326; *Miller v. French*, 1 Aik. (Vt.) 99; *Slasson v. Davis*, 1 Aik. (Vt.) 73; *Field v. Sawyer*, *Brayt.* (Vt.) 39.

58. *Tobias v. Vlin*, 21 Vt. 544.



predicated.<sup>60</sup> Third, the right to charge the account must exist at the time the articles composing the account are sold and delivered.<sup>60</sup>

**2. Illustrations of Proper Charges.**—The action will lie for the recovery of articles that have arisen from partnership dealings between plaintiff and defendant, when the action does not draw the partnership balance into controversy;<sup>61</sup> a probate judge may recover the fees allowed him by statute for his judicial services;<sup>62</sup> owners of joint property who agree that each may use what he wishes and account for any excess may bring the action;<sup>63</sup> a claim by one cotenant against his fellow-tenant for detaining the common property may be adjusted in this action;<sup>64</sup> a bailiff or receiver may be called to account in this action;<sup>65</sup> and recovery may be had for labor performed for the use and hire of chattels.<sup>66</sup>

**3. Illustrations of Improper Charges.**—The action may not be maintained where money has been paid and received as part payment on a note;<sup>67</sup> for the price of articles sold and not delivered;<sup>68</sup> to recover an item accrued antecedent to a settlement;<sup>69</sup> for large sums of money not the subject-matter of book account.<sup>70</sup> One of two joint owners of property who puts it to his own use, is not liable for his share to the other in his action.<sup>71</sup> Nor can there be in this action a recovery on a collateral liability;<sup>72</sup> nor where articles are temporarily borrowed, and not worn out or demanded back.<sup>73</sup>

59. *Winn v. Sprague*, 35 Vt. 243; *Scott v. Brigham*, 27 Vt. 561; *Gleason v. Vermont Cent. R. Co.*, 25 Vt. 37; *Soule v. Dougherty*, 24 Vt. 92; *Gay v. Rogers*, 18 Vt. 342; *Miller v. French*, 1 Aik. (Vt.) 99; *Field v. Sawyer*, *Brayt.* (Vt.) 39.

60. *Terrill v. Beecher*, 9 Conn. 344; *Bradley v. Goodyear*, 1 Day (Conn.) 104; *Loomis v. Wainwright*, 21 Vt. 520; *Hall v. Eaton*, 12 Vt. 510; *Nason v. Crocker*, 11 Vt. 463; *Shaw v. Shaw*, 6 Vt. 69; *Farrand v. Gage*, 3 Vt. 326; *Slasson v. Davis*, 1 Aik. (Vt.) 73.

61. *Hydeville Co. v. Barnes*, 37 Vt. 538; *Duryea v. Whitcomb*, 31 Vt. 395; *Green v. Chapman*, 27 Vt. 236; *Tobias v. Blin*, 21 Vt. 544; *Albee v. Fairbanks*, 10 Vt. 314; *Sawyer v. Proctor*, 2 Vt. 580.

62. *Sargeant v. Sunderland*, 21 Vt. 284.

63. *Briggs v. Brewster*, 23 Vt. 100.

64. *Gates v. Lockwood*, 27 Vt. 286.

65. *Woodward v. Harlow*, 28 Vt. 338.

66. *Parker v. Bryant*, 40 Vt. 291.

And see *Victor Sew. Mach. Co. v. Weeks*, 49 Vt. 342, where the action was allowed to recover the price of machines sent to defendant under an agreement that he should sell all ma-

chines consigned to him and remit for the same within a specified time.

67. *Bradley v. Goodyear*, 1 Day (Conn.) 104; *Martin v. Eames*, 26 Vt. 476; *Stone v. Pulsipher*, 16 Vt. 428; *Peach v. Mills*, 14 Vt. 371; *Chellis v. Woods*, 11 Vt. 466; *Farrand v. Gage*, 3 Vt. 326; *Miller v. French*, 1 Aik. (Vt.) 99; *Slasson v. Davis*, 1 Aik. (Vt.) 73.

68. *Bradley v. Goodyear*, 1 Day (Conn.) 104; *Martin v. Eames*, 26 Vt. 476; *Stone v. Pulsipher*, 16 Vt. 428; *Peach v. Mills*, 14 Vt. 371; *Chellis v. Woods*, 11 Vt. 466; *Farrand v. Gage*, 3 Vt. 326; *Miller v. French*, 1 Aik. (Vt.) 99; *Slasson v. Davis*, 1 Aik. (Vt.) 73.

69. *Remington v. Noble*, 19 Conn. 383 (where the charge was omitted from the settlement by mistake); *Rogers v. Moor*, 2 Root (Conn.) 58; *Punderson v. Shaw*, *Kirby* (Conn.) 150.

70. *Page v. Zehring*, 6 Wkly. L. Bul. (Ohio) 299.

71. *Albee v. Fairbanks*, 10 Vt. 314.

72. *Smyth v. Hyde*, 19 Vt. 54.

73. *Scott v. Brigham*, 27 Vt. 561. And see *Wood v. Barney*, 2 Vt. 369, liquors to an amount not collectible under statute.

C. WHO MAY MAINTAIN BOOK ACCOUNT.—1. In General.—Any person to whom the account is payable may maintain the action of book account<sup>74</sup> or book debt.<sup>75</sup>

2. Natural or Artificial Person.—The plaintiff may be either a natural person<sup>76</sup> or a corporation.<sup>77</sup>

Illustrations.—Illustrative instances as to the persons who may maintain the action are given in the notes.<sup>78</sup>

D. WHO MAY BE SUED IN BOOK ACCOUNT.—Any person may be sued in this action by whom the account is payable.<sup>79</sup>

Illustrations.—Illustrative cases are given in the notes showing who may be made defendant in this action.<sup>80</sup>

E. THE PLEADINGS.—1. Declaration or Complaint.—In the action of book account the form of the declaration, as prescribed by statute, sets forth a sum certain, as justly due from the defendant, that such sum is due upon the original book of the plaintiff, making profert of the same, and alleging a request of payment by the plaintiff and defendant's refusal to pay.<sup>81</sup> In the action of book debt the complaint shall contain a statement constituting the cause of action and the facts upon which the plaintiff relies.<sup>82</sup>

2. Pleadings of Defendant—*a. Book Account.*—There can be no plea filed to an action of book account which puts in issue the merits

74. *Woodward v. Harlow*, 28 Vt. 338; *Sergeant v. Sunderland*, 21 Vt. 284.

75. *Bowers v. Dunn*, 2 Root (Conn.) 59; *Phenix v. Prindle, Kirby* (Conn.) 207; *Minor v. Erving's Exr.*, Kirby (Conn.) 158.

76. *Pangborn v. Saxton*, 11 Vt. 79; *Sawyer v. Proctor*, 2 Vt. 580.

77. *Vermont Mut. Fire Ins. Co. v. Cummings*, 11 Vt. 503.

78. One to whom interest is due, arising from an express or implied agreement to pay it, may sue in book debt. *Phenix v. Prindle, Kirby* (Conn.) 207.

So a person to whom postage is due may sue in book account. *Sergeant v. Pettibone*, 1 Aik. (Vt.) 355.

And any party upon whose books an account has properly been charged may bring this action. *Keyes v. Carpenter*, 3 Vt. 209; *Stevens v. Richards*, 2 Aik. (Vt.) 81.

But no one can bring the action of book account unless the sum sued for is due at the time the action is commenced, although it all may be due at the time of the hearing before the auditor. *Wetherell v. Evarts*, 17 Vt. 219.

79. *Stone v. Foster*, 16 Vt. 546;

*Starr v. Huntley*, 12 Vt. 13; *Blish v. Granger*, 6 Vt. 340.

80. One for whom labor has been performed, either under an express or implied contract, may be sued in this action for the same. *Parker v. Bryant*, 40 Vt. 291.

A bailiff or receiver may be called to account in this action for notes received on agreement to account. *Woodward v. Harlow*, 28 Vt. 338.

But a deputy sheriff may not be sued for money in his hands in book account, except upon an express promise to pay. *Gleason v. Briggs*, 28 Vt. 135.

One tenant in common may be sued in this action if he has not accounted and the accounts may be adjusted. *Gates v. Lockwood*, 27 Vt. 286.

A shipper may be sued by a common carrier for freight charges. *Boardman v. Keeler*, 2 Vt. 65.

But book account will not lie for damages for breach of contract, nor for tort. *Fry v. Slyfield*, 3 Vt. 246.

81. *Bridgeman Bros. Co. v. Swing*, 205 Pa. 479, 55 Atl. 26; *McKoy v. Brown*, 13 Vt. 593. See Vermont Stat. (1894), § 547.

82. *Reiley v. Torkomian*, 78 Conn. 645, 63 Atl. 516.

of plaintiff's account.<sup>83</sup> Hence the pleas of payment,<sup>84</sup> *nil debet*,<sup>85</sup> or payment by way of accord and satisfaction<sup>86</sup> may not be filed to this action, unless the matters thus put in issue may be established by evidence independently of defendant's own.<sup>87</sup> But an off-set as a defense must be specially pleaded.<sup>88</sup>

b. *Book Debt*. — To this action may be pleaded the general issue *nil debet*,<sup>89</sup> the statute of limitations,<sup>90</sup> or any other plea which goes to defeat the plaintiff's right of action.<sup>91</sup> It is simply debt by book.<sup>92</sup>

F. DEFENSES. — 1. *Book Account*. — The defenses to book account are as diversified as in any other action,<sup>93</sup> the limitation only applying to the method of their presentation.<sup>94</sup> Thus, the defenses available are the statute of limitations,<sup>95</sup> payment,<sup>96</sup> accord and satisfaction,<sup>97</sup> release,<sup>98</sup> or any other legitimate defense,<sup>99</sup> except off-set.<sup>1</sup>

83. *Matthews v. Tower*, 39 Vt. 433; *Porter v. Smith*, 20 Vt. 344; *Delaware v. Staunton*, 8 Vt. 48.

In *Porter v. Smith*, 20 Vt. 344, the action was book account. The plaintiffs declared against the defendants as partners. The defendants pleaded that they ought not to account because they were never partners and the defendant Ford pleaded, severally, his discharge in bankruptcy. The plaintiffs demurred to both pleas. The court decided *pro forma* that the first plea was sufficient and rendered judgment for the defendants. In the opinion reversing the court below the supreme court of Vermont said: "It has long been settled, that, in the action of book account, no defence can be specially pleaded, which depends, for its effect, upon the plaintiff's account. All such defences must go before the auditors. All pleas in court must go to the declaration. This plea, indeed, professes that. But, in the opinion of the court, it addresses itself to a matter, which the plaintiff was not bound to prove strictly as alleged. The fact of there being, in some form, a joint liability is, indeed, of the essence of the recovery, and is therefore the main inquiry to be had before the auditors, and cannot be taken from them, without putting the whole case to the jury. But whether the joint liability resulted from a general or special partnership, or from a partnership in the particular transaction, was not necessary to be alleged, or proved, even if alleged, and of course could not form the point of a plea in bar. The cases of *Delaware v. Staunton*, 8 Vt. 48, and *Bishop v. Bald-*

*win*, 14 Vt. 145, show fully the view of this court in regard to the subject, and the proper distinction between this and the action of account."

84. *Matthews v. Tower*, 39 Vt. 433; *Delaware v. Staunton*, 8 Vt. 48.

85. *Matthews v. Tower*, 39 Vt. 433.

86. *Matthews v. Tower*, 39 Vt. 433.

87. *Read v. Barlow*, 1 Aik. (Vt.) 145.

88. *Hassam v. Hassam*, 22 Vt. 516; *Tobias v. McGregor*, 19 Vt. 113; *Eaton v. Whitcomb*, 17 Vt. 641; *Temple v. Bradley*, 14 Vt. 254. But see *Walker v. Barrington*, 28 Vt. 781; *Flower Brook Mfg. Co. v. Buck*, 18 Vt. 238.

89. *Anderson v. Henshaw*, 2 Day (Conn.) 272.

90. *Anderson v. Henshaw*, 2 Day (Conn.) 272.

91. *Ferrill v. Beecher*, 9 Conn. 344; *Anderson v. Henshaw*, 2 Day (Conn.) 272.

92. *Terrill v. Beecher*, 9 Conn. 344.

93. *Hall v. Armstrong*, 68 Vt. 421, 26 Atl. 592, 20 L. R. A. 366, 370; *Porter v. Smith*, 20 Vt. 344.

94. *Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366, 370; *Porter v. Smith*, 20 Vt. 344.

95. *Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366, 370.

96. *Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366, 370; *Delaware v. Staunton*, 8 Vt. 48.

97. *Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366, 370.

98. *Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366, 370.

99. See *Delaware v. Staunton*, 8 Vt. 48.

1. *Blackmore v. Page*, 2 Tyl. (Vt.) 110.



2. **Book Debt.**—This action seems to be, so far as its purpose is concerned, quite the same as that of book account.<sup>2</sup> The latter term appears to be generally used in Vermont,<sup>3</sup> while in Connecticut it seems to be distinctly known as book debt.<sup>4</sup> Many defenses to this action may be interposed by plea,<sup>5</sup> or before the auditors at the plaintiff's election.<sup>6</sup>

G. **TRIAL.**—1. **Trial by Auditors.**—The proof of the account is taken before auditors,<sup>7</sup> after an interlocutory judgment for an accounting,<sup>8</sup> and before whom every proper defense may be made,<sup>9</sup> as shown by the illustrations in the notes.<sup>10</sup>

**Appointment of Auditors.**—The auditors are appointed by the court,<sup>11</sup>

2. **Conn.**—*Phenix v. Prindle*, Kirby 207. **Pa.**—*Hamill v. O'Donnell*, 2 Miles 101. **Vt.**—*Sargeant v. Pettibone*, 1 Aik. 81.

3. *Warren v. Bishop*, 22 Vt. 607; *Eddy v. Stafford*, 18 Vt. 235; *Wetherell v. Evarts*, 17 Vt. 219; *Spear v. Peck*, 15 Vt. 566; *Albee v. Fairbanks*, 10 Vt. 314; *Keyes v. Carpenter*, 3 Vt. 209.

4. *Humphrey v. Oviatt*, 8 Conn. 413; *Bowers v. Dunn*, 2 Root (Conn.) 59; *Phenix v. Prindle*, Kirby (Conn.) 207.

5. *Harris v. Baker*, 1 Root (Conn.) 220. And see *Terrill v. Beecher*, 9 Conn. 344 (where the general issue was pleaded); *Stocking v. Sage*, 1 Conn. 74; *Bradley v. Goodyear*, 1 Day (Conn.) 104.

In *Harris v. Baker*, 1 Root (Conn.) 220, the action was book debt. Defendant pleaded a special agreement made at the time of hiring the plaintiff to pay him in a particular way, in bar of the plaintiff's case. A demurrer to this plea was properly overruled.

6. *Peck v. Abbe*, 11 Conn. 207; *Lerd v. Shaler*, 3 Conn. 132; 8 Am. Dec. 160.

In *Beach v. Mills*, 5 Conn. 494, the action was book debt in common form. After the issue joined on the plea of *owe nothing*, by agreement of parties a third person was appointed sole auditor to adjust and liquidate the accounts. Before the auditor in this case the entire defense was made. The auditor made out a report in favor of the plaintiff. In arriving at his conclusion he admitted improper evidence, as contended by the defendant, who filed a remonstrance against the acceptance of the report, in which he specified the grounds of his remonstrance. The court decided against the defendant and the case was taken to the supreme court,

and the action of the court below reversed. From the analogies authorized by the decisions in Connecticut it seems that this defense might have been availed of on the plea before the court or jury. However, parties chose to make their defense before the auditor.

In *Weed v. Bishop*, 7 Conn. 128, the case was tried before auditors and the defense was the incompetency of certain evidence admitted to sustain the plaintiff's action.

7. *Matthews v. Tower*, 39 Vt. 433.

In *Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366, the court in discussing the question whether or not a jury trial in book accounts is allowable on the merits of the case says in the course of its opinion: "Rev. Laws, § 1206, provides for the trial of actions of account and of book account by auditors, when pending in the county court." After discussing the question at some length the learned Judge, Thompson, held that the auditors are to hear the evidence and determine the balance of the account in all the trial courts.

8. *Matthews v. Tower*, 39 Vt. 433, 438; *Smith v. Bradley*, 39 Vt. 366, 369.

9. *Matthews v. Tower*, 39 Vt. 433.

10. *Matthews v. Tower*, 39 Vt. 433. **Tender and Refusal.**—*King v. Lacey*, 8 Conn. 498; *Woodcock v. Clark*, 18 Vt. 333; *Pratt v. Gallup*, 7 Vt. 344.

**Settlement.**—*Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366, 370.

11. *Huntington v. Rumnill*, 3 Day (Conn.) 390; Conn. Stat. (1888), §1037; Vt. Stat. (1894), § 1457; *Read v. Barlow*, 1 Aik. (Vt.) 145; *Dickenson v. Gould*, 2 Tyler (Vt.) 32; *Booth v. Tousey*, 1 Tyler (Vt.) 407.

of whom there shall be not more than three.<sup>12</sup> If the case be before a justice of the peace the jurors act as auditors.<sup>13</sup>

2. **Jury Trial.**—It is provided by statute in Vermont that upon filing the declaration and pleading the general issue of account *vel non* the trial thereof may be by jury.<sup>14</sup> In Connecticut the statute provides that there shall be no trial by jury.<sup>15</sup>

3. **Practice After Verdict.**—If the verdict be in favor of the plaintiff, an interlocutory judgment is entered requiring the defendant to account.<sup>16</sup> The cause is then referred to auditors,<sup>17</sup> who examine the account,<sup>18</sup> hear the evidence adduced before them by the parties,<sup>19</sup> and make report of their findings to the court.<sup>20</sup>

4. **Disposition of the Auditors' Report.**—If either party be dissatisfied with the report of the auditors, he may except to it.<sup>21</sup> If no exception be taken, it is accepted by the court, and judgment is rendered for the amount found to be due as shown by this report.<sup>22</sup>

H. EVIDENCE—1. **Competency of Witnesses.**—At common law the parties to an action were not competent witnesses.<sup>23</sup> But in the actions of book account and book debt the rule did not apply, and the parties have always been competent witnesses.<sup>24</sup>

2. **Admissibility of Books.**—The account books of the parties are admissible in evidence.<sup>25</sup> For further discussion of the evidence in this kind of action, see authority cited in the notes.<sup>26</sup>

I. JURISDICTIONAL AMOUNT.—1. **Test of Jurisdiction.**—The test

In Vermont it is provided by statute that the court may appoint one or more auditors. See *Hall v. Armstrong*, 65 Vt. 424, 26 Atl. 592, 20 L. R. A. 366.

12. *Vide* authorities cited in preceding note.

13. *King v. Lacey*, 8 Conn. 498; *Dickenson v. Gould*, 2 Tyler (Vt.) 32.

14. *May v. Brownell*, 3 Vt. 463, 468.

The right to have the action tried by jury does not exist as matter of right. *Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366.

15. *Reiley v. Torkomian*, 78 Conn. 645, 63 Atl. 516.

16. *May v. Brownell*, 3 Vt. 463.

17. *May v. Brownell*, 3 Vt. 463.

18. *Cross v. Haskins*, 13 Vt. 536.

19. *May v. Brownell*, 3 Vt. 463, 468.

20. *May v. Brownell*, 3 Vt. 463, 468; *Wood v. Barney*, 2 Vt. 369.

21. *Hill v. Hogaboom*, 13 Vt. 141; *Macks v. Brush*, 5 Vt. 70.

22. *Seargent v. Seward*, 31 Vt. 509; *Way v. Way*, 27 Vt. 625; *Flower Brook Mfg. Co. v. Buck*, 16 Vt. 290; *Shaw v. Shaw*, 6 Vt. 69.

23. U. S.—*Sharpe v. Thatcher*, 2 Dall. 77, 1 L. ed. 296; *Jones v. United States*, 1 Ct. Cl. 383. Ill.—*Marks v.*

*Butler*, 24 Ill. 567. Ind.—*Johnson v. Cox*, 12 Ind. 362. N. Y.—*Pack v. City of New York*, 3 N. Y. 489.

24. Conn.—*Peck v. Abbe*, 11 Conn. 207. Ohio.—*Cram v. Spear*, 8 Ohio 494. R. I.—*Pawtucket Steam & G. P. Co. v. Briggs*, 21 R. I. 457, 44 Atl. 595. Tenn.—*French v. Brandon*, 1 Head 47. Vt.—*Woodbury v. Woodbury's Estate*, 50 Vt. 152; *Clark v. Marsh*, 20 Vt. 338; *Gay v. Rogers*, 18 Vt. 342; *Keeler v. Mathews*, 17 Vt. 125; *Delaware v. Staunton*, 8 Vt. 48; *Fassett v. Vincent*, 8 Vt. 73, 117; *McLaughlin v. Hill*, 6 Vt. 20; *Whiting v. Corwin*, 5 Vt. 451; *Leach v. Shepard*, 5 Vt. 363; *Mattocks v. Owen*, 5 Vt. 42; *May v. Corlew*, 4 Vt. 12; *Fay v. Green*, 2 Aik. 386; *Burton v. Ferris*, *Brayt*. 78.

25. Conn.—*Reiley v. Torkomian*, 78 Conn. 645, 63 Atl. 516; *Palmer v. Green*, 6 Conn. 14; *Leavenworth v. Phelps*, *Kirby* 71. Vt.—*Ward v. Baker*, 16 Vt. 287; *Read v. Barlow*, 1 Aik. 145. Va.—*Clark v. Sleet's Admr.*, 99 Va. 381, 38 S. E. 183, 3 Va. Sup. Ct. 266; *Freeland v. Cocke*, 3 Munf. 352.

26. See title "Books of Account," 2 ENCYCLOPÆDIA OF EVIDENCE.



of the jurisdictional amount is the extent of the claim of the plaintiff against the defendant, and not the balance found in his favor.<sup>27</sup>

2. **Jurisdictional Amount as Shown by the Declaration.** — It is not necessary that the amount required to confer jurisdiction appear upon the face of the statutory declaration.<sup>28</sup>

J. **AMOUNT RECOVERABLE.** — The recovery is not limited to the amount claimed in the declaration.<sup>29</sup>

K. **DEFENDANT'S RECOVERY.** — If a balance be found in favor of the defendant, judgment will be given therefor.<sup>30</sup>

L. **RECOVERY OF COSTS.** — The general rule is that the party succeeding in the action shall recover his costs.<sup>31</sup> If, however, a party is sued on book account and appears to the action, but does not bring forward his account, and afterwards sues to recover it, he cannot recover his costs.<sup>32</sup> If each party prevails in part, the costs will be apportioned;<sup>33</sup> but the matter rests largely in the discretion of the court.<sup>34</sup>

M. **SPLITTING ACCOUNT.** — In any form of action on an account the plaintiff cannot split the account and maintain separate actions on the different parts thereof.<sup>35</sup>

**IV. ACTION ON STATED ACCOUNT. — A. WHO MAY SUE AND BE SUED. — 1. Who May Sue. — a. In General.** — Any person as to whom some other person was under obligation to account,<sup>36</sup> or against

27. *Berry Shoe Co. v. Dechenes*, 68 Vt. 387, 35 Atl. 335.

28. *Berry Shoe Co. v. Dechenes*, 68 Vt. 387, 35 Atl. 335.

29. *Berry Shoe Co. v. Dechenes*, 68 Vt. 387, 35 Atl. 335.

30. *Fowler v. Stocking*, 5 Day (Conn.) 539.

31. *La. — French v. Gifford*, 31 Iowa

428. *La. — Underwood v. Lacapere*, 14 La. Ann. 276. *N. J. — Hann v. McCormick*, 4 N. J. L. 121.

32. *Downer v. Frizzle*, 10 Vt. 541.

33. *Watts v. Kavanagh*, 35 Vt. 34.

34. *Batchelder v. Tenney*, 27 Vt. 784.

35. *U. S. — Bartels v. Schell*, 16 Fed. 341. *Ala. — Jasper Merc. Co. v. O'Rear*, 112 Ala. 247, 20 So. 583. *Ga. — Parks v. Oskamp*, 97 Ga. 802, 25 S. E. 369; *McDonal v. Tison*, 94 Ga. 549, 20 S. E. 427; *Parris v. Hightower*, 76 Ga. 631; *Floyd v. Cox*, 72 Ga. 147. *Ill. — Rosenmueller v. Lampe*, 89 Ill. 212, 31 Am. Rep. 74; *Lucas v. LeCompte*, 42 Ill. 303. *Ia. — Williams-Abbott Elec. Co. v. Model Elec. Co.*, 134 Iowa 665; 112 N. W. 181, 13 L. R. A. (N. S.) 529; *Lamb v. Hanneman*, 40 Iowa 41. *Miss. — Ash v. Lee*, 51 Miss. 101; *Grayson v. Williams*, 1 Walk. 298, 12 Am. Dec. 568. *Mo. — Flaherty's Admr. v.*

*Taylor*, 35 Mo. 447; *Piel v. Finck*, 19 Mo. App. 338. *N. Y. — Pakas v. Hollingshead*, 184 N. Y. 211, 77 N. E. 40, 3 L. R. A. 1042; *Stevens v. Lockwood*, 13 Wend. 644, 28 Am. Dec. 492; *Guernsey v. Carver*, 8 Wend. 492, 24 Am. Dec. 60. *N. C. — Simpson v. Elwood*, 114 N. C. 528, 19 S. E. 598; *Marks v. Ballance*, 113 N. C. 28, 18 S. E. 75; *Magruder v. Randolph & Co.*, 77 N. C. 79. *Pa. — Buck v. Wilson*, 113 Pa. 423, 6 Atl. 97. *Tenn. — Johnson v. Pirtle*, 1 Swan 262.

**Continuous Account an Entirety.** — The court in *Guernsey v. Carver*, 8 Wend. (N. Y.) 492, 24 Am. Dec. 60, decides that an account for goods sold is an entire demand where it is wholly due and cannot be split into several causes of action. There is an extended note to this case in 24 Am. Dec. 61, 62, where this question is considered.

**The Massachusetts Doctrine.** — In *Badger v. Titcomb*, 15 Pick. (Mass.) 409, the court decided that "a running account for goods sold, money lent, or money paid, at different times, is not an entire demand incapable of being divided for the purpose of bringing separate suits, unless there be an agreement to that effect."

36. *U. S. — Eastern Cherokees v. Cherokee Nation*, 202 U. S. 101, 26 Sup.



whom a demand existed,<sup>37</sup> and with whom such other person has accounted, may bring an action on an account stated.<sup>38</sup>

b. *Specific Persons.*—An assignee of an account stated,<sup>39</sup> a consignor of goods with reference to his consignee,<sup>40</sup> a principal with reference to his agent,<sup>41</sup> a *cestui que trust* with reference to the holder of

Ct. 588, 50 L. ed. 949. Ala.—Ivy Coal & C. Co. v. Long, 139 Ala. 535, 36 So. 722. Fla.—Daytona Bridge Co. v. Bond, 47 Fla. 136, 36 So. 445. Ill.—Reardon v. Clover, 81 Ill. App. 526. Ky.—Louisville Bkg. Co. v. Asher, 112 Ky. 138, 65 S. W. 133, 99 Am. St. Rep. 283. Mass.—Chase v. Chase, 191 Mass. 556, 78 N. E. 115. Mo.—McCormick v. City of St. Louis, 166 Mo. 315, 65 S. W. 1038. N. Y.—Delabarre v. McAlpin, 101 App. Div. 468, 92 N. Y. Supp. 129. Vt.—Powers v. New England F. Ins. Co., 68 Vt. 390, 35 Atl. 331.

There must be a previous transaction of a monetary character creating the relation of debtor and creditor. An account stated cannot be used to create a liability where none before existed, but only to determine the amount of such pre-existing debt. Daytona Bridge Co. v. Bond, 47 Fla. 136, 36 So. 445; Chase v. Chase, 191 Mass. 556, 78 N. E. 115. But in order to recover the balance of an account stated it is not indispensable that defendant should have been legally liable for every item on some other ground before the account was delivered. Patillo v. Allen-West Com. Co., 131 Fed. 680, 65 C. C. A. 508.

37. Conn.—Zacarino v. Pallotti, 49 Conn. 36. Miss.—Tennessee Brew. Co. v. Hendricks, 77 Miss. 491, 27 So. 526. Mo.—McCormick v. City of St. Louis, 166 Mo. 315, 65 S. W. 1038. N. Y.—Delabarre v. McAlpin, 101 App. Div. 468, 92 N. Y. Supp. 129.

38. U. S.—Charlotte Oil & F. Co. v. Hartog, 85 Fed. 150, 29 C. C. A. 56. Ala.—Jasper Tr. Co. v. Lampkin, 50 So. 337, 24 L. R. A. (N. S.) 1237; Christian & Craft Groc. Co. v. Hill, 122 Ala. 490, 26 So. 149. Ark.—Lane v. Bodley, 80 Ark. 469, 97 S. W. 441, 7 L. R. A. (N. S.) 924. Del.—Shea v. Kerr, 1 Penne. 198, 40 Atl. 241. Fla.—Daytona Bridge Co. v. Bond, 47 Fla. 136, 36 So. 445. Ill.—Throop v. Sherwood, 9 Ill. 92; King v. Machesney, 88 Ill. App. 341. Mass.—Chase v. Chase, 191 Mass. 556,

78 N. E. 115. Miss.—Tennessee Brew. Co. v. Hendricks, 77 Miss. 491, 27 So. 526. Neb.—Cahill-Swift Mfg. Co. v. Morrissey Plumb. Co., 3 Neb. (Unof.) 865, 93 N. W. 204. Nev.—Quinn v. White, 26 Nev. 42, 62 Pac. 995, 64 Pac. 818. N. H.—Cochrane v. Allen, 58 N. H. 250. N. Y.—Delabarre v. McAlpin, 101 App. Div. 468, 92 N. Y. Supp. 129; Hall v. New York Brick & P. Co., 95 App. Div. 371, 88 N. Y. Supp. 582; Leiser v. McDowell, 69 App. Div. 444, 74 N. Y. Supp. 1021; Brush & Stephens Co. v. Ross, 51 Misc. 44, 99 N. Y. Supp. 796; New York Board of Fire Underwriters v. Boughan & Co., 97 N. Y. Supp. 402; Holmes v. De Camp, 1 Johns. 34, 3 Am. Dec. 293. S. D.—Krueger v. Dodge, 15 S. D. 159, 87 N. W. 965. Vt.—Powers v. New England F. Ins. Co., 68 Vt. 390, 35 Atl. 331. Va.—McCormick's Exrs. v. Wright Exrs., 79 Va. 524.

39. Ferguson v. Milliken, 42 Mich. 441, 4 N. W. 185.

40. U. S.—Charlotte Oil & F. Co. v. Hartog, 85 Fed. 150, 29 C. C. A. 56; Eichel v. Sawyer, 44 Fed. 845. Cal.—Mayberry v. Cook, 121 Cal. 588, 54 Pac. 95. N. H.—Austin v. Ricker, 61 N. H. 97. Ohio.—Woodward v. Suydam, 11 Ohio 360. Pa.—Bevan v. Cullen, 7 Pa. 281; Hall v. Sloan, 9 Phila. 138.

41. U. S.—Ranald S. S. Co. v. Wesenberg & Co., 122 Fed. 969; Eichel v. Sawyer, 44 Fed. 845. Ill.—Bailey v. Bensley, 87 Ill. 556; Follansbee v. Parker, 70 Ill. 11. La.—Mornay v. Bordelais, 6 Rob. 318. Mich.—Wheeler v. Baker, 132 Mich. 507, 93 N. W. 1069. N. Y.—McClain v. Schofield, 74 Hun 437, 26 N. Y. Supp. 700; Allen v. McConihe, 58 Hun 605, 12 N. Y. Supp. 232; Martine v. Huyler, 55 Hun 611, 8 N. Y. Supp. 734; Cartwright v. Greene, 47 Barb. 9. Ore.—Crawford v. Hutchinson, 38 Ore. 578, 65 Pac. 84. Pa.—Vantries v. Richey, 8 Watts & S. 87; Smedley v. Williams, 1 Pars. Eq. Cas. 359.

the trust fund,"<sup>42</sup> and any person who is a creditor of another, and has stated the account,"<sup>43</sup> may sue.

2. **Who May Be Sued.**—a. *In General.*—Any one who is liable to another upon a contractual demand which has been the subject of an account stated, may be made defendant in this action;<sup>44</sup> and any person liable to account and who has actually accounted.<sup>45</sup>

b. *Specific Persons.*—There may be made defendant in this action a consignee with reference to his consignor,<sup>46</sup> an agent with reference to his principal,<sup>47</sup> a trustee with reference to his beneficiary,<sup>48</sup> and any debtor who has become a party to an account stated.<sup>49</sup>

42. *Rand v. Whipple*, 71 App. Div. 62, 75 N. Y. Supp. 740.

43. *Pulliam v. Booth*, 21 Ark. 420; *Holmes v. De Camp*, 1 Johns. (N. Y.) 34, 3 Am. Dec. 293.

44. Ala.—*Ivy Coal & C. Co. v. Long*, 139 Ala. 535, 36 So. 722. Fla.—*Daytona Bridge Co. v. Bond*, 47 Fla. 136, 36 So. 445. S. D.—*Krueger v. Dodge*, 15 S. D. 159, 87 N. W. 965. Vt.—*Powers v. New England F. Ins. Co.*, 68 Vt. 390, 35 Atl. 331. Va.—*McCormick's Exrs. v. Wright's Exrs.*, 79 Va. 524.

45. U. S.—*Charlotte Oil & F. Co. v. Hartog*, 85 Fed. 150, 29 C. C. A. 56. Ala.—*Jasper Tr. Co. v. Lampkin*, 50 So. 337, 24 L. R. A. (N. S.) 1237; *Christian & Craft Groc. Co. v. Hill*, 122 Ala. 490, 26 So. 149. Ark.—*Lane v. Taylor*, 80 Ark. 469, 97 S. W. 441, 7 L. R. A. (N. S.) 924. Del.—*Shea v. Kerr*, 1 Penne. 198, 40 Atl. 241. Fla.—*Daytona Bridge Co. v. Bond*, 47 Fla. 136, 36 So. 445. Ill.—*Throop v. Sherwood*, 9 Ill. 92; *King v. Machesney*, 88 Ill. App. 341. Mass.—*Chase v. Chase*, 191 Mass. 556, 78 N. E. 115. Miss.—*Tennessee Brew. Co. v. Hendricks*, 77 Miss. 491, 27 So. 526. Neb.—*Cahill-Swift Mfg. Co. v. Morrissey Plumb. Co.*, 3 Neb. (Unof.) 865, 93 N. W. 204. Nev.—*Quinn v. White*, 26 Nev. 42, 62 Pac. 995, 64 Pac. 818. N. H.—*Cochrane v. Allen*, 58 N. H. 250. N. Y.—*Delabarre v. McAlpin*, 101 App. Div. 468, 92 N. Y. Supp. 129; *Hall v. New York Brick & P. Co.*, 95 App. Div. 371, 88 N. Y. Supp. 582; *Leiser v. McDowell*, 69 App. Div. 444, 74 N. Y. Supp. 1021; *Brush & Stephens Co. v. Ross*, 51 Misc. 44, 99 N. Y. Supp. 796; *New York Board of Fire Underwriters v. Boughan & Co.*, 97 N. Y. Supp. 402; *Holmes v. DeCamp*, 1 Johns. 34, 3 Am. Dec. 293. S. D.—*Krueger v. Dodge*, 15 S. D. 159,

87 N. W. 965. Vt.—*Powers v. New England F. Ins. Co.*, 68 Vt. 390, 35 Atl. 331.

46. U. S.—*Charlotte Oil & F. Co. v. Hartog*, 85 Fed. 150, 29 C. C. A. 56; *Eichel v. Sawyer*, 44 Fed. 845. Cal.—*Mayberry v. Cook*, 121 Cal. 538, 54 Pac. 95. N. H.—*Austin v. Ricker*, 61 N. H. 97. Ohio.—*Woodward v. Suydam*, 11 Ohio 360. Pa.—*Bevan v. Cullen*, 7 Pa. 281; *Hall v. Sloan*, 9 Phila. 138.

47. U. S.—*Ranald S. S. Co. v. Wesenberg & Co.*, 122 Fed. 969; *Eichel v. Sawyer*, 44 Fed. 845. Ill.—*Bailey v. Bensley*, 87 Ill. 556; *Follansbee v. Parker*, 70 Ill. 11. La.—*Mornay v. Bordelais*, 6 Rob. 318. Mich.—*Wheeler v. Baker*, 132 Mich. 507, 93 N. W. 1069. N. Y.—*McClain v. Schofield*, 74 Hun 437, 26 N. Y. Supp. 700; *Allen v. McConihe*, 58 Hun 605, 12 N. Y. Supp. 232; *Martine v. Huyler*, 55 Hun 611, 8 N. Y. Supp. 734; *Cartwright v. Greene*, 47 Barb. 9. Ore.—*Crawford v. Hutchinson*, 38 Ore. 578, 65 Pac. 84. Pa.—*Vantries v. Richey*, 8 Watts & S. 87; *Smedley v. Williams*, 1 Pars. Eq. Cas. 359.

48. *Eichel v. Sawyer*, 44 Fed. 845; *Rand v. Whipple*, 71 App. Div. 62, 75 N. Y. Supp. 740.

49. U. S.—*Charlotte Oil & F. Co. v. Hartog*, 85 Fed. 150, 29 C. C. A. 56. Ala.—*Jasper Tr. Co. v. Lampkin*, 50 So. 337, 24 L. R. A. (N. S.) 1237; *Christian & Craft Groc. Co. v. Hill*, 122 Ala. 490, 26 So. 149. Ark.—*Lane v. Taylor*, 80 Ark. 469, 97 S. W. 441, 7 L. R. A. (N. S.) 924. Del.—*Shea v. Kerr*, 1 Penne. 198, 40 Atl. 241. Fla.—*Daytona Bridge Co. v. Bond*, 47 Fla. 136, 36 So. 445. Ill.—*Throop v. Sherwood*, 9 Ill. 92; *King v. Machesney*, 88 Ill. App. 341. Mass.—*Chase v. Chase*, 191 Mass. 556, 78 N. E. 115. Miss.—*Tennessee Brew. Co. v. Hendricks*, 77



**B. THE PLEADINGS. — 1. Declaration or Complaint. — a. In General.** — In a declaration or complaint on an account stated, it is sufficient to allege an accounting by the defendant with the plaintiff<sup>50</sup> or his assignor,<sup>51</sup> the indebtedness shown thereby for a specific sum,<sup>52</sup> a promise to pay such sum,<sup>53</sup> and a failure to pay the same.<sup>54</sup>

**b. Subject-Matter of Original Debt.** — In suing on account stated the plaintiff need not state in his pleading the subject-matter of the original debt upon which the account is based.<sup>55</sup>

**c. Allegation of an Accounting.** — It is essential to a declaration at common law in assumpsit,<sup>56</sup> or a complaint under the code system,<sup>57</sup>

Miss. 491, 27 So. 526. **Neb.** — Cahill-Swift Mfg. Co. v. Morrissey Plumb Co., 3 Neb. (Unof.) 865, 93 N. W. 204. **Nev.** — Quinn v. White, 26 Nev. 42, 62 Pac. 995, 64 Pac. 818. **N. H.** — Cochran v. Allen, 58 N. H. 250. **N. Y.** — Delabarre v. McAlpin, 101 App. Div. 468, 92 N. Y. Supp. 129; Hall v. New York Brick & Pav. Co., 95 App. Div. 371, 88 N. Y. Supp. 582; Leiser v. McDowell, 69 App. Div. 444, 74 N. Y. Supp. 1021; Brush & Stephens Co. v. Ross, 51 Misc. 44, 99 N. Y. Supp. 796; New York Board of Fire Underwriters v. Boughan & Co., 97 N. Y. Supp. 402; Holmes v. DeCamp, 1 Johns. 34, 3 Am. Dec. 293. **S. D.** — Krueger v. Dodge, 15 S. D. 159, 87 N. W. 965. **Vt.** — Powers v. New England F. Ins. Co., 68 Vt. 390, 35 Atl. 331. **Va.** — McCormick's Exrs. v. Wright's Exrs., 79 Va. 524.

50. *Truman v. Owens*, 17 Ore. 523, 21 Pac. 665.

51. Inasmuch as the law raises a promise to pay the balance found due from the fact of stating an account (*U. S.* — *York v. Wistar*, 30 Fed. Cas. No. 18,141. *Mass.* — *Chace v. Trafford*, 116 Mass. 529, 17 Am. Rep. 171. *Mo.* — *Kent v. Highleyman*, 17 Mo. App. 9. *N. C.* — *Hawkins v. Long*, 74 N. C. 781. *Pa.* — *Tassey v. Church*, 4 Watts & S. 141), it necessarily follows that an assignee may sue on such an account in all jurisdictions in which accounts are assignable. *U. S.* — *Martin v. Ihmsen*, 21 How. 394, 16 L. ed. 134; *May v. Logan County*, 30 Fed. 250; *Marrison B. & W. Co. v. H. C. Yeager*, 1 Fed. 285; *Patchin v. The A. D. Patchin*, 12 Law. Rep. 21, 18 Fed. Cas. No. 10,794; *Chamberlain v. Eckert*, 2 Biss. 126, 5 Fed. Cas. No. 2,577. *Cal.* — *Tuller v. Arnold*, 98 Cal. 522, 33 Pac. 445. *Ill.* — *Wineman v. Hughson*, 44 Ill. App. 22.

52. *Carlisle v. Davis*, 9 Ala. 858; *DeWitt v. Porter*, 13 Cal. 171.

53. *U. S.* — *Columbia River Packing Co. v. Tallant*, 133 Fed. 990; *York v. Wistar*, 30 Fed. Cas. No. 18,141. *Ill.* — *Throop v. Sherwood*, 9 Ill. 92. *Miss.* — *McCall v. Nave*, 52 Miss. 494.

54. *De Witt v. Porter*, 13 Cal. 171; *Moss v. Lindblomm*, 39 App. Div. 586, 57 N. Y. Supp. 703; reversing 26 Misc. 157, 56 N. Y. Supp. 746.

55. *Ark.* — *St. Louis, etc. R. Co. v. Camden Bank*, 47 Ark. 541, 1 S. W. 704. *Del.* — *Gregory v. Bailey's Admr.*, 4 Har. 256; *Parkin's Admr. v. Bennington*, 1 Har. 209. *Ill.* — *Throop v. Sherwood*, 9 Ill. 92. *La.* — *Oakey v. Weil*, 7 La. Ann. 169. *Mass.* — *Chace v. Trafford*, 116 Mass. 529, 17 Am. Rep. 171. *Mich.* — *Stevens v. Tuller*, 4 Mich. 387. *Minn.* — *Christofferson v. Howe*, 57 Minn. 67, 58 N. W. 830. *Miss.* — *Reinhardt v. Hines*, 51 Miss. 344. *N. Y.* — *Goings v. Patten*, 1 Daly 168, 17 Abb. Pr. 339. *Utah.* — *Benites v. Hampton*, 3 Utah 369, 3 Pac. 206, 208; *Robbins v. Woodhull*, 1 Utah 317. *Vt.* — *Powers v. New England F. Ins. Co.*, 68 Vt. 390, 35 Atl. 331.

56. In *Millikin v. Ferguson*, 56 Mich. 189, 22 N. W. 278, which was the same case that had already been before the supreme court in 42 Mich. 441, 4 N. W. 185, the court said: "Plaintiff sued as assignee of the claim there set out in full, and the principal error alleged now is one which, if an error, was involved but not set up in that case. We have no doubt that it was properly counted on as an absolute promise to pay \$300, and that it was equally admissible under the common counts as an account stated."

57. *Minn.* — *Northern Line Packet Co. v. Platt*, 22 Minn. 413. *Mo.* —



that there be an allegation of an account stated between the parties.<sup>59</sup>

**Illustrations.**—It is not sufficient to allege that on a certain date the account sued on “was rendered to the defendant;”<sup>60</sup> so an allegation that one party to an account made a statement of it, and delivered it to the other party, who made no objection to it, is not sufficient;<sup>60</sup> but an allegation that an account was stated between the parties meets the requirements that an accounting must be stated.<sup>61</sup>

d. *Promise To Be Alleged.*—(I.) **At Common Law.**—In the common law action of assumpsit upon an account stated, an express promise must be alleged.<sup>62</sup> The *insumul computassent* count is sufficient.<sup>63</sup>

Ward v. Farrelly, 9 Mo. App. 370. N. Y.—Emery v. Pease, 20 N. Y. 62.

58. Minn.—Northern Line Packet Co. v. Platt, 22 Minn. 413. Mo.—Brown v. Kimmel, 67 Mo. 430; Ward v. Farrelly, 9 Mo. App. 370. N. Y.—Emery v. Pease, 28 N. Y. 62.

**Form of Complaint.**—In Bouslog v. Garrett, 39 Ind. 338, the complaint on account stated, which was held sufficient, was in the following language: “N. G., plaintiff, complains of defendant, and says that on the 1st day of January, 1870, the defendant was indebted to the plaintiff in the sum of one thousand and seven dollars and eighty-four cents, for money found due from the said defendant to the plaintiff upon an account then stated between them; which said sum, together with the legal interest thereon, remains unpaid, for which he demands judgment.”

59. Colo.—St. Louis L. B. B. Co. v. Colorado Nat. Bank, 8 Colo. 70, 5 Pac. 800. Mo.—Brown v. Kimmel, 67 Mo. 430. N. Y.—Kauffmann v. Judah, 78 App. Div. 632, 79 N. Y. Supp. 494; Woodruff v. Hunter, 65 App. Div. 404, 73 N. Y. Supp. 210.

60. U. S.—Patillo v. Allen-West Com. Co., 108 Fed. 723, 47 C. C. A. 637; McKenzie v. Poorman Silver Mines, 88 Fed. 111, 31 C. C. A. 409. Ark.—Atkinson v. Burt, 65 Ark. 316, 53 S. W. 404. Colo.—St. Louis L. B. Co. v. Colorado Nat. Bank, 8 Colo. 70, 5 Pac. 800. Mo.—Ward v. Farrelly, 9 Mo. App. 370.

61. Ga.—Ward v. Stewart, 103 Ga. 260, 29 S. E. 872. Ind.—McDowell v. North, 24 Ind. App. 435, 55 N. E. 789. Mont.—McFarland v. Cutter, 1 Mont. 383. N. Y.—Hatch v. Von Taube, 31 Misc. 30, 62 N. Y. Supp. 1031. W. Va.—Van Dorn v. Lewis County Court, 38 W. Va. 267, 18 S. E. 579.

62. U. S.—York v. Wistar, 30 Fed. Cas. No. 18,141. Cal.—Baird v. Crank, 98 Cal. 293, 33 Pac. 63. Ill.—Throop v. Sherwood, 9 Ill. 92. Vt.—Parker v. Clemons, 80 Vt. 521, 68 Atl. 646.

**Form of Declaration on Account Stated Showing Allegation of a Promise.**—In Parker v. Clemons, 80 Vt. 521, 68 Atl. 646, the defendant's assistant accidentally overturned a jar of chemical fluid, which ran out and leaked through the floor into the plaintiff's jewelry store, and injured various articles therein. Defendant promised to pay the amount of damage when ascertained, but after repairs were made, refused. The plaintiff brought an action of assumpsit with the common counts, to which the defendant pleaded the general issue. The court held however that the action should have been trespass on the case for a tort, saying: “This case does not fall within either of the first three divisions made in the text-books—*indebitatus assumpsit*, *quantum meruit*, or *quantum valebat*. . . . The form adopted by Chitty, and ever since followed, is ‘that the defendant accounted with the plaintiff of and concerning diverse sums of money before then due from the defendant to the plaintiff, and then in arrear and unpaid, and that upon such accounting the defendant was found to be in arrear to the plaintiff in a named sum, and that, being so found in arrear and indebted, the defendant in consideration thereof undertook and faithfully promised,’ etc., and the allegation of the breach in this, as in other common counts, is: ‘Yet the defendant, not regarding his said promises, . . . hath not, although often requested, as yet paid said sum of money,’ etc.”

63. 1 Chit. Pl. (6th Am. ed.) 358,

(II.) *Under Code System.*—Under the code system, the allegation of an express promise is not required.<sup>64</sup> If the ultimate fact of an account stated between the parties is averred a promise will be implied.<sup>65</sup>

e. *Assent of Defendant.*—It must appear from the complaint that the defendant assented to the account.<sup>66</sup> If the fact of an account stated be averred, the defendant's assent is necessarily implied.<sup>67</sup>

f. *Non-payment of the Account.*—No technical words are necessary in alleging non-payment of the account. Any words from which a failure to pay may be inferred are sufficient.<sup>68</sup>

g. *Illustrations as to Declaration or Petition.*—Illustrative forms as to the sufficiency and insufficiency of declarations and petitions in actions on accounts stated are given in the notes.<sup>69</sup>

359; *Cathell v. Goodwin*, 1 Har. & G. (Md.) 968; *Gilson v. Stewart*, 7 Watts (Pa.) 100.

64. *Chace v. Trafford*, 116 Mass. 529, 17 Am. Rep. 175.

65. *Bouslog v. Garrett*, 39 Ind. 338; *Chace v. Trafford*, 116 Mass. 529, 17 Am. Rep. 171, 175.

But under the code system, it is advisable to allege an express promise. *Ward v. Farrelly*, 9 Mo. App. 370.

66. U. S.—*Charlotte Oil & F. Co. v. Hartog*, 85 Fed. 150, 29 C. C. A. 56; *Columbia River Pack. Co. v. Talant*, 133 Fed. 990; s. c. 132 Fed. 271. Ala.—*Christian & Craft Groc. Co. v. Hill*, 122 Ala. 490, 26 So. 149. Ark.—*Charlesworth v. Withlow*, 74 Ark. 277, 85 S. W. 423; *Southwestern Tel. & T. Co. v. Benson*, 63 Ark. 283, 38 S. W. 341. Cal.—*Beltaire v. Rosenberg*, 129 Cal. 164, 61 Pac. 916. Del.—*Shea v. Kerr*, 1 Penne. 198, 40 Atl. 241. Ill.—*Seal Lock Co. v. Chicago Mfg. & O. Co.*, 98 Ill. App. 637; *King v. Machesney*, 88 Ill. App. 341; *Peterson v. Wachowski*, 86 Ill. App. 661; *Peoria Com. Co. v. Maguire*, 53 Ill. App. 470. Mich.—*White v. Campbell*, 25 Mich. 463. Minn.—*Allis v. Day*, 14 Minn. 516. Mo.—*Cape Girardeau & S. L. R. Co. v. Kimmel*, 58 Mo. 83. Neb.—*Cahill-Swift Mfg. Co. v. Morrissey Plumb. Co.*, 3 Neb. (Unof.) 865, 93 N. W. 204. Nev.—*Quinn v. White*, 26 Nev. 42, 62 Pac. 995, 64 Pac. 818. N. Y.—*Hughes v. Smither*, 163 N. Y. 553, 57 N. E. 1112; *Volkening v. DeGraaf*, 81 N. Y. 268; *Hall v. New York Brick & P. Co.*, 95 App. Div. 371, 88 N. Y. Supp. 582; *Leiser v. McDowell*, 69 App. Div. 444, 74 N. Y. Supp. 1021; *Tinney v. Pierrepont*, 18 App. Div. 627, 45 N. Y. Supp.

977; *Callahan v. O'Rourke*, 17 App. Div. 277, 45 N. Y. Supp. 764; *New York Board of Fire Underwriters v. Boughan & Co.*, 97 N. Y. Supp. 402. N. C.—*Copland v. American De Forest Wire-less Tel. Co.*, 136 N. C. 11, 48 S. E. 501. Pa.—*Rehill v. McTague*, 114 Pa. 82, 7 Atl. 224, 60 Am. Rep. 341. Tex.—*Bartholomew v. Sheppard*, 41 Tex. Civ. App. 579, 93 S. W. 218. Wash.—*Ault v. Interstate Sav. & L. Assn.*, 15 Wash. 627, 47 Pac. 13.

67. U. S.—*York v. Wistar*, 30 Fed. Cas. No. 18,141. Ala.—*Ryan v. Gross*, 48 Ala. 370. Mass.—*Chace v. Trafford*, 116 Mass. 529, 17 Am. Rep. 171. Mich.—*Watkins v. Ford*, 69 Mich. 357, 37 N. W. 300. Mo.—*Kent v. Highleyman*, 17 Mo. App. 9. Neb.—*Claire v. Claire*, 10 Neb. 54, 4 N. W. 411. N. H.—*Cochrane v. Allen*, 58 N. H. 250. N. Y.—*Robbins v. Downey*, 18 N. Y. Supp. 100, 45 N. Y. St. 279. N. C.—*Hawkins v. Long*, 74 N. C. 781. Ohio.—*Dyer v. Isham*, 4 Ohio C. C. 429. Pa.—*Tassey v. Church*, 4 Watts & S. 141.

68. *DeWitt v. Porter*, 13 Cal. 171; *Moss v. Lindblomm*, 39 App. Div. 586, 57 N. Y. Supp. 703, reversing 26 Misc. 157, 56 N. Y. Supp. 746; *Hatch v. Von Taube*, 31 Misc. 30, 62 N. Y. Supp. 1031.

69. *Harrison v. Henderson*, 67 Kan. 202, 72 Pac. 878.

*Sufficiency of Declaration or Complaint.*—It is held in *Carlisle v. Davis*, 9 Ala. 858, that a count on an account stated is good if it states the accounting of the defendant with plaintiff and the indebtedness thereby for a specific sum, followed by a *super se assumpsit*.

h. *Action of Debt.*—At common law the action of debt may be brought on an account stated.<sup>70</sup>

i. *Bill of Particulars.*—In most jurisdictions, no bill of particulars need be filed with the declaration or complaint on an account stated.<sup>71</sup>

j. *Should Declare on Account Stated.*—If a party would recover on an account stated, he must declare on such account in his pleading.<sup>72</sup> The recovery upon such account is referable to the defendant's promise to pay the sum found due upon the accounting by the parties.<sup>73</sup> The accounting becomes a new contract, the consideration of

A complaint which alleges that the defendant was justly indebted to the plaintiffs in the sum of ——— dollars for money laid out at defendant's special instance and request, to wit, at ———, on the ——— day of ———, and in the sum of ——— dollars for money found to be due between the plaintiff and defendant on an account then stated between them, and said defendant, being so indebted to the plaintiff, afterwards, to wit, on the day and year aforesaid, at the place aforesaid, undertook and promised to pay the same, and that said sum is due the plaintiff, etc., is a sufficient complaint. *De Witt v. Porter*, 13 Cal. 171.

In a complaint on an account stated, the allegations were that "on the first day of January, 1870, the defendant was indebted to the plaintiff in the sum of \$1007.84, for money due from said defendant to the plaintiff upon an account then stated between them, which said sum, together with legal interest thereon, remains unpaid, for which plaintiff demands judgment." The complaint was held to be sufficient, the court holding that the promise to pay was impliedly included in the allegation contained in this paragraph. *Bouslog v. Garrett*, 39 Ind. 338.

A complaint which alleges that plaintiff and defendant accounted together concerning certain work and labor, and the wages due therefor, and the amounts paid on account, and that there was found due plaintiff a certain sum, which defendant then and there agreed to pay, clearly and sufficiently alleges an account stated. *McFarland v. Cutter*, 1 Mont. 383.

**Insufficiency of Declaration or Complaint.**—Where the count on an account stated alleges a promise to pay the amount with ten per cent. interest, without alleging that the promise was in writing, the declaration was insuffi-

cient. *Matlock v. Purefoy*, 18 Ark. 492.

In a complaint as upon an account stated, an allegation that one party to the account made a statement of it and delivered it to the other party, who made no objection, is not an allegation that an account was stated. *St. Louis L. B. B. Co. v. Colorado Co.*, 8 Colo. 70, 5 Pac. 800.

So an allegation that a bill of items was presented to defendants, and after some months returned without objection, does not set forth a cause of action as an account stated, but only a general *indebitatus assumpsit*. *Brown v. Kimmel*, 67 Mo. 430.

D. R. S. brought an action upon an account stated, a copy of the account being attached to and made part of the petition, which showed an account between F. L. S. & Co. and defendant; but there was no allegation of an assignment to plaintiff or ownership by him. It was held that the petition did not support a judgment for the plaintiff. *Thompson v. Stetson*, 15 Neb. 112, 17 N. W. 368.

70. *Somerville v. Grim*, 17 W. Va. 803; *Eib v. Pindall's Exr.*, 5 Leigh. (Va.) 109.

71. Cal.—*Auzerais v. Naglee*, 74 Cal. 60, 15 Pac. 371. Ga.—*Ward v. Stewart*, 103 Ga. 260, 29 S. E. 872. Ind.—*Salem Gravel Road v. Pennington*, 62 Ind. 175. Mass.—*Chace v. Trafford*, 116 Mass. 529, 17 Am. Rep. 171.

72. Minn.—*McCormick Harv. Mach. Co. v. Wilson*, 39 Minn. 467, 40 N. W. 571; *Northern Line Packet Co. v. Platt*, 22 Minn. 413. Miss.—*Reinhardt v. Hines*, 51 Miss. 344. Mo.—*Ward v. Farrelly*, 9 Mo. App. 370. Ore.—*Bump v. Cooper*, 20 Ore. 527, 26 Pac. 848. Wash.—*Wilson v. Waldron*, 12 Wash. 149, 40 Pac. 740.

73. U. S.—*Patillo v. Allen-West Com. Co.*, 108 Fed. 723, 47 C. C. A.



which is the original liability arising from the open account formerly existing between the parties.<sup>74</sup>

k. *Amendment*.—If the plaintiff's declaration or complaint does not sufficiently aver an account stated, it is open to amendment so as to make it a proper pleading upon an account stated.<sup>75</sup>

2. *Pleadings of Defendant*.—a. *At Common Law*.—(I.) *General Issue*.—As the usual form of action at common law on an account stated is *assumpsit*, the usual plea is *non assumpsit*.<sup>76</sup>

(II.) *Defenses Under the Plea*.—Under this plea at common law, all defenses can be received,<sup>77</sup> except the statute of limitations or a release.<sup>78</sup>

b. *Under the Code*.—(I.) *General Answer or Denial*.—The general or special answer of denial will put in issue only the fact of the account stated.<sup>79</sup> An answer which controverts any of the essentials of an account stated is sufficient to put the plaintiff on proof of his case.<sup>80</sup>

(II.) *Special Answer*.—Matters not in denial of the fact of an account stated must be specially pleaded in the answer.<sup>81</sup>

637. *Idaho*—Naylor v. Lewiston & S. E. Elec. R. Co., 14 Idaho 789, 96 Pac. 573. *Ill.*—American Brew. Co. v. Berner-Mayer Co., 83 Ill. App. 446. *Mo.*—Columbia Brew. Co. v. Berney, 90 Mo. App. 96. *Pa.*—Payne v. Nicholas, 2 Phila. 220. *Utah*—Robbins v. Woodhull, 1 Utah 317.

74. *Delabarre v. McAlpin*, 101 App. Div. 468, 92 N. Y. Supp. 129; *Mead v. Grigsby's Admrs.*, 26 Gratt. (Va.) 612.

75. *Brown v. Giso*, 14 N. M. 282, 91 Pac. 716.

76. *Dunlap v. Miles*, 4 Yeates (Pa.) 366; *Lyne v. Gilliat*, 3 Call (Va.) 5.

77. *U. S.*—Witlich v. Allison, 56 Fed. 796, 6 C. C. A. 135, 13 U. S. App. 389. *Colo.*—Gutshall v. Cooper, 37 Colo. 212, 86 Pac. 125, 6 L. R. A. (N. S.) 820. *Ind.*—Bouslog v. Garrett, 39 Ind. 338. *Mass.*—Dunbar v. Johnson, 108 Mass. 519. *Minn.*—Warner v. Myrick, 16 Minn. 91. *N. Y.*—Field v. Knapp, 108 N. Y. 87, 14 N. E. 829; *Donald v. Gardner*, 44 App. Div. 235, 60 N. Y. Supp. 668; *Ensign v. Hooker*, 6 App. Div. 425, 39 N. Y. Supp. 543. *Pa.*—*Dunlap v. Miles*, 4 Yeates 366. *Va.*—*Lyne v. Gilliat*, 3 Call 5. *W. Va.*—*Balson v. Findley*, 52 W. Va. 343, 43 S. E. 142.

78. See the title "*Variance*," 13 ENCYCLOPEDIA OF EVIDENCE, 766, 767, where this subject is fully considered.

79. *Kansas Pac. R. Co. v. Anderson*, 23 Kan. 44.

80. *McKenzie v. Poorman Silver Mines*, 88 Fed. 111, 31 C. C. A. 409.

81. *Cal.*—Hendy v. March, 75 Cal. 566, 17 Pac. 702. *Colo.*—Gutshall v. Cooper, 37 Colo. 212, 86 Pac. 125, 6 L. R. A. (N. S.) 820; *St. Louis L. B. B. Co. v. Colorado Nat. Bank*, 8 Colo. 70, 5 Pac. 800. *Ind.*—*State Life Ins. Co. v. Postal*, 43 Ind. App. 144, 84 N. E. 156, 1093. *Minn.*—*Moody v. Thwing*, 46 Minn. 511, 49 N. W. 229; *Warner v. Myrick*, 16 Minn. 91. *Mo.*—*Commercial Elec. Supply Co. v. Meysenberg*, 85 Mo. App. 337. *N. Y.*—*Uhlhorn v. Hovey*, 49 Misc. 638, 97 N. Y. Supp. 1040; *Beach v. Kidder*, 55 Hun 603, mem., 8 N. Y. Supp. 587; *Weeks v. Hoyt*, 5 Hun 347; *Anthony v. Day*, 52 How. Pr. 350. *Pa.*—*Teller v. Sommer*, 132 Pa. 33, 18 Atl. 1071; *Dunlap v. Miles*, 4 Yeates 366.

*Breach of Contract*.—In *Gutshall v. Cooper*, 37 Colo. 212, 86 Pac. 125, 6 L. R. A. (N. S.) 820, the action was upon a stated account, to which there was a general denial by way of answer and a further defense and cross-complaint, to the effect that the defendant and one Carr, in January, 1900, entered into a verbal contract whereby Carr agreed to cut and deliver to defendant's sawmill all the timber above ten inches in diameter standing upon a certain tract of land adjoining the mill, for which defendant was to pay Carr \$2.50 per 1,000 feet; that Carr, with the

c. *Statute of Limitations.*—(I.) *In General.*—The statute of limitations is a bar to an action on account stated,<sup>82</sup> and the period within which such action is barred depends upon the local law applicable to the action,<sup>83</sup> as well as the time when it begins to run,<sup>84</sup> but as a rule it runs from the date of the statement thereof.<sup>85</sup>

(II.) *Acknowledgment To Remove Bar of Statute.*—Whether an acknowledgment in writing is necessary to remove the bar of the statute of limitations is governed by statute,<sup>86</sup> and the statute is not the same in all the states.<sup>87</sup>

(III) *Statute Must Be Pleaded.*—If the statute of limitations be relied on as a defense, it must be pleaded,<sup>88</sup> unless the fact that the account is barred clearly appears upon the face of the pleading, in which event, under the code system, this defense is available on demurrer.<sup>89</sup>

C. EVIDENCE.—1. *Burden of Proof.*—The burden of establishing

consent of defendant, assigned and turned over the contract to plaintiff; that plaintiff abandoned such contract, and refused to carry out and complete the same according to the terms thereof, to the damage of defendant. There was a verdict and judgment for the plaintiff, from which an appeal was taken. The supreme court, in reversing the court below, held that a good defense was set up.

82. U. S.—*Baker v. Biddle*, Baldw. 394, 2 Fed. Cas. No. 764. Ala.—*Oden v. Bonner*, 93 Ala. 393, 9 So. 409. Ark.—*St. Louis, etc. R. Co. v. Camden Bank*, 47 Ark. 541, 1 S. W. 704. Cal.—*Auzerais v. Naglee*, 74 Cal. 60, 15 Pac. 371; *Cross v. Sacramento Sav. Bank*, 66 Cal. 462, 6 Pac. 94. Ill.—*Rear-don v. Clover*, 81 Ill. App. 526. Ia.—*Stewart v. Chadwick*, 8 Iowa 463. La.—*Pickens v. Friend*, 26 La. Ann. 585. Mass.—*Chace v. Trafford*, 116 Mass. 529, 17 Am. Rep. 171. N. Y.—*Volkening v. DeGraaf*, 8 N. Y. 268; *Weed v. Smull*, 7 Paige 573; *Goings v. Patten*, 1 Daly 168, 17 Abb. Pr. 339.

83. *First Nat. Bank v. Allen*, 100 Ala. 476, 14 So. 335, 27 L. R. A. 426; *Ware v. Manning*, 86 Ala. 238, 5 So. 682; *Tuggle v. Minor*, 76 Cal. 96, 18 Pac. 131.

84. Cal.—*Auzerais v. Naglee*, 74 Cal. 60, 15 Pac. 371. Ia.—*Morse v. Minton*, 101 Iowa 603, 70 N. W. 691. N. C.—*Suttle v. Doggett*, 87 N. C. 203.

85. *Auzerais v. Naglee*, 74 Cal. 60, 15 Pac. 371, 375; *Union Bank v.*

*Knapp*, 3 Pick. (Mass.) 96, 15 Am. Dec. 181.

86. *Nool's Exr. v. Garner's Exrs.*, 70 Ala. 443; *Bryan v. Ware*, 20 Ala. 687; *Chace v. Trafford*, 116 Mass. 529, 17 Am. Rep. 171.

87. *Removal of Bar of Statute.*—In *Chace v. Trafford*, 116 Mass. 529, 17 Am. Rep. 171, an action upon an account stated, the defense was a general denial and a plea of the statute of limitations. The court held that a stated account was within the statute requiring an acknowledgment in writing to relieve from the bar of the statute.

See *Payne v. Walker*, 26 Mich. 60.

88. *Vogel v. Kennedy*, 127 Mo. App. 228, 104 S. W. 1151, 1153.

89. Cal.—*Wise v. Hogan*, 77 Cal. 184, 19 Pac. 278; *Smith v. Hall*, 19 Cal. 85; *Ord v. De La Guerra*, 18 Cal. 67. Ga.—*Stringer v. Stringer*, 93 Ga. 320, 20 S. E. 242. Ia.—*Moulton v. Walsh*, 30 Iowa 361. Kan.—*Walker v. Fleming*, 37 Kan. 171, 14 Pac. 470. Miss.—*Matthews v. Southeimer*, 39 Miss. 174. Mo.—*Maddox v. Duncan*, 62 Mo. App. 474. N. Y.—*Muir v. Trustees*, 3 Barb. Ch. 477. Tex.—*Lewis v. Alexander*, 51 Tex. 578; *Smith v. Fly*, 24 Tex. 345, 76 Am. Dec. 109; *Walton v. Talbot*, 1 Posey Unrep. Cas. 511. Wis.—*Howell v. Howell*, 15 Wis. 55.

*Contra*, *St. Louis, etc. R. Co. v. Brown*, 49 Ark. 253, 4 S. W. 781. See the title "*Limitation of Actions.*"



an account stated is upon the party relying upon it,<sup>90</sup> whether such account be the subject of an action<sup>91</sup> or a ground of defense.<sup>92</sup>

**2. Presumption From General Settlement.**—A general settlement between the parties raises a presumption that it includes all claims arising prior to such settlement,<sup>93</sup> and the burden of proof is upon him who would avoid the evidentiary effect thereof.<sup>94</sup>

**D. SURCHARGE AND FALSIFICATION OF ACCOUNT STATED.**—**1. Definition.**—To surcharge and falsify an account stated is but an impeachment of its correctness. To surcharge an account is to show the omission of a credit therefrom which should have been given.<sup>95</sup> To falsify an account is to show a wrong charge made therein.<sup>96</sup>

**2. Remedies for Impeachment of Accounts Stated.**—The usual remedy to surcharge and falsify an account stated is by bill in equity;<sup>97</sup> but in most jurisdictions this remedy is not exclusive, and hence an action at law may be brought to recover for a matter improperly omitted from the account.<sup>98</sup>

**3. Account Stated as Ground of Defense.**—An account stated may be impeached when interposed as a ground of defense either at law<sup>99</sup> or in equity.<sup>1</sup>

**4. Who May Surcharge or Falsify an Account.**—The rule here is

**90. Fla.**—*Withers v. Sandlin*, 44 Fla. 253, 32 So. 829. **Ky.**—*Williams v. Gilchrist*, 4 Bibb 527. **Mich.**—*Gooding v. Hingston*, 20 Mich. 439. **N. Y.**—*Mincer v. Green*, 47 Misc. 374, 94 N. Y. Supp. 15; *Troup v. Haight*, 1 Hopk. Ch. 239. **Ore.**—*Truman v. Owens*, 17 Ore. 523, 21 Pac. 665.

**91. Concord Apt. House Co. v. Alaska Refrigerator Co.**, 78 Ill. App. 682; *Mattingly v. Shortell*, 120 Ky. 52, 85 S. W. 215; *Williams v. Gilchrist*, 4 Bibb 527.

**92. Concord Apt. House Co. v. Alaska Refrigerator Co.**, 78 Ill. App. 682.

**93. Kirkpatrick v. Tipton** (Iowa), 114 N. W. 887; *Meyer v. Marshall*, 34 W. Va. 42, 11 S. E. 730.

**94. Kirkpatrick v. Tipton** (Iowa), 114 N. W. 887.

To establish an account its essential elements must be shown. *Fisse v. Blanke*, 127 Mo. App. 422, 105 S. W. 689, 692.

As to admissibility and competency of evidence, see *ENCYCLOPAEDIA OF EVIDENCE*, Vol. 1, p. 158 *et seq.*

As to sufficiency of evidence, see 1 *ENCYCLOPAEDIA OF EVIDENCE*, p. 158 *et seq.*, and the following cases: **Colo.**—*Walker v. Steel*, 9 Colo. 388, 12 Pac. 423. **Ill.**—*House v. Beak*, 43 Ill. App. 615. **Ia.**—*Frost v. Clark*, 82 Iowa 298,

48 N. W. 82. **Mo.**—*McCormack v. Sawyer*, 104 Mo. 36, 15 S. W. 998; *Mulford v. Caesar*, 53 Mo. App. 263. **N. J.**—*Weigel v. Hartman Steel Co.*, 51 N. J. L. 446, 20 Atl. 67. **S. C.**—*Ingram v. Lukens*, 30 S. C. 616, 9 S. E. 348. **Wis.**—*Hill v. Durand*, 58 Wis. 160, 15 N. W. 390.

**95. Rehill v. McTague**, 114 Pa. 82, 7 Atl. 224, 60 Am. Rep. 341.

**96. Rehill v. McTague**, 114 Pa. 82, 7 Atl. 224, 60 Am. Rep. 341.

**97. Ark.**—*Roberts v. Totten*, 13 Ark. 609. **Cal.**—*Branger v. Chevalier*, 9 Cal. 353. **Fla.**—*Moore v. Felkel*, 7 Fla. 44. **Mass.**—*Farnam v. Brooks*, 9 Pick. 212. **N. Y.**—*Weed v. Smull*, 7 Paige 573; *Ogden v. Astor*, 4 Sandf. 311. **Tenn.**—*Bankhead v. Alloway*, 6 Coldw. 56. **Va.**—*Shugart's Admr. v. Thompson's Admr.*, 10 Lehigh 434. **W. Va.**—*Ruffner v. Hewitt*, 7 W. Va. 585.

**98. Dak.**—*Waldron v. Evans*, 1 Dak. 11, 46 N. W. 607. **Mo.**—*McKeen v. Boatmen's Bank*, 74 Mo. App. 281. **Ore.**—*Normandin v. Gratton*, 12 Ore. 505, 8 Pac. 653. **Tex.**—*Fox v. Sturm*, 21 Tex. 406.

**99. Varner v. Core**, 20 W. Va. 473.

**1. Perkins v. Hart**, 11 Wheat. (U. S.) 237, 6 L. ed. 463; *Bell v. List*, 6 W. Va. 469; *McNeel v. Baker*, 6 W. Va. 153.



that an account stated is open to impeachment only by the parties to it.<sup>2</sup>

5. **Pleadings.**—a. *At Law.*—If an action at law is brought to recover an item omitted from an account stated, the declaration may be special upon such omitted item,<sup>3</sup> or the declaration may be in general *indebitatus assumpsit*.<sup>4</sup>

b. *In Equity.*—If the suit be in equity to impeach the account stated, the bill must specify the errors in the account,<sup>5</sup> and the controversy is thus narrowed to the matters so specified.<sup>6</sup>

6. **Fraud as Ground of Impeachment.**—If the ground of impeachment be that of fraud, the facts constituting such fraud must be also averred in the bill.<sup>7</sup>

7. **Mistake as Cause for Impeachment.**—If the cause for impeachment be that of mistake, the allegation of such mistake must also be made in the bill.<sup>8</sup>

8. **Defense to Action on Account Stated.**—By the weight of authority, when an account stated is sued on, it cannot be impeached under a general denial under the code system,<sup>9</sup> but it seems it may be under the general issue at common law.<sup>10</sup> Where the former rule prevails the grounds upon which it is attempted to surcharge or falsify

2. *Rehill v. McTague*, 114 Pa. 82, 7 Atl. 224, 60 Am. Rep. 341; *Parker v. Bloxam*, 20 Beav. 295, 52 Eng. Reprint 616.

3. *Remington v. Noble*, 19 Conn. 383, 387; *Sage v. Hawley*, 16 Conn. 106, 41 Am. Dec. 128.

4. *Remington v. Noble*, 19 Conn. 383, 387; *Sage v. Hawley*, 16 Conn. 106, 41 Am. Dec. 128; *Harrison v. Henderson*, 67 Kan. 202, 72 Pac. 878.

5. *N. Y.*—*Hourse v. Prime*, 7 Johns. Ch. 69, 11 Am. Dec. 403. *N. C.*—*Suttle v. Doggett*, 87 N. C. 203; *McAdoo v. Thompson*, 72 N. C. 408; *Wetherspoon v. Carmichael*, 41 N. C. 143; *Mebane v. Mebane*, 36 N. C. 403. *Va.*—*Neff v. Wooding*, 83 Va. 432, 2 S. E. 731; *Shugart's Admr. v. Thompson's Admr.*, 10 Leigh 434. *W. Va.*—*McCarty v. Chalfant*, 14 W. Va. 531; *Ruffner v. Hewitt*, 7 W. Va. 285; *McNeel v. Baker*, 6 W. Va. 153.

6. *Shugart's Admr. v. Thompson's Admr.*, 10 Leigh (Va.) 434.

7. *Kronenberger v. Binz*, 56 Mo. 121; *Silver v. St. Louis, etc. R. Co.*, 5 Mo. App. 381; *Beach v. Kidder*, 55 Hun 603, 8 N. Y. Supp. 587.

8. *Cal.*—*Hendy v. March*, 75 Cal. 566, 17 Pac. 702. *Mo.*—*Kronenberger v. Binz*, 56 Mo. 121; *Silver v. St. Louis, etc. R. Co.*, 5 Mo. App. 381. *N. Y.*—*Beach v. Kidder*, 55 Hun 603, 8 N. Y.

Supp. 587. *Va.*—*Chapman's Admr. v. Shepherd's Admr.*, 24 Gratt. 377. *W. Va.*—*Batson v. Findley*, 52 W. Va. 343, 43 S. E. 142; *Calwell v. Caperton's Admr.*, 27 W. Va. 397.

9. *Cal.*—*Hendy v. March*, 75 Cal. 566, 17 Pac. 702. *Colo.*—*St. Louis L. B. B. Co. v. Colorado Nat. Bank*, 8 Colo. 70, 5 Pac. 800. *Minn.*—*Moody v. Thwing*, 46 Minn. 511, 49 N. W. 229; *Warner v. Myrick*, 16 Minn. 91. *N. Y.*—*Barker v. Hoff*, 52 How. Pr. 382; *Anthony v. Day*, 52 How. Pr. 35; *Weeks v. Hoyt*, 5 Hun 347.

In *Warner v. Myrick*, 16 Minn. 91, the court says: "The very purpose of declaring upon an account stated is to save the necessity of proving the correctness of the items composing the same, (*Ogden v. Astor*, 4 Sandf. 332; 2 Greenl. Ev. 127;) the effect of the account stated being to establish *prima facie* the accuracy of the items without further proof, and the party seeking to impeach the account is therefore bound to show affirmatively any mistake or error complained of. *Lockwood v. Thorne*, 18 N. Y. 292."

10. *Harman v. Maddy Bros.*, 57 W. Va. 66, 49 S. E. 1009; *Thomas v. Hawkes*, 9 M. & W. (Eng.) 53. See in this connection 13 *ENCYCLOPAEDIA OF EVIDENCE*, 764. But see *Lyne v. Gilliat*, 3 Call (Va.) 5.

the account must be specially pleaded;<sup>11</sup> but in a few states the account may be assailed under a general denial.<sup>12</sup>

9. **Different Pleas in the Same Action.**—In some jurisdictions in the same action on account stated the defendant may plead several different matters of defense, though they be inconsistent.<sup>13</sup> In other jurisdictions this is not allowed.<sup>14</sup>

10. **Effect of Stated Account.**—An account stated creates a *prima facie* case of liability as to the party against whom a balance therein is shown.<sup>15</sup> Such an account is deemed conclusive unless impeached on some specified ground of fraud<sup>16</sup> or mistake<sup>17</sup> or error.<sup>18</sup>

11. **Account Stated Not an Estoppel.**—The principle is well recognized that a stated account does not operate as an estoppel,<sup>19</sup> unless

11. Ala.—Langdon v. Roane's Admr., 6 Ala. 518, 41 Am. Dec. 60. Cal.—Clarkson v. Hoyt, 36 Pac. 382; Hendy v. March, 75 Cal. 566, 17 Pac. 702. Mo.—Marmion v. Waller, 53 Mo. App. 610. Neb.—McKinster v. Hitchcock, 19 Neb. 100, 26 N. W. 705. Ore.—Fleischner v. Kubli, 20 Ore. 328, 25 Pac. 1086.

12. Bouslog v. Garrett, 39 Ind. 338.

13. McKinster v. Hitchcock, 19 Neb. 100, 26 N. W. 705.

14. Gerber v. Gerber, 52 Wash. 253, 100 Pac. 735; Seattle Nat. Bank v. Carter, 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177 and note.

15. U. S.—Wiggins v. Burkham, 10 Wall. 129, 19 L. ed. 884; Hager v. Thompson, 1 Black 80, 17 L. ed. 41; Talcott v. Chew, 27 Fed. 273; McLaughlin v. United States, 36 Ct. Cl. 138. Ill.—Bailey v. Bensley, 87 Ill. 556; Webster v. Pierce, 35 Ill. 158. La.—Flower v. Millaudon, 19 La. 195. Neb.—McKinster v. Hitchcock, 19 Neb. 109, 26 N. W. 705; Keller v. Keller, 18 Neb. 366, 25 N. W. 364. N. Y.—Samson v. Freedman, 102 N. Y. 699, 7 N. E. 419; Dows v. Durfee, 10 Barb. 213; Peck v. Minot, 4 Robt. 323. Pa.—Verrier v. Guillou, 97 Pa. 63; Sergeant v. Ewing, 30 Pa. 75. Va.—Camp v. Wilson, 97 Va. 265, 33 S. E. 591; Mertens v. Nottebohm, 4 Gratt. 163; Townes v. Birchett, 12 Leigh 173. W. Va.—Ruffner v. Hewitt, 7 W. Va. 585.

16. U. S.—Talcott v. Chew, 27 Fed. 273. Ala.—Sloan v. Guice, 77 Ala. 394. Ark.—Lawrence v. Ellsworth, 41 Ark. 502. Miss.—Peeples v. Yates, 88 Miss. 289, 40 So. 996. Mo.—McCormick v. City of St. Louis, 166 Mo. 315, 65 S. W. 1038. N. Y.—Manchester Paper Co. v. Moore, 104 N. Y. 680, 10 N. E. 861; Kock v. Bonitz, 4 Daly

117; Smith v. Ogilvie, 5 N. Y. Supp. 382. N. C.—Hawkins v. Long, 74 N. C. 781. Ore.—Fleischner v. Kubli, 20 Ore. 328, 25 Pac. 1086. Va.—Camp v. Wilson, 97 Va. 265, 33 S. E. 591.

17. U. S.—Charlotte Oil & F. Co. v. Hartog, 85 Fed. 150, 29 C. C. A. 56, 61. Ala.—Ware v. Manning, 86 Ala. 238, 5 So. 682; Sloan v. Guice, 77 Ala. 394. Conn.—Goodwin v. United States Ins. Co., 24 Conn. 591. Mo.—Pickel v. St. Louis Chamber of Commerce Assn., 10 Mo. App. 191. N. Y.—Manchester Paper Co. v. Moore, 104 N. Y. 680, 10 N. E. 861; Harley v. Eleventh Ward Bank, 76 N. Y. 618; Boyce v. Walker, 130 App. Div. 305, 114 N. Y. Supp. 166; Smith v. Ogilvie, 5 N. Y. Supp. 382. N. C.—Hawkins v. Long, 74 N. C. 781. Tenn.—Raht v. Union Consol. Min. Co., 5 Lea 1. Utah.—Lawler v. Jennings, 18 Utah 35, 55 Pac. 60; Roach v. Gilmer, 3 Utah 389, 4 Pac. 221. Va.—Camp v. Wilson, 97 Va. 265, 33 S. E. 591.

18. Camp v. Wilson, 97 Va. 265, 33 S. E. 591; Batson v. Findley, 52 W. Va. 343, 43 S. E. 142.

19. U. S.—Taber Lumb. Co. v. O'Neal, 160 Fed. 596, 87 C. C. A. 498, 601. Ill.—Reardon v. Clover, 81 Ill. App. 526; Peoria Com. Co. v. Maguire, 53 Ill. App. 470. Ind.—Higham v. Harris, 108 Ind. 246, 8 N. E. 255. La.—Pavie v. Noyrel, 5 Mart. (N. S.) 92. Neb.—McKinster v. Hitchcock, 19 Neb. 100, 26 N. W. 705. N. Y.—Bratt v. Scott, 63 Hun 632, 18 N. Y. Supp. 507; Schuyler v. Ross, 59 Hun 628, 13 N. Y. Supp. 944; Porter v. Lobach, 2 Bosw. 188. Pa.—Verrier v. Guillou, 97 Pa. 63. S. C.—Ingraham v. Lukens, 30 S. C. 616, 9 S. E. 348. Tex.—Fox v. Sturm, 21 Tex. 407; Seiber v. Johnson Merc. Co., 40 Tex. Civ. App. 600, 90 S. W. 600; Mine &

the party seeking to impeach it has done some act which causes the other party to alter his situation in relation to it to his prejudice.<sup>20</sup>

**12. What Acts Do Not Create an Estoppel.**—Upon the doctrine just stated, a party is not precluded from impeaching an account stated because its statement has been signed by the parties,<sup>21</sup> or a note given in settlement thereof,<sup>22</sup> a receipt in full given,<sup>23</sup> a release executed,<sup>24</sup> or an agreement made that the settlement of the account shall be conclusive.<sup>25</sup>

**13. Relieves From Proof of Items.**—An account stated simply relieves the party relying upon it of proof of the accuracy of such account.<sup>26</sup> Therefore, the introduction of the account accompanied by competent evidence that it is a stated one makes out the plaintiff's case in the first instance.<sup>27</sup>

**14. Plea of Account Stated.**—If to an action upon an open account an account stated is pleaded in bar of the action, the plaintiff may take issue on such plea,<sup>28</sup> and thus try the question of account stated;<sup>29</sup> or he may reply by way of surcharging and falsifying the account stated in the plea,<sup>30</sup> or in some manner specify his objections to the account stated.<sup>31</sup> In some jurisdictions the plaintiff is bound

*Smelt S. Co. v. Creel* (Tex. Civ. App.), 79 S. W. 67. *Utah*.—*Lawler v. Jennings*, 18 Utah 35, 55 Pac. 60. *Vt.*—*Bushes v. Allen*, 31 Vt. 631. *Va.*—*Camp v. Wilson*, 97 Va. 265, 33 S. E. 591. *W. Va.*—*Ruffner v. Hewitt*, 7 W. Va. 585.

*20. U. S.*—*Long-Bell Lumb. Co. v. Stump*, 86 Fed. 574, 30 C. C. A. 260; *Ranald S. S. Co. v. Wesenberg & Co.*, 122 Fed. 969. *Ky.*—*Vicroy v. Tolle*, 10 Ky. L. Rep. 317. *Minn.*—*Wharton v. Anderson*, 28 Minn. 301, 9 N. W. 860. *Pa.*—*In re O'Bold's Estate*, 221 Pa. 145, 70 Atl. 555. *Wis.*—*Segelke & Kohlaus Mfg. Co. v. Vincent*, 135 Wis. 237, 115 N. W. 806.

**Estoppel.**—It is held in *Segelke & Kohlaus Mfg. Co. v. Vincent*, 135 Wis. 237, 115 N. W. 806, *quoting* from *Wharton v. Anderson*, 28 Minn. 301, 9 N. W. 860, that an account stated is not conclusively correct unless in arriving at the agreed balance there has been some concession made upon items disputed between the parties, so that the balance is the result of a compromise, or some act has been done or forbore in consequence of the accounting, and relying upon it, the party claiming the benefit of it would be placed in a worse position than if

the accounting had not been had, so as to bring the case within the principles of an *estoppel in pais*.

*21. U. S.*—*York v. Wistar*, 30 Fed. Cas. No. 18,141. *Cal.*—*Auzerais v. Naglee*, 74 Cal. 60, 15 Pac. 371. *Conn.*—*Mitchell v. Allen*, 38 Conn. 188. *La.*—*Darby v. Lastrapes*, 28 La. Ann. 605. *N. Y.*—*Bruen v. Hone*, 2 Barb. 586.

*22. Flower v. Millaudon*, 19 La. 185; *Green v. Glascock*, 9 Rob. (La.) 119.

*23. Clark v. Marbourg*, 33 Kan. 471, 6 Pac. 548; *Ingraham v. Lukens*, 30 S. C. 616, 9 S. E. 348.

*24. Kelsey v. Hobby*, 16 Pet. (U. S.) 269, 10 L. ed. 961.

*25. Peteet v. Crawford*, 51 Miss. 43.

*26. U. S.*—*Talcott v. Chew*, 27 Fed. 273. *Del.*—*Thompson v. Thompson*, 2 Har. 202. *Miss.*—*Reinhardt v. Hines*, 51 Miss. 344.

*27. Talcott v. Chew*, 27 Fed. 273; *McKinster v. Hitchcock*, 19 Neb. 100, 26 N. W. 705.

*28. Perkins v. Hart*, 11 Wheat. (U. S.) 237, 6 L. ed. 463; *Bell v. List*, 6 W. Va. 469; *McNeel v. Baker*, 6 W. Va. 153.

*29. Varner v. Core*, 20 W. Va. 472.

*30. Costin v. Baxter*, 41 N. C. 197.

*31. Varner v. Core*, 20 W. Va. 472.



by such plea in a court of law,<sup>82</sup> and he is then compelled to resort to equity to impeach such account.<sup>83</sup>

**15. Reply of Fraud to Plea of Account Stated.**—On well settled principles, if fraud was used in the procurement of an account stated, there seems no good reason why the question of fraud should not be tried in any action at law to defeat such plea in all cases.<sup>84</sup>

**16. Relationship of Parties as to Account Stated.**—In the matter of the impeachment of an account stated, the relationship of the parties is not to be overlooked.<sup>85</sup> This relationship may be that of ordinary debtor and creditor,<sup>86</sup> or the parties may sustain some sort of fiduciary or confidential relationship to each other.<sup>87</sup>

32. *Wonderly v. Christian*, 91 Mo. App. 158; *Roach v. Gilmer*, 3 Utah 389, 4 Pac. 221.

33. *Wonderly v. Christian*, 91 Mo. App. 158.

34. An account stated may be assailed in equity for fraud. *Ala.*—*Moses v. Noble*, 86 Ala. 407, 5 So. 181. *Fla.*—*White v. Walker*, 5 Fla. 478. *Ky.*—*Waggoner v. Minter*, 7 J. J. Marsh. 173; *Barnett's Admr. v. Barnett*, 6 J. J. Marsh. 499. *Md.*—*Gover v. Hall*, 3 Har. & J. 43. *Miss.*—*Taylor v. Blackman*, 12 So. 458. *Mo.*—*Kraushaar v. Brant*, 22 Mo. App. 162; *Cannon v. Sanford*, 20 Mo. App. 590. *Ohio.*—*Fowler v. Piatt's Admr.*, *Wright* 206. *S. C.*—*M'Crae v. Hollis*, 4 Desaus. Eq. 122. *Tenn.*—*Love v. White*, 4 Hayw. 210; *Gray v. Washington*, *Cooke* 320.

And the jurisdiction of law and equity is correct in cases of fraud. *U. S.*—*Cady v. Whaling*, 7 Biss. 430, 4 Fed. Cas. No. 2,285. *Conn.*—*Phalen v. Clark*, 19 Conn. 421, 1 Am. Rep. 253. *Ill.*—*Robinson v. Chesseldine*, 5 Ill. 332. *Ky.*—*Harlan v. Wingate*, 2 J. J. Marsh. 138. *Mich.*—*Wright v. Hake*, 38 Mich. 325. *Mo.*—*Nelson v. Betts*, 21 Mo. App. 219.

So no good reason is assignable why an account stated should not be impeached when interposed as a defense to an action at law. *Knott v. Seamands*, 25 W. Va. 99.

35. *Ala.*—*Stewart v. McMurray*, 82 Ala. 269, 3 So. 47; *Pauling v. Creagh's Admr.*, 54 Ala. 646, 652; *Rembert v. Brown*, 17 Ala. 667. *Ga.*—*Lewis v. Allen*, 68 Ga. 398. *Ill.*—*Jennings v. McConnel*, 17 Ill. 148; *Hopkinson v. Jones*, 28 Ill. App. 409; *Gruby v. Smith*, 13 Ill. App. 43. *Md.*—*Smith v. Davis*, 49 Md. 470. *N. Y.*—*San-*

*chez v. Dickinson*, 65 Hun 620, 19 N. Y. Supp. 733, 47 N. Y. St. 203; *Philips v. Belden*, 2 Edw. Ch. 1; *Ogden v. Astor*, 4 Sandf. 311. *Ore.*—*Hoyt v. Clarkson*, 23 Ore. 51, 31 Pac. 198. *S. C.*—*McDow v. Brown*, 2 Rich. L. 95, 106. *Tex.*—*McGary v. Lamb*, 3 Tex. 342. *W. Va.*—*McKay v. McKay's Admr.*, 33 W. Va. 724, 11 S. E. 213. *Eng.*—*Barrett v. Hartley*, L. R. 2 Eq. 789, 12 Jur. (N. S.) 426, 14 L. T. 474; *Williamson v. Barbour*, 50 L. J. Ch. 147, 9 Ch. Div. 529, 37 L. T. 698; *Revett v. Harvey*, 1 Sim. & St. 502, 57 Eng. Reprint 199; *Allfrey v. Allfrey*, 10 Beav. 353, 50 Eng. Reprint 618; *Vaughan v. Lloyd*, cited in *Wharton v. May*, 5 Ves. Jr. 27, 48, 31 Eng. Reprint 454; *Matthews v. Wallwyn*, 4 Ves. Jr. 118, 31 Eng. Reprint 62; *Newman v. Payne*, 2 Ves. Jr. 199, 30 Eng. Reprint 593; *Kennedy v. Brown*, 13 C. B. (N. S.) 676, 106 E. C. L. 677.

36. *Ogden v. Astor*, 4 Sandf. (N. Y.) 311.

37. *Ala.*—*Paulling v. Creagh's Admr.*, 54 Ala. 646; *Rembert v. Brown*, 17 Ala. 667. *Ill.*—*Hopkinson v. Jones*, 28 Ill. App. 409; *Gruby v. Smith*, 13 Ill. App. 43. *N. Y.*—*Sanchez v. Dickinson*, 65 Hun 620, 19 N. Y. Supp. 733, 47 N. Y. St. 203; *Philips v. Belden*, 2 Edw. Ch. 1. *Ore.*—*Hoyt v. Clarkson*, 23 Ore. 51, 31 Pac. 198. *S. C.*—*McDow v. Brown*, 2 Rich. L. 95, 106. *Eng.*—*Barrett v. Hartley*, L. R. 2 Eq. 789, 12 Jur. (N. S.) 426, 14 L. T. 474; *Revett v. Harvey*, 1 Sim. & St. 502, 57 Eng. Reprint 199; *Allfrey v. Allfrey*, 10 Beav. 353, 50 Eng. Reprint 618; *Vaughan v. Lloyd*, cited in *Wharton v. May*, 5 Ves. Jr. 27, 48, 31 Eng. Reprint 454; *Matthews v. Wallwyn*, 4 Ves. Jr. 118, 31 Eng. Reprint 62; *Newman v. Payne*, 2 Ves. Jr. 199, 30 Eng.

**Effect of Such Relationship on Account Stated.**—If the relationship of the parties be fiduciary or confidential, the courts are somewhat inclined to relax the rule as to the effect to be given to an account stated,<sup>38</sup> when it is sought to be impeached by the party reposing the trust or confidence.<sup>39</sup>

**Illustrations of This Doctrine.**—Thus, if the relationship of the parties be that of principal and agent,<sup>40</sup> attorney and client,<sup>41</sup> guardian and ward,<sup>42</sup> or trustee and beneficiary,<sup>43</sup> the courts will more readily open the account than one stated between an ordinary debtor and creditor.<sup>44</sup>

**17. Grounds of Impeachment of Account Stated.** — a. *Fraud.* — If the accounting between the parties be affected by fraud, the stated account will not be upheld to the extent that the fraud has entered into it.<sup>45</sup>

b. *Mistake.* — In all jurisdictions a stated account shown to have been made under a mistake of fact will be corrected so far as it may be affected by such mistake;<sup>46</sup> and such account will be corrected, when injustice has been done, if it be the result of a mistake of law.<sup>47</sup> Nor is it necessary that the mistake be mutual.<sup>48</sup>

c. *Accident.* — If it be made to appear that the account stated was the result of accident, the court will relieve from the effect thereof.<sup>49</sup>

**18. Bar to Impeachment of Account Stated.** — a. *Knowledge of the Error.* — When the parties have full knowledge of all the transactions which it involves and there is no unfairness in the accounting, a stated account is conclusive.<sup>50</sup>

Reprint 593; *Williamson v. Barbour*, 50 L. J. Ch. 147, 9 Ch. Div. 529, 37 L. T. 698; *Kennedy v. Brown*, 13 C. B. (N. S.) 676, 106 E. C. L. 677.

38. *Paulling v. Creagh's Admrs.*, 54 Ala. 646, 652; *Hoyt v. Clarkson*, 23 Ore. 51, 31 Pac. 198.

39. See cases cited in last preceding note.

40. *Rembert v. Brown*, 17 Ala. 667; *Hoyt v. Clarkson*, 23 Ore. 51, 31 Pac. 198.

41. *Jennings v. McConnel*, 17 Ill. 148.

42. Ala. — *Stewart v. McMurray*, 82 Ala. 269, 3 So. 47; Ga. — *Lewis v. Allen*, 68 Ga. 398. Md. — *Smith v. Davis*, 49 Md. 470. Tex. — *McGary v. Lamb*, 3 Tex. 342. W. Va. — *McKay v. McKay's Admrs.*, 33 W. Va. 724, 11 S. E. 213.

43. *Parker's Admrs. v. Parker* (N. J. Eq.), 5 Atl. 586; *Nail v. Martin*, 39 N. C. 159.

44. Ala. — *Stewart v. McMurray*, 82 Ala. 269, 3 So. 47; *Rembert v. Brown*, 17 Ala. 667. Ga. — *Lewis v. Allen*, 68 Ga. 398. Ill. — *Jennings v. McConnel*, 17 Ill. 148. Md. — *Smith v. Davis*, 49

Md. 470. N. J. — *Parker's Admr. v. Parker* (N. J. Eq.), 5 Atl. 586. N. C. — *Nail v. Martin*, 39 N. C. 159. Ore. — *Hoyt v. Clarkson*, 23 Ore. 51, 31 Pac. 198. Tex. — *McGary v. Lamb*, 3 Tex. 342. W. Va. — *McKay v. McKay's Admrs.*, 33 W. Va. 724, 11 S. E. 213.

45. *Ware v. Manning*, 86 Ala. 258, 5 So. 682; *Bull v. City of Quincy*, 52 Ill. App. 186.

46. Cal. — *Polhemus v. Heiman*, 50 Cal. 438; *Branger v. Chevalier*, 9 Cal. 353. Ill. — *Eddie v. Eddie*, 61 Ill. 134. Minn. — *Wharton v. Anderson*, 28 Minn. 301, 9 N. W. 860. Ore. — *State v. Brown*, 10 Ore. 215.

47. *Louisville Bkg. Co. v. Asher*, 112 Ky. 138, 65 S. W. 133, 99 Am. St. Rep. 283; *Wharton v. Anderson*, 28 Minn. 301, 9 N. W. 860.

48. *Sedgwick v. Macy*, 24 App. Div. 1, 49 N. Y. Supp. 154.

49. *Lancey v. Maine Cent. R. Co.*, 72 Me. 34; *Boston & L. R. Corp. v. Nashua & L. R. Corp.*, 157 Mass. 258, 31 N. E. 1067.

50. U. S. — *Charlotte Oil & Fertilizer Co. v. Hartog*, 85 Fed. 150, 29 C.

b. *Gross Negligence*. — If a party has been grossly negligent in the making of a stated account, he may be denied relief because of such negligence.<sup>51</sup>

c. *Compromise*. — A stated account made by way of compromise will not be disturbed.<sup>52</sup>

d. *Laches*. — If a party seeking to impeach a stated account has been guilty of laches in bringing his suit for that purpose, he will not be granted relief.<sup>53</sup>

#### 19. Matters Considered in Suits to Impeach Stated Account.

a. *Loss or Destruction of Vouchers*. — If vouchers belonging to the party against whom it is sought to impeach an account have been lost or destroyed, this constitutes a strong circumstance for withholding relief.<sup>54</sup>

b. *Death of Party*. — So the death of one of the parties to the account stated is another circumstance which the court will consider in a suit to impeach such an account.<sup>55</sup>

c. *Payment of Balance*. — So the payment of the balance found due on an account stated operates against a party seeking to impeach the same.<sup>56</sup>

20. *Evidence*. — a. *Burden of Proof*. — Whoever would impugn the accuracy of an account stated takes upon himself the burden of proving that it is inaccurate,<sup>57</sup> whether in a suit to impeach such ac-

C. A. 56. Ala. — Hunt v. Stockton Lumb. Co., 113 Ala. 387, 21 So. 454. Ark. — Lanier v. Union Mtg. Bkg. & T. Co., 64 Ark. 39, 40 S. W. 466. D. C. — Marmion v. McClellan, 11 App. Cas. 467. Fla. — Daytona Bridge Co. v. Bond, 47 Fla. 136, 36 So. 445. Kan. — Dobbs v. Campbell, 10 Kan. App. 185, 63 Pac. 289. La. — Glennon v. Vatter, 109 La. 942, 33 So. 930; Douglass v. Manning, 21 La. Ann. 231; Mornay v. Bordelais, 6 Rob. 318. Mo. — Wonderly v. Christian, 91 Mo. App. 158; Gibson v. Smith, 77 Mo. App. 233. N. Y. — Clark v. Fairchild, 22 Wend. 576; Schettler v. Smith, 2 Jones & S. 17; Peek v. Minot, 4 Robt. 323. Pa. — Shillingford v. Good, 95 Pa. 25; *In re Peters' Estate*, 20 Pa. Super. 223. Vt. — Draper v. Pierce, 29 Vt. 250. Va. — Camp v. Wilson, 97 Va. 265, 33 S. E. 591; Gore v. Buzzard's Admrs., 4 Leigh 231. W. Va. — Batson v. Findley, 52 W. Va. 343, 43 S. E. 142.

51. Cannon v. Sanford, 20 Mo. App. 590.

52. Wharton v. Anderson, 28 Minn. 301, 9 N. W. 860. See the title "Compromise and Settlement."

53. Bell v. Moon, 79 Va. 341. For a full presentation of this subject see title "Laches."

54. Md. — Brown v. Rowles, 21 Md. 11. N. H. — George v. Johnson, 45 N. H. 456. N. Y. — Bruen v. Hone, 2 Barb. 586. Pa. — Emmons v. Stahlnecker, 11 Pa. 366.

55. U. S. — Edler v. Clark, 51 Fed. 117. Ala. — Paulding v. Creagh's Admrs., 54 Ala. 646, 653. Pa. — Emmons v. Stahlnecker, 11 Pa. 366.

56. Ala. — Kilpatrick v. Henson, 81 Ala. 464, 1 So. 188. Ill. — Peddicord v. Connard, 85 Ill. 102; Seal Lock Co. v. Chicago Mfg. & Optical Co., 98 Ill. App. 637. La. — Flower v. Millaudon, 19 La. 185.

57. U. S. — Freeland v. Heron, 7 Cranch 147, 3 L. ed. 297; United States v. Kuhn, 4 Cranch C. C. 401, 26 Fed. Cas. No. 15,545; Baker v. Biddle, 1 Baldw. 394, 2 Fed. Cas. No. 764. Cal. — Cross v. Sacramento Sav. Bk., 66 Cal. 462, 6 Pac. 94. Conn. — Goodwin v. U. S. Annuity & L. Ins. Co., 24 Conn. 591. Ill. — Gage v. Parmelee, 87



count<sup>58</sup> or when it is pleaded by a defendant in bar of an action.<sup>59</sup>

b. *Character of Evidence.*—The nature of the evidence admissible in a suit to impeach an account stated does not differ from that employed in other matters of controversy.<sup>60</sup>

c. *Sufficiency of the Evidence.*—The rule as to the sufficiency of the evidence to show fraud or mistake in a stated account requires that such evidence be clear and satisfactory.<sup>61</sup>

21. *Relief Granted.*—a. *Nature Thereof.*—The nature of the relief that will be granted in a suit to impeach a stated account will depend upon the pleadings in the cause<sup>62</sup> and the sufficiency of the evidence in support thereof.<sup>63</sup>

Ill. 329; Concord Apt. House Co. v. Alaska Refrig. Co., 78 Ill. App. 682; McDavid v. Ellis, 78 Ill. App. 381. Ky.—Waggoner v. Minter, 7 J. J. Marsh. 173. La.—Flower v. Millaudon, 19 La. 195. Md.—Brown v. Rowles, 21 Md. 11. Mo.—Kenneth Inv. Co. v. Nat. Bank of Republic, 96 Mo. App. 125, 70 S. W. 173. N. J.—Brown v. Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250. N. Y.—Conville v. Shook, 144 N. Y. 686, 39 N. E. 405; Welsh v. German American Bank, 73 N. Y. 424, 29 Am. Rep. 175; Little v. McClain, 134 App. Div. 197, 118 N. Y. Supp. 916. N. C.—Gooch v. Vaughan, 92 N. C. 610. N. D.—Montgomery v. Fritz, 7 N. D. 348, 75 N. W. 266. Ohio.—Fowler v. Piatt's Admr., Wright 206. Ore.—Fisk v. Basche, 31 Ore. 178, 49 Pac. 981. Pa.—Shillingford v. Good, 95 Pa. 25. S. C.—Fraser v. Hext, 2 Strobb. Eq. 250. Tenn.—Raht v. Union Consol. Min. Co., 5 Lea 1. Va.—Goldsmith v. Latz, 96 Va. 680, 32 S. E. 483; Neff v. Wooding, 83 Va. 432, 2 S. E. 731; Wimbish v. Rawlins' Exr., 76 Va. 48; Townes v. Birchett, 12 Leigh 173; Freeland v. Cocke's Representatives, 3 Munf. 352. W. Va.—Ruffner v. Hewitt, 7 W. Va. 585. Wis.—Freeman v. Bolzell, 63 Wis. 378, 23 N. W. 708. Eng.—Pritt v. Clay, 6 Beav. 503, 49 Eng. Reprint 920.

58. U. S.—Stearns v. Page, 7 How. 819, 12 L. ed. 928. Ala.—Paulling v. Creagh's Admr., 54 Ala. 646. Fla.—Moore v. Felkel, 7 Fla. 44. La.—Waters v. Briscoe, 11 La. Ann. 639; Kimball v. Brander, 6 La. 711. N. J.—Somers v. Cresse (N. J. Eq.), 13 Atl. 23. N. Y.—Chubbuck v. Vernam, 42 N. Y. 432. N. C.—Gooch v. Vaughan, 92 N. C. 610. N. D.—Montgomery v.

Fritz, 7 N. D. 348, 75 N. W. 266. Wis.—Hoyt v. McLaughlin, 52 Wis. 280, 8 N. W. 889. Eng.—Pit v. Cholmondeley, 2 Ves. 565, 28 Eng. Reprint 360.

59. Mo.—Goodrich v. Coffin, 83 Me. 324, 22 Atl. 217. Miss.—Abraham v. McCurdy, 15 So. 137. N. Y.—Chubbuck v. Vernam, 42 N. Y. 432.

60. D. C.—Bean v. Wheatley, 13 App. Cas. 473. Mass.—Wakefield v. Farnum, 170 Mass. 422, 49 N. E. 640. Va.—Johnson's Exrs. v. Johnson, 4 Call 38. See ENCYCLOPEDIA OF EVIDENCE, title "Accounts, Accounting, and Accounts Stated," 129-184.

61. Cal.—Branger v. Chevalier, 9 Cal. 353. La.—Mornay v. Bordelais, 6 Rob. 318. Miss.—Stebbins v. Niles, 3 Cushm. 267; Coopwood v. Baldwin, 3 Cushm. 212. Neb.—McKinster v. Hitchcock, 19 Neb. 100, 26 N. W. 705. N. J.—Brown v. Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250, 256, 257. R. I.—Seamans v. Burt, 11 R. I. 320. W. Va.—Chapman v. Liverpool S. & C. Co., 57 W. Va. 395, 50 S. E. 601; Harman v. Maddy Bros., 57 W. Va. 66, 49 S. E. 1009. Wis.—Case v. Fish, 58 Wis. 56, 15 N. W. 808.

Discussion of the Rule as to the Sufficiency of the Evidence.—The rule or principle relating to the sufficiency of the evidence to impeach an account stated is well considered in the case of Harman v. Maddy Bros., 57 W. Va. 66, 49 S. E. 1009.

62. U. S.—Stearns v. Page, 7 How. 819, 12 L. ed. 928. Ala.—Moses v. Noble, 86 Ala. 407, 5 So. 181. Cal.—Branger v. Chevalier, 9 Cal. 353. N. Y.—Philips v. Belden, 2 Edw. Ch. 1.

63. White v. Walker, 5 Fla. 478; Botifleur's Sureties v. Weyman, 1 MeCord Eq. (S. C.) 156.

b. *Extent of Relief.*—If the fraud or mistake is properly shown to have entered into the whole account stated, it will be opened *in toto* and the account restated.<sup>64</sup> But if the fraud or mistake relate to only a part of the items in the account, the action of the court will be restricted to such items only.<sup>65</sup>

c. *Relief in Suit to Surcharge or Falsify.*—If the suit be only to surcharge or falsify as to some items of the account, the court will not open the whole account,<sup>66</sup> and the other parts of the account will be treated as conclusively correct.<sup>67</sup>

22. *Form of Decree.*—a. *Interlocutory.*—In a suit in equity to surcharge or falsify an account stated, if the court decide to open the account *in toto* the cause will be referred to a master to restate the account anew;<sup>68</sup> but if only certain items are in dispute the reference will be as to such items only.<sup>69</sup>

64. Ark.—Roberts v. Totten, 13 Ark. 609. Cal.—Branger v. Chevalier, 9 Cal. 353. Pa.—Rehill v. McTague, 114 Pa. 82, 7 Atl. 224, 60 Am. Rep. 341. Tenn.—Bankhead v. Alloway, 6 Coldw. 56. W. Va.—Seabright v. Seabright, 28 W. Va. 412, 433, 434.

65. N. Y.—Carpenter v. Kent, 101 N. Y. 591, 5 N. E. 787; Bruen v. Hone, 2 Barb. 586. Va.—Shugart's Admr. v. Thompson's Admr., 10 Leigh 434. W. Va.—Windon v. Stewart, 43 W. Va. 711, 721, 28 S. E. 776. Seabright v. Seabright, 28 W. Va. 412, 433, 434.

66. Ark.—Roberts v. Totten, 13 Ark. 609. Cal.—Branger v. Chevalier, 9 Cal. 353. W. Va.—Windon v. Stewart, 43 W. Va. 711, 28 S. E. 776.

67. Cal.—Branger v. Chevalier, 9 Cal. 353. N. Y.—Ogden v. Astor, 4 Sandf. 311. W. Va.—Windon v. Stewart, 43 W. Va. 711, 721, 28 S. E. 776.

68. Ala.—Paulling v. Creagh's Admrs., 54 Ala. 646. Ark.—Roberts v. Totten, 13 Ark. 609. Cal.—Branger v. Chevalier, 9 Cal. 353. Conn.—Goodwin v. U. S. Annuity & L. Ins. Co., 24 Conn. 591. Ill.—Sutphen v. Cushman, 35 Ill. 186. Mass.—Farnam v. Brooks, 9 Pick. 212. N. Y.—Liscomb v. Agate, 67 Hun 388, 22 N. Y. Supp. 126; Bullock v. Boyd, 1 Hoffm. Ch. 294; Barrow v. Rhinelander, 1 Johns. Ch. 550; Bruen v. Hone, 2 Barb. 586. Pa.—Rehill v. McTague, 114 Pa. 82, 7 Atl. 224, 60 Am. Rep. 341. S. C.—McDow v. Brown, 2 Rich. L. 95, 105. Tenn.—Bankhead v. Alloway, 6 Coldw. 56. Eng.—Beaumont v. Boulton, 7 Ves. Jr. 599, 32 Eng. Reprint 241, 5 Ves. Jr. 485, 81 Eng. Reprint

695; Brown v. Pring, 1 Ves. 407, 27 Eng. Reprint 1109; Vernon v. Vawdry, 2 Atk. 119, 26 Eng. Reprint 474.

69. U. S.—Allen-West Com. Co. v. Patillo, 90 Fed. 628, 33 C. C. A. 194, 61 U. S. App. 94. Ala.—Moses v. Noble, 86 Ala. 407, 5 So. 181; Paulling v. Creagh's Admrs., 54 Ala. 646, 652; Cowan v. Jones, 27 Ala. 317, 325. Ark.—Roberts v. Totten, 13 Ark. 609. Cal.—Branger v. Chevalier, 9 Cal. 353. Fla.—White v. Walker, 5 Fla. 478. Ga.—Wilson v. Frishie, 57 Ga. 269. Md.—Gover v. Hall, 3 Har. & J. 43. Mass.—Farnam v. Brooks, 9 Pick. 212. Mo.—Boyle v. Hardy, 28 Mo. 390; Maguire v. Filley, 9 Mo. App. 581. N. J.—Brown v. Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250. N. Y.—Conville v. Shook, 144 N. Y. 686, 39 N. E. 405; Carpenter v. Kent, 101 N. Y. 591, 5 N. E. 787; Smith v. Ogilvie, 5 N. Y. Supp. 382; Berdell v. Allen, 22 Jones & S. 38, 3 N. Y. St. 523; Bruen v. Hone, 2 Barb. 586; Philips v. Belden, 2 Edw. Ch. 1; Ogden v. Astor, 4 Sandf. 311. N. C.—Compton v. Culberson, 17 N. C. 93. S. C.—Murrell v. Greenland, 1 Desaus. 332; McDow v. Brown, 2 Rich. L. 95, 105. S. D.—Hale v. Hale, 14 S. D. 644, 86 N. W. 650. Tenn.—Patton v. Cone, 1 Lea 14; Bankhead v. Alloway, 6 Coldw. 56, 75. Va.—Chapman v. Shepherd, 24 Gratt. 377. W. Va.—Ruffner v. Hewitt, 7 W. Va. 585. Wis.—Miller v. Chippewa County 58 Wis. 630, 17 N. W. 535. Eng.—Bourke v. Bridgman, 1 Barn. K. B. 272, 94 Eng. Reprint 185; Brownell v. Brownell, 2 Bro. C. C. 62, 29

b. *Final Decree*.—After the coming in of the master's report, it is usually confirmed by a final decree,<sup>70</sup> after disposing of the exceptions thereto if any are filed to such report,<sup>71</sup> and a decree is entered adjudicating the amount due to the party in whose favor the balance on the account exists.<sup>72</sup>

**23. Variance in Actions on Account.**—a. *In General*.—The rule is rooted in the rules and principles governing the trial of causes that the *allegata* and *probata* must correspond; and in an action on any form of account this doctrine is applicable.<sup>73</sup>

**Illustrations.**—Cases illustrative of the doctrine of variance in actions upon account are found in the notes.<sup>74</sup>

b. *Precautions to Avoid Variance—Joinder of Counts*.—As counts on an open account and one stated may be joined in the same pleading, it is advisable to do so for the purpose of admitting the evidence in support of the action in any event of the case.<sup>75</sup>

c. *Amendment of Bill*.—If the suit be one in equity to surcharge or falsify an account stated, the courts are liberal in allowing amendments to the bill to avoid variance.<sup>76</sup>

Eng. Reprint 35; *Vernon v. Vawdry*, 2 Atk. 119, 26 Eng. Reprint, 474.

70. *Ala.*—*Moore v. Hubbard*, 4 *Ala.* 187. *Ia.*—*Hershee v. Hershey*, 15 *Iowa* 185. *Miss.*—*Brooks v. Robinson*, 54 *Miss.* 272. *N. J.*—*Ruckman v. Decker*, 28 *N. J. Eq.* 5.

71. *U. S.*—*Kimberly v. Arms*, 129 *U. S.* 512, 9 *Sup. Ct.* 355, 32 *L. ed.* 764. *Ala.*—*Moore v. Hubbard*, 4 *Ala.* 187. *Ia.*—*Hershee v. Hershey*, 15 *Iowa* 185. *Miss.*—*Brooks v. Robinson*, 54 *Miss.* 272. *N. J.*—*Ruckman v. Decker*, 28 *N. J. Eq.* 5.

72. *Ala.*—*Moore v. Hubbard*, 4 *Ala.* 187. *N. J.*—*Ruckman v. Decker*, 28 *N. J. Eq.* 5. *Tex.*—*Farley v. Ward*, 1 *Tex.* 646.

73. *Mattingly v. Shortell*, 120 *Ky.* 52, 85 *S. W.* 215; *Vanbebbler v. Plunkett*, 26 *Ore.* 562, 38 *Pac.* 707, 27 *L. R. A.* 811.

74. *Vila v. Weston*, 33 *Conn.* 42; *Milliken v. Ferguson*, 56 *Mich.* 189, 22 *N. W.* 278.

To support a declaration on an account stated, proof of a settlement of accounts is required. *Williams v. Gilchrist*, 4 *Bibb (Ky.)* 527.

In an action upon an account stated, the stating must be proved as alleged. To recover upon a *quantum meruit* the pleadings must be amended. *Mattingly v. Shortell*, 120 *Ky.* 52, 85 *S. W.* 215.

It is not necessary to show the nature of the original debt or to prove

the items constituting the account, but it must appear that a certain claim existed, of and concerning which the account was stated. *Powers v. New England F. Ins. Co.*, 68 *Vt.* 390, 35 *Atl.* 331.

If the plaintiff fails to prove the agreement he cannot recover by proving the items of the account. *Mincer v. Greene*, 47 *Misc.* 374, 94 *N. Y. Supp.* 15.

In such an action the defense of usury is available without averment that the balance claimed to be due was agreed to in consequence of fraud or mistake. *Jorgensen v. Kingsley*, 60 *Neb.* 44, 82 *N. W.* 104.

If the complaint alleges an account stated, and the answer merely denies without alleging any facts to impeach, evidence to impeach the account is inadmissible. *Moody v. Thwing*, 46 *Minn.* 511, 49 *N. W.* 229.

When the action is strictly on an account stated, only proof of an account stated will support the allegation. *Truman v. Owens*, 17 *Ore.* 523, 21 *Pac.* 665.

A due bill is admissible under an *insimul computassant* as evidence of a balance due between parties. *Fairchild v. Dennison*, 4 *Watts (Pa.)* 258.

75. *Vila v. Weston*, 33 *Conn.* 42.

76. *Corbin v. Mills' Exrs.*, 19 *Gratt. (Va.)* 438, 465; *Shugart's Admr. v. Thompson's Admr.*, 10 *Leigh (Va.)* 434.



**24. Trial by Jury.**—When the action on an account of any kind is essentially legal in its character, the right of trial by jury exists;<sup>77</sup> but the jury may be waived and the controversy submitted to the court for trial.<sup>78</sup> If the action is equitable in character, the court hears the evidence and determines the issues,<sup>79</sup> in the absence of statute otherwise providing;<sup>80</sup> but if the action is strictly for an accounting it is always the better practice to refer the case to the proper officer to have the account stated by him.<sup>81</sup>

**25. Practice in Cases of Reference.**—When a case is referred to a master or commissioner upon a bill to surcharge or falsify an account stated, the practice is not materially different from that on a reference in suits for an accounting.<sup>82</sup>

**Illustrations.**—Cases illustrative of the practice upon reference in suits brought to surcharge and falsify stated accounts are given in the notes.<sup>83</sup>

See the title "Amendments."

**Probate Settlement Prima Facie Settlement of Account.**—In *Leach v. Buckner*, 19 W. Va. 36, the court holds that an *ex parte* settlement of the fiduciary is only *prima facie* correct; and parties interested may file a bill surcharging and falsifying the account as settled.

**77.** *Noo's Exr. v. Garner's Admr.*, 70 Ala. 443.

**78. U. S.**—*Kearney v. Case*, 12 Wall. 275, 20 L. ed. 395; *Burr v. Des Moines, etc. R. Co.*, 1 Wall. 99, 102, 17 L. ed. 561; *Campbell v. Boyreau*, 21 How. 223, 16 L. ed. 96; *Kelsey v. Forsyth*, 21 How. 85, 16 L. ed. 32; *Suydam v. Williamson*, 26 How. 427, 15 L. ed. 978; *Guild v. Frontin*, 18 How. 135, 15 L. ed. 290; *Parsons v. Armor*, 3 Pet. 413, 425, 7 L. ed. 724; *United States v. Rathbone*, 2 Paine 578, 27 Fed. Cas. No. 16,121. **Ala.**—*Stein v. Jackson*, 31 Ala. 24. **Cal.**—*Russell v. Elliott*, 2 Cal. 245. **Ind.**—*Lake Erie etc. R. Co. v. Heath*, 9 Ind. 558. **Miss.**—*Lewis v. Garrett's Admr.*, 5 How. 434. **N. Y.**—*Baird v. New York*, 74 N. Y. 382, 386.

**Submission to the Court in Lieu of Jury.**—In *May v. Kloss*, 44 Mo. 300, the action was commenced before a justice of the peace. The case was taken to the circuit court and there tried with the judge sitting as a jury. At the trial testimony was offered to show that the defendant, when the statement and orders were presented to him, admitted them to be correct and that he owed the balance stated. At

the close of the evidence the judge made the following declaration of law, to which the defendant excepted, and the action of the court was affirmed by the supreme court of Missouri: "Plaintiffs ask the court to declare the law to be that if the court, sitting as a jury, believes that the plaintiffs presented the account sued on to defendant for payment, and, after having showed and read to him the assignments made thereon, defendant admitted it to be correct, the plaintiffs can recover a judgment on the same as on an account stated, without being itemized, and should be so rendered for the plaintiff."

**79.**—*Harris v. Rummel*, 83 Ark. 1, 102 S. W. 716; *State v. Churchill*, 48 Ark. 426, 3 S. W. 352, 880; *Gross v. Jones* (Miss.), 42 So. 802.

**80. Ga.**—*Brown v. Burke*, 22 Ga. 574. **Ind.**—*Redinbo v. Fretz*, 99 Ind. 458. **N. Y.**—*Townsend v. Hendricks*, 2 Sweeney 503. **Ohio**—*Chapman v. Lee*, 45 Ohio St. 356, 13 N. E. 436. **S. C.**—*Smith & Co. v. Bryce*, 17 S. C. 538.

**81. McGuire v. Wright**, 18 W. Va. 507.

**82. Seabright v. Seabright**, 28 W. Va. 412; *McGuire v. Wright*, 18 W. Va. 507.

**83. Davis v. Morriss' Exrs.**, 76 Va. 34; *Chapman's Admrs. v. Shepherd's Admr.*, 24 Gratt. (Va.) 377; *Corbin v. Mills' Exrs.*, 19 Gratt. (Va.) 438; *Shugart's Admr. v. Thompson's Admr.*, 16 Leigh (Va.) 434; *Seabright v. Sea-*

**26. Questions for Court and Jury.**—In an action upon an account stated, if the facts are undisputed the question whether the account is a stated one is for the court.<sup>84</sup> If, however, the facts are in dispute the question is one for the jury.<sup>85</sup>

**Illustrations.**—As to when the question is one for the jury or for the court, illustrations are found in the notes.<sup>86</sup>

**27. Instructions.**—When the question is whether there was an account stated, dependent upon a conflict in the testimony adduced,

bright, 28 W. Va. 412; McGuire v. Wright, 18 W. Va. 507.

**Proceedings Before the Master or Referee or Commissioners.**—In Shugart's Admr. v. Thompson's Admr., 10 Leigh (Va.) 434, the court lays down the practice very clearly and succinctly.

So, in Corbin v. Mill's Exrs., 19 Gratt. (Va.) 438, 465, it is said: "When an account has been ordered upon a proper bill, an additional objection to the settled accounts may be discovered in the progress of the case. It would be attended with inconvenience and delay to require the plaintiff in any such case to amend his bill for the purpose of alleging the additional objections. It will save time and expense, and generally be attended with no inconvenience to allow the plaintiff to raise the objection before the commissioner with a proper specification in writing, and to allow the defendant to meet the objection by an affidavit, giving to the affidavit the same weight which would have been given to an answer if the matter had been alleged in the bill. This is the full extent to which the settled rule of practice can be safely and conveniently relaxed, and this is the extent to which, as I understand it, Judge Standard meant to go in Shugart's Admr. v. Thompson's Admr., 10 Leigh 434."

The same practice as that shown in the case of Shugart's Admr. v. Thompson's Admr., 10 Leigh (Va.) 434, is observed and followed in West Virginia. Seabright v. Seabright, 28 W. Va. 412.

**84. U. S.**—P. H. McLaughlin & Co. v. United States, 37 Ct. Cl. 150. Ala.—Bryan v. Ware, 20 Ala. 687. Kan.—Dobbs v. Campbell, 10 Kan. App. 185, 63 Pac. 289. Mo.—McKeen v. Boatmen's Bank, 74 Mo. App. 281. Ore.—Crawford v. Hutchinson, 38 Ore. 578, 65 Pac. 84. S. C.—Gem Chemical

Co. v. Youngblood, 58 S. C. 56, 36 S. E. 437.

**85. Fla.**—Daytona Bridge Co. v. Bond, 47 Fla. 136, 36 So. 445. Ida.—Lewis v. Utah Const. Co., 10 Idaho 214, 77 Pac. 336. Ill.—Congress Const. Co. v. Interior Bldg. Co., 86 Ill. App. 199; Pick & Co. v. Slimmer, 70 Ill. App. 358. Ia.—Hollenbeck v. Ristine, 105 Iowa 488, 75 N. W. 355, 67 Am. St. Rep. 306. Kan.—Kansas Pac. R. Co. v. Anderson, 23 Kan. 44. Mo.—Ferguson v. Davidson, 147 Mo. 664, 49 S. W. 859. N. Y.—Spellman v. Muehlfield, 166 N. Y. 245, 59 N. E. 817; Lockwood v. Thorne, 11 N. Y. 170, 62 Am. Dec. 81; Hatch v. Von Taube, 31 Misc. 468, 64 N. Y. Supp. 393. Pa.—McMullin v. Reid, 213 Pa. 338, 62 Atl. 924. Wash.—Sturgeon v. Wightman, 32 Wash. 195, 72 Pac. 1045.

In Wiggins v. Burkham, 10 Wall. (U. S.) 129, 19 L. ed. 884, Mr. Justice Swain, considering the principle announced in the text, said: "The proposition that what is reasonable time in such cases is a question for the jury, as laid down by the court below, cannot be sustained. Where the facts are clear, it is always a question exclusively for the court. The point was so ruled by this court in Toland v. Sprague, (12 Pet. 336. See, also, Lockwood v. Thorne, 1 Kernan, 175.) Where the proofs are conflicting, the question is a mixed one of law and of fact. In such cases the court should instruct the jury as to the law upon the several hypotheses of fact insisted upon by the parties."

See the title "Jury."

**86. Little v. McClain**, 134 App. Div. 197, 118 N. Y. Supp. 916.

The court in Little v. McClain, *supra*, says: "As a rule, the question as to what is a reasonable time within which to object is for the jury, although it has been held that the retention of an account rendered for a

the court will instruct the jury as to the law governing their action in such case.<sup>87</sup>

**Illustrations.**—In the notes illustrations are given of instructions in actions on accounts stated.<sup>88</sup>

period of 19 days without objection justified the court in directing a verdict for the plaintiff as upon an account stated. *Knickerbocker v. Gould*, 115 N. Y. 533, 22 N. E. 573."

Ordinarily, whether an account presented in evidence is an account stated is a question for the jury. *Davis v. Tiernan & Co.*, 2 How. (Miss.) 786; *Lockwood v. Thorne*, 11 N. Y. 170, 62 Am. Dec. 81.

In an action upon an account, the question whether at the time of the demand of payment the account was or was not objected to by defendant was a question for the jury. *Field v. Reid*, 21 Ga. 314.

Whether silence for an unreasonable time after receipt of an account amounts to an admission of its correctness is a question for the jury. *Moran v. Gordon*, 33 Ill. App. 46.

But an account presented to one who admits its correctness, as a matter of law becomes an account stated. *Toland v. Sprague*, 12 Pet. (U. S.) 300, 9 L. ed. 1093; *Martin v. Acker*, 1 Blatchf. & H. 279, 16 Fed. Cas. No. 9,155.

87. U. S. — *Wiggins v. Burkham*, 10 Wall. 129, 19 L. ed. 884. Ala. — *Rice v. Schloss*, 90 Ala. 416, 7 So. 802; *Ware v. Manning*, 86 Ala. 238, 5 So. 682. Cal. — *Terry v. Sickles*, 13 Cal. 427; *Cusick v. Boyne*, 1 Cal. App. 643, 82 Pac. 985. Fla. — *Daytona Bridge Co. v. Bond*, 47 Fla. 136, 36 So. 445; *Martyn v. Arnold*, 36 Fla. 446, 18 So. 791. Ill. — *Miller v. Bruns*, 41 Ill. 293. Md. — *McCarty v. Harris*, 93 Md. 741. 49 Atl. 414. Mich. — *Rosenfield v. Fortier*, 94 Mich. 29, 53 N. W. 930; *Burritt v. Villeneuve*, 92 Mich. 282, 52 N. W. 614; *Peter v. Thiekstun*, 51 Mich. 589, 17 N. W. 68; *White v. Campbell*, 25 Mich. 463. Miss. — *Anding v. Levy*, 57 Miss. 51. Mo. — *Carroll v. Paul's Admr.*, 16 Mo. 226. N. Y. — *Robbins v. Downey*, 16 N. Y. Supp. 205, 41 N. Y. St. 95. Wis. — *Valley Lumber Co. v. Smith*, 71 Wis. 304, 37 N. W. 412, 5 Am. St. Rep. 216; *Cobb v. Arundell*, 26 Wis. 553.

88. Ala. — *Syson v. Hieronymus*, 127

Ala. 482, 28 So. 967; *Rice v. Schloss*, 90 Ala. 416, 7 So. 802; *Ware v. Manning*, 86 Ala. 238, 5 So. 682; *Bryan v. Ware*, 20 Ala. 687. Conn. — *Goodwin v. U. S. Annuity & L. Ins. Co.*, 24 Conn. 591. Fla. — *Martyn v. Arnold*, 36 Fla. 446, 18 So. 791. Ga. — *Field v. Reid*, 21 Ga. 314. Ill. — *Beebe v. Smith*, 194 Ill. 634, 62 N. E. 856; *Eddie v. Eddie*, 61 Ill. 134; *F. J. Dewes Brewery Co. v. Kerwin*, 107 Ill. App. 620. Mich. — *Wood v. O'Callaghan*, 140 Mich. 598, 104 N. W. 36. Mo. — *Burger v. Burger*, 34 Mo. App. 153. Neb. — *Hendrix v. Kirkpatrick*, 48 Neb. 670, 67 N. W. 759; *Brewer v. Wright*, 25 Neb. 305, 41 N. W. 159. N. J. — *Bolton v. Hodgson*, 1 N. J. L. 229. Ore. — *Fleishner v. Kubli*, 20 Ore. 328, 25 Pac. 1086. Tex. — *Mine & Smelter Supply Co. v. Creel* (Tex. Civ. App.), 79 S. W. 67. W. Va. — *Harman v. Maddy Bros.*, 57 W. Va. 66, 49 S. E. 1009. Wis. — *Cobb v. Arundell*, 26 Wis. 553.

**Instructions.—What Constitutes an Account Stated.**—In *Ware v. Manning*, 86 Ala. 238, 5 So. 682, the following instruction as to what constitutes an account stated was held to be correct: "The court charges the jury that to make an account a stated account it is not necessary that a balance be struck by the parties, by deducting what one party owes from what the other owes; nor is it necessary that the exact amount of the account be ascertained by making additions and counting of interest due on the account, and thus ascertaining the exact amount of the account. If a man is shown his account, and the items charged against him, and he makes no objection to the account, then this makes the account a stated account."

In *Watkins v. Ford*, 69 Mich. 357, 37 N. W. 300, the following instruction was held to be strictly accurate and expressed in a clear language: "In this case the plaintiff sues upon an account stated. 'An account stated means a balance struck between the parties on a settlement; and where a plaintiff is able to show that the mutual dealings which have occurred be-



**28. Verdict.**—*a. In General.*—In an action on an account stated, the verdict must ordinarily be restricted to the balance shown by such account.<sup>89</sup>

*b. Directing Verdict.*—If the accuracy of the account stated is not controverted, the court is authorized in directing a verdict for the plaintiff in an action brought by him on such account.<sup>90</sup>

*c. Where Account Is Only Assailed in Part.*—If the defendant has by his defense impugned the account only in part, a verdict may be properly directed as to the residue.<sup>91</sup>

**29. Judgment.**—The judgment, as in other actions, should be within the scope of the pleadings.<sup>92</sup>

tween two parties have been adjusted, settled, and a balance struck, the law implies a promise to pay that balance.”

**Opportunity to Examine Account.**—In *Shrewsbury v. Tufts*, 41 W. Va. 212, 218, 23 S. E. 692, an instruction was approved which, among other things, told the jury that if they believed “that the plaintiff had opportunity, by the exercise of reasonable care and diligence, to discover any alleged error in the same, then, as to all the items of alleged error in such accounts stated, and not within a reasonable time thereafter specifically called to the attention of the defendant by the plaintiff, he is concluded and estopped, and, as to all such items charged in the plaintiff’s account, you must find for the defendant.”

**Ignorance and Fraud.**—In *Camp v. Wilson*, 97 Va. 265, 33 S. E. 591, the court instructed that certain facts, if believed, would show an account stated, “and the plaintiff is barred from recovering damages growing out of the transaction of the parties prior to said account and settlement, unless they further believe that said balance, when accepted by said Wilson, was received by him in ignorance of the fact that such damages had been caused, or that there was some fraud in the making up of said account.”

**Receipt of Account Without Objection.**—In *Goldsmith v. Latz*, 96 Va. 680, 686, 32 S. E. 483, the court instructed the jury that “if they believe from the evidence in this case, that the plaintiff received from the defendants a statement of the account between them, showing the exact amount of

compensation for his services in the year beginning January 18, 1894, and ending January 15, 1895, and accepted the same without complaint or objection, and thereafter continued for more than a year in the employment of the defendants, without objection or complaint of the amount of the profits awarded him in the statement, such conduct, without explanation satisfactory to the jury, on the part of Latz, raises a strong presumption that he had agreed to the correctness of such settlement, and, unless the jury should believe from the evidence in this case, that such presumption is rebutted by Latz, they should find for the defendants on this question.”

89. Ill.—*Walsh v. Hettinger*, 58 Ill. App. 619. La.—*Ayland v. Rice*, 23 La. Ann. 75; *Nicholson v. Pelanne*, 14 La. Ann. 508. N. Y.—*Spinrad v. Finelite*, 6 Misc. 259, 26 N. Y. Supp. 761. Wis.—*Kehl v. Smith*, 87 Wis. 212, 58 N. W. 244.

90. *Knickerbocker v. Gould*, 115 N. Y. 533, 22 N. E. 573. See the title “Verdict.”

91. U. S.—*Wiggins v. Burkham*, 10 Wall. 129, 19 L. ed. 884. Ala.—*Joseph v. Southwark F. & M. Co.*, 99 Ala. 47, 10 So. 327; *Ware v. Manning*, 86 Ala. 238, 5 So. 682; *Burns v. Campbell*, 71 Ala. 271. Cal.—*Branger v. Chevalier*, 9 Cal. 353. Mo.—*Mulford v. Caesar*, 53 Mo. App. 263. N. Y.—*Power v. Root*, 3 E. D. Smith 70.

92. Cal.—*McCarthy v. Mt. Tecarte L. & W. Co.*, 111 Cal. 328, 43 Pac. 956. Mo.—*Davis & Co. v. Boswell*, 77 Mo. App. 294. N. Y.—*Frothingham v. Satterlee*, 70 App. Div. 613, 75 N. Y. Supp. 21.

**Illustrations.**—This principle is illustrated by the cases cited in the notes.<sup>93</sup>

**V. ACCOUNTING IN EQUITY.**—A. CLASSES OF CASES.—There are two general classes of cases in which a party may resort to a court of equity for relief in matters of account: the one in which the account is complicated,<sup>94</sup> and the other where the relation of trust or confidence between the parties exists.<sup>95</sup>

93. A judgment as for goods sold and delivered is improper where the petition makes pretense of declaring on an account stated. *Davis & Co. v. Boswell*, 77 Mo. App. 294.

See also *Frothingham v. Satterlee*, 70 App. Div. 613, 75 N. Y. Supp. 21, where it was sought to recover on an account stated in favor of a broker, and defendant was not allowed to recover under a counterclaim.

Judgment cannot exceed the balance due upon the face of the account. *McCarthy v. Mt. Tecarte L. & W. Co.*, 111 Cal. 328, 43 Pac. 956.

94. U. S.—*Brown v. Equitable Life Assur. Soc.*, 151 Fed. 1, 81 C. C. A. 1, reversing 142 Fed. 835; *McMullen Lumb. Co. v. Strother*, 136 Fed. 295, 69 C. C. A. 433; *Gunn v. Brinkley Car Works & Mfg. Co.*, 66 Fed. 382, 13 C. C. A. 529; *Alexander v. Mason*, 125 Fed. 830; *Fenno v. Primrose*, 116 Fed. 49; *Crossley v. New Orleans*, 20 Fed. 352; *Pacific R. Co. v. Atlantic & P. R. Co.*, 20 Fed. 277. Ala.—*Hall v. McKeller*, 155 Ala. 508, 46 So. 460; *Oden v. Lockwood*, 136 Ala. 514, 33 So. 895; *Attalla Min. & Mfg. Co. v. Winchester*, 102 Ala. 184, 14 So. 565; *Knotts v. Tarver*, 8 Ala. 743; *T. & J. Kirkman v. Vanlier*, 7 Ala. 217. Ark.—*Charlesworth v. Whitlow*, 74 Ark. 277, 85 S. W. 423; *McClintock v. Thweatt*, 71 Ark. 323, 73 S. W. 1093. Del.—*Farmers' & Mechanics' Bank v. Polk*, 1 Del. Ch. 167. Ill.—*Street v. Thompson*, 229 Ill. 613, 82 N. E. 367; *Miller v. Russell*, 224 Ill. 68, 79 N. E. 434; *Southworth v. People ex rel. Armstrong*, 183 Ill. 621, 56 N. E. 407; *Crown Coal & Tow Co. v. Thomas*, 177 Ill. 534, 52 N. E. 1042; *Gleason & Bailey Mfg. Co. v. Hoffman*, 168 Ill. 25, 43 N. E. 143; *Forster, Waterbury & Co. v. Webster Mfg. Co.*, 108 Ill. App. 41. Ind.—*Cummins v. White*, 4 Blackf. 356; *Peck v. Brame*, 2 Blackf. 141. Ky.—*Manion v. Manion*, 120 Ky. 1, 85 S. W. 197; *City of Covington v. Limerick*, 19 Ky. L. Rep. 330, 40 S. W. 254; *Robert Mitchell Furn. Co. v. Mon-*

*arch*, 19 Ky. L. Rep. 239, 39 S. W. 823. Mass.—*Brown v. Corey*, 191 Mass. 189, 77 N. E. 838; *Badger v. McNamara*, 123 Mass. 117. Mich.—*Blodgett v. Foster*, 114 Mich. 688, 72 N. W. 1000, 68 Am. St. Rep. 504. N. J.—*Jewett v. Bowman*, 29 N. J. Eq. 174. N. Y.—*Chase v. Knickerbocker Phosphate Co.*, 32 App. Div. 400, 53 N. Y. Supp. 220 (landlord and tenant); *Schuetz v. German-American Real Estate Co.*, 21 App. Div. 163, 47 N. Y. Supp. 500 (accounting between corporation and its president). Ore.—*Kaston v. Paxton*, 46 Ore. 308, 80 Pac. 209, 114 Am. St. Rep. 871. Pa.—*Holland v. Hallahan*, 211 Pa. 223, 60 Atl. 735; *Graham v. Cummings*, 208 Pa. 516, 57 Atl. 943; *Simpson v. Summer-ville*, 30 Pa. Super. 17; *Burton v. Train-er*, 27 Pa. Super. 626; *United States Bank v. Biddle*, 2 Pars. Eq. Cas. 31. Va.—*Wilson v. Miller*, 104 Va. 446, 51 S. E. 837. W. Va.—*White v. Cook*, 51 W. Va. 201, 41 S. E. 410, 90 Am. St. Rep. 775, 57 L. R. A. 417 (sheriff and deputy); *Latimer v. Billmyer*, 5 W. Va. 33. Eng.—*O'Connor v. Spaight*, 1 Sch. & Lef. 305.

"Courts of equity have jurisdiction of matters of account: First. Where there are mutual demands, and *a fortiori* when complicated. Second. When the accounts are on one side and a discovery is sought that is material to the relief. Third. Equity having taken jurisdiction for discovery, will, to avoid multiplicity of suits, administer suitable relief. Courts of equity decline jurisdiction in matters of accounts: First. When the demands are all on one side, and no discovery is claimed or necessary. Second. When on one side, there are demands, and on the other mere payments or sets-off, and no discovery is sought or required." *Petty v. Fogle*, 16 W. Va. 497.

95. U. S.—*Brown v. Equitable Life Assur. Soc.*, 151 Fed. 1, 81 C. C. A. 1, reversing 142 Fed. 835; *Western Union*

Tel. Co. v. American Bell Tel. Co., 125 Fed. 342, 60 C. C. A. 220; Harvey v. Sellers, 115 Fed. 757; Colonial & U. S. Mortg. v. Hutchinson Mortg. Co., 44 Fed. 219; Pacific R. Co. v. Atlantic & P. R. Co., 20 Fed. 277. Ala.—Hall v. McKeller, 155 Ala. 508, 46 So. 460; Oden v. Lockwood, 136 Ala. 514, 33 So. 895. Cal.—Sanderson v. McIntosh, 65 Cal. 36, 2 Pac. 728. Ill.—Forster, Waterbury & Co. v. Webster Mfg. Co., 108 Ill. App. 41. Mass.—Campbell v. Cook, 193 Mass. 251, 79 N. E. 261; Brown v. Corey, 191 Mass. 189, 77 N. E. 838. Mich.—Richardson v. Welch, 47 Mich. 309, 11 N. W. 172. N. Y.—Yuengling v. Betz, 120 App. Div. 709, 105 N. Y. Supp. 815; Ross v. Durant, 44 App. Div. 381, 61 N. Y. Supp. 15; Galvin v. Ryan, 108 N. Y. Supp. 574. Pa.—Fischer v. Riehl, 219 Pa. 505, 69 Atl. 70; Holland v. Hallahan, 211 Pa. 223, 60 Atl. 735; Graham v. Cummings, 208 Pa. 516, 57 Atl. 943. Va.—Wilson v. Miller, 104 Va. 446, 51 S. E. 837; Huff v. Thrash, 75 Va. 546; Crenshaw v. Seigfried, 24 Gratt. 272. Wash.—Causten v. Barnette, 49 Wash. 659, 96 Pac. 225. W. Va.—Van Dorn v. Lewis, 38 W. Va. 267, 18 S. E. 579. Wis.—Rippe v. Stodgill, 61 Wis. 38, 20 N. W. 645.

**Between Telegraph and Telephone Companies.**—The Western Union Telegraph Co. and American Bell Telephone Co. consolidated their business. By the contract the latter was to control the whole and pay to the former a percentage of all receipts. A relation of trust was established. *Western Union Tel. Co. v. American Bell Tel. Co.*, 125 Fed. 342, 60 C. C. A. 220.

**Exploiting Patent Rights.**—Complainant agreed to aid defendant in financing and exploiting patent rights for a percentage of the net profits. A trust relation was held to be created, giving complainant a right to an accounting. *Harvey v. Sellers*, 115 Fed. 757.

**Accounting by National Bank.**—A bill may be filed by the United States against a national bank, not a public depository, for an accounting of moneys deposited with it by a postmaster. *United States v. National Bank*, 73 Fed. 379.

**Accounting by Husband as Trustee of Wife's Separate Estate.**—The administrator of a deceased wife may maintain a bill in equity to compel the husband to account as trustee of her

separate equitable estate under an antenuptial contract. *Donovan v. Haynie*, 67 Ala. 51.

**Mining Property.**—One who conveys mining rights to creditors under an agreement for reconveyance when the latter realize sufficient to cancel the debt, may demand an accounting when the creditors refuse to convey. *Adams v. Lambard*, 80 Cal. 426, 22 Pac. 180.

**Between Mortgagor and Mortgagee.** Equity will aid a mortgagor where the mortgagee has sold the property and has refused to collect from the purchaser the unpaid portion of the price which represents the mortgagor's equity. *Gillett v. Hickling*, 16 Ill. App. 392.

And one who conveys land to another as security for advances to be made to a third person, which land the grantee sells, taking notes and a mortgage for the purchase money, he is entitled to an accounting of the advances made, and to a transfer to him of the securities taken on payment of the sum so found due from him. *Burlingame v. Hobbs*, 12 Gray (Mass.) 367.

**Purchase and Holding of Property for Common Benefit.**—Persons associated together for the purchase and holding of property for their common benefit may compel an account from one of their number who has acted for them, and deceived them concerning the amount paid. *Dole v. Wooldredge*, 135 Mass. 140.

**Proceeds of Insurance Held by Creditor.**—*Tateum v. Ross*, 150 Mass. 440, 23 N. E. 230.

**Purchase at tax sale by creditor on agreement to convey to debtor.** *Berlein v. Bieler*, 96 Mo. 491, 9 S. W. 916.

**Purchase at Partition Sale.**—One who purchases land at a partition sale in trust for himself and his brother, may be held to account to the latter's widow and children. *Fay v. Fay* (N. J. Eq.), 29 Atl. 356.

**Purchase at Execution Sale.**—Where a debtor gave a bond to five of his creditors, in which all their debts were included, and an attorney entered up judgment thereon, and three of the creditors attended the execution sale in the absence of the other two, and agreed not to bid against each other, and employed an attorney to bid in the property for less than one-fifth of its value, and resold and divided up the



**B. JURISDICTION. — COMPLICATED ACCOUNTS. — 1. In General. — a. Inadequate Remedy at Law.** — The general rule is that equity has jurisdiction for an accounting where the remedy at law is inadequate.<sup>90</sup>

**b. Test of Inadequacy.** — The test whereby the inadequacy of the remedy at law and the right to resort to equity may be determined is

proceeds, the three creditors were liable to account to the other two for their shares of the profits. *Hawley v. Cramer*, 4 Cow. (N. Y.) 717.

**Stock in Fund for Purchasing Steamboat.** — Where defendants agreed with complainant to take stock in a fund wherewith to build a steamboat, and defendants paid a certain amount, and complainant caused the boat to be sold at auction, and, having bid it in, sold it for a large advance, he was bound to account with defendants for their part of the proceeds of the last sale. *Cobb v. Goodhue*, 11 Paige (N. Y.) 110.

**Receiver.** — To charge one in an action of account as receiver, it is not necessary that he should have any specific appointment as such. *Kelly v. Kelly*, 3 Barb. (N. Y.) 419.

**Subscriptions for Consolidation of Railways.** — *Gould v. Seney*, 56 Hun 649, 9 N. Y. Supp. 818.

**Excessive Share in Distribution of Estate.** — If husband and wife receive in her right, in some informal distribution, not sanctioned by the county court on final distribution, or by the legal assent of the other heirs, an amount of property greater than her share of the estate, and retain it in such capacity, as her share, until the administration upon the estate is closed, they may be compelled to account for such surplus by those co-distributees who have not received their shares. *Brinson v. Cunliff*, 25 Tex. 760.

**96. U. S.** — *Root v. Lake Shore & M. S. R. Co.*, 105 U. S. 189, 26 L. ed. 975; *French v. Hay*, 22 Wall. 231, 22 L. ed. 799; *Empire Circuit Co. v. Sullivan*, 169 Fed. 1009; *Hunt v. O'Connor*, 151 Fed. 707; *Alexander v. Mason*, 125 Fed. 830; *Fenno v. Primrose*, 116 Fed. 49; *Berkey v. Cornell*, 90 Fed. 711; *Washburn & Moen Mfg. Co. v. Freeman Wire Co.*, 41 Fed. 410; *Gaines v. New Orleans*, 17 Fed. 16; *Magic Ruffle Co. v. Elm City Co.*, 14 Blatchf. 109, 16 Fed. Cas. No. 8,950; *Baker v. Biddle*, Baldw. 394, 2 Fed. Cas. No. 764. **Ala.** — *Attalla Min. & Mfg. Co. v. Winchester*,

102 Ala. 184, 14 So. 565; *Tecumseh Iron Co. v. Camp*, 93 Ala. 572, 9 So. 343; *Avery v. Ware*, 58 Ala. 475; *May v. Lewis*, 22 Ala. 646. **Colo.** — *Kayser v. Maugham*, 8 Colo. 232, 6 Pac. 803. **Conn.** — *Norwich & W. R. Co. v. Storey*, 17 Conn. 364. **Ga.** — *Printup v. Fort*, 40 Ga. 276; *Bowen v. Johnson*, 12 Ga. 9; *Powers v. Gray*, 7 Ga. 206; *McLaren v. Steapp*, 1 Ga. 376. **Ill.** — *Craig v. McKinney*, 72 Ill. 305; *Logan v. Lucas*, 59 Ill. 237; *Forster, Waterbury & Co. v. Webster Mfg. Co.*, 108 Ill. App. 41; *Crown Coal & Tow Co.*, 73 Ill. App. 679, *affirmed*, 177 Ill. 534, 52 N. E. 1042. **Ind.** — *Cummins v. White*, 4 Blackf. 356. **Ia.** — *White v. Hampton*, 10 Iowa 238; *Claussen v. Lafrenx*, 4 Greene 224. **Ky.** — *Dunwidge v. Kerley*, 6 J. J. Marsh. 501. **Me.** — *Carter v. Bailey*, 64 Me. 458. **Mass.** — *Brown v. Corey*, 191 Mass. 189, 77 N. E. 838; *Workman v. Smith*, 155 Mass. 92, 29 N. E. 198; *Badger v. McNamara*, 123 Mass. 117; *Frue v. Loring*, 120 Mass. 507; *Ward v. Peck*, 114 Mass. 121; *Adams v. Palmer*, 6 Gray 336; *Massachusetts Gen. Hospital v. State Mut. Life Assur. Co.*, 4 Gray 227. **Mich.** — *Blodgett v. Foster*, 114 Mich. 688, 72 N. W. 1000, 68 Am. St. Rep. 504; *Nash v. Burchard*, 87 Mich. 85, 49 N. W. 492; *Darrah v. Boyce*, 62 Mich. 480, 29 N. W. 102; *Bay City Bridge Co. v. Van Etten*, 36 Mich. 210. **Miss.** — *Planters' Compress Assn. v. Hanes*, 52 Miss. 469; *Kelly v. Weaver*, 37 Miss. 631. **Mo.** — *Silver v. St. Louis, etc. R. Co.*, 5 Mo. App. 381. **N. H.** — *Walker v. Cheever*, 35 N. H. 339. **N. J.** — *Bellingham v. Palmer*, 54 N. J. Eq. 136, 141, 33 Atl. 199; *Olds v. Regan* (N. J. Eq.), 32 Atl. 827; *Martin v. Martin* (N. J. Eq.), 23 Atl. 822; *Crane v. Ely*, 37 N. J. Eq. 564. **N. Y.** — *Chase v. Knickerbocker Phosphate Co.*, 32 App. Div. 400, 53 N. Y. Supp. 220; *Howell v. Crosby*, 89 Hun 355, 35 N. Y. Supp. 328; *Short v. Barry*, 58 Barb. 177; *Lynch v. Willard*, 6 Johns. Ch. 342; *Ludlow v. Simond*, 2 Caines Cas. 1, 2 Am. Dec. 291; *Durant v. Einstein*, 5 Robt. 423. **Pa.** — *Paton v. Clark*, 156

Pa. 49, 27 Atl. 116; Pittsburgh & Connellsville R. Co.'s Appeal, 99 Pa. 177; Grubb's Appeal, 90 Pa. 228; United States Bank v. Biddle, 2 Pars. Eq. Cas. 31; Long v. Cochran, 9 Phila. 267. S. C.—Butler v. Ardis, 2 McCord Eq. 60. Va.—Coffman v. Sangston, 21 Gratt. 263; Poage v. Willson, 2 Leigh 490. Wash.—Seattle Nat. Bank v. School Dist. No. 40, 20 Wash. 368, 55 Pac. 317. W. Va.—Petty v. Fogle, 16 W. Va. 497. Wis.—Ellis v. Southwestern Land Co., 102 Wis. 409, 78 N. W. 583; Stein v. Benedict, 83 Wis. 603, 53 N. W. 891; Blake v. Blake, 56 Wis. 392, 14 N. W. 173. Eng.—Fluker v. Taylor, 3 Drew. 183, 61 Eng. Reprint 873; Bliss v. Smith, 34 Beav. 508, 55 Eng. Reprint 732; Carlisle v. Wilson, 13 Ves. Jr. 276, 33 Eng. Reprint 297; Foley v. Hill, 2 H. L. Cas. 28, 9 Eng. Reprint 1002; Taff Vale Co. v. Nixon, 1 H. L. Cas. 111, 9 Eng. Reprint 695; Welchman v. Farebrother, 1 Jur. (N. S.) 126; King v. Rossett, 2 Y. & J. 33; Barry v. Stevens, 31 L. J. Ch. 785; Blyth v. Whiffan, 27 L. T. N. S. 330; Smith v. Leveaux, 9 L. T. N. S. 313; Southampton Dock Co. v. Southampton H. & P. Board, L. R. 11 Eq. 254, 23 L. T. 698.

**Effect of Present Method of Legal Procedure as to Remedy in Equity for an Accounting.**—In *Bellingham v. Palmer*, 54 N. J. Eq. 136, 141, 33 Atl. 199, the court in its opinion, considering the question when the legal remedy is adequate, said: "Now, in determining whether a court of law can adequately deal with an account, I do not perceive why the present, and not the past, method of legal procedure should not be regarded. This is the rule in regard to bills for new trials exhibited in the court of equity. The propriety of such bills is not tested by the restricted power of courts of common law to grant new trials at the time when such bills were first entertained, but is tried by the present liberal practice of the court in this respect. As was observed in *Executors of Powers v. Administrator of Butler*, 3 Gr. Ch. 465: 'Upon examination of the numerous authorities; it will be seen that, as the courts of law have extended their jurisdiction over these subjects, the courts of equity have withdrawn their jurisdiction from them.' This remark was

reiterated in the case of *Hannon v. Maxwell*, 4 Stew. Eq. 318, 329, decided by the court of appeals. So it seems to me that the question is whether a court of law can now adequately deal with the account. The question is simply adequacy of the remedy, and that should be decided by the present processes of legal investigation. As already remarked, these processes have become radically changed—so changed, in fact, that the remarks of Judge Finch, in his opinion in the case of *Marvin v. Brooks*, 94 N. Y. 71, 80, are almost as pertinent here as in the State of New York. Speaking of the jurisdiction of a court of equity in matters of account resting upon their complexity and also for discovery, he observed: 'That the necessity for a resort to equity is now very slight, if it can be said to exist at all, since a court of law can send to a referee a long account, too complicated for the handling of a jury, and furnishes, by the examination of the adverse witness before trial and the production and deposit of books and papers, almost as complete a means of discovery as can be furnished by a court of equity.' The power to refer, the power to previously examine witnesses, and the power to obtain an inspection and copies of books and papers in actions at law, must be taken into account when the question of equity jurisdiction rests upon the single ground of the inadequacy of a court of law to reach satisfactory results in the trial of a legal cause of action. These improved methods of procedure do not strip this court of jurisdiction in instances of complicated accounts—but when the degree of complexity which will put the case beyond the capacity of the law court to try is to be ascertained, then the present mode of trial is certainly a factor of importance."

**Test of Jurisdiction in the Federal Court for an Accounting in Equity.**—Where there is a plain, adequate and complete remedy at law recourse is to be had to the principles of equity and not to the laws of the state in which the court sits. *Empire Circuit Co. v. Sullivan*, 169 Fed. 1009, 1010, citing *Barber v. Barber*, 21 How. (U. S.) 582, 16 L. ed. 226; *Robinson v. Campbell*, 3

not so well defined as to be of universal application;" but the following principles are abundantly supported by authority, the cases showing that courts of equity have jurisdiction in matters of account:

**Wheat.** (U. S.) 212, 4 L. ed. 372; **Gordon v. Hobart**, 2 Sumn. 401, 10 Fed. Cas. No. 5,609.

97. **Forster, Waterbury & Co. v. Webster Mfg. Co.**, 108 Ill. App. 41; **Grafton v. Reed**, 26 W. Va. 437.

**Statement of Principle.**—"If the bill on its face shows that the specific accounts can be fairly determined in a court of law, and that no discovery is necessary to the relief sought, the simple fact that the bill contains vague and general statements as to the inadequacy of the remedy in a court of law, or the necessity for some discovery from the defendant, without stating the specific facts showing that there is such inadequacy in the remedy at law, or necessity for a discovery, such statements will be considered merely as pretexts for foisting a jurisdiction upon courts of equity, which does not belong to them, and they will be disregarded and jurisdiction declined." **Grafton v. Reed**, 26 W. Va. 437.

**Illustrations.**—In **Wisner v. Consolidated Fruit Jar Co.**, 25 App. Div. 362, 49 N. Y. Supp. 500, the allegations showed that plaintiff purchased goods at various times of the defendant; that from time to time he paid defendant sums of money, by which he overpaid the defendant by about \$5,000, which he sought to recover. This was a legal cause of action, and the fact that plaintiff also demanded an accounting did not make the action an equitable one.

In **McLellan v. Goodwin**, 43 App. Div. 148, 59 N. Y. Supp. 290, the agreement annexed to the complaint provided that the plaintiff was to assume and control the business and conduct the tour of the defendant during the season of 1896-97, and that he was to allow to the defendant 50 per cent. of the gross receipts for each and every performance during the term of the agreement, and in consideration thereof the defendant was to furnish a competent acting company, costumes for same, also property man, carpenters, and personal representative, assuming and paying all salaries connected therewith. It was

held that only a legal action on damages would lie.

An equitable action for an accounting cannot be sustained between a landlord and his tenant under a lease of farm and personal property on shares. **Getman v. Dorr**, 28 Misc. 654, 59 N. Y. Supp. 788.

See also the following cases: **U. S.**—**Washburn & Moen Mfg. Co. v. Freeman Wire Co.**, 44 Fed. 410. **Ala.**—**Oden v. Lockwood**, 136 Ala. 514, 33 So. 895; **Dargin v. Hewlitt**, 115 Ala. 510, 22 So. 128. **Me.**—**Carter v. Bailey**, 64 Me. 458, 18 Am. Rep. 273. **Mass.**—**Frue v. Loring**, 120 Mass. 507; **Ward v. Peck**, 114 Mass. 121. **N. J.**—**DeBoeise v. H. & W. Co.**, 67 N. J. Eq. 472, 58 Atl. 91. **N. Y.**—**Moore v. Coyne & Delaney Mfg. Co.**, 113 App. Div. 52, 98 N. Y. Supp. 892; **Henderson v. Dougherty**, 95 App. Div. 346, 88 N. Y. Supp. 665; **Hart v. Garrett**, 87 App. Div. 536, 84 N. Y. Supp. 774; **Lee v. Washburn**, 80 App. Div. 410, 80 N. Y. Supp. 1040; **Everett v. DeFontaine**, 78 App. Div. 219, 79 N. Y. Supp. 692. **Ore.**—**Willis v. Crawford**, 38 Ore. 552, 63 Pac. 892, 53 L. R. A. 904.

In **Darrah v. Boyce**, 62 Mich. 480, 29 N. W. 102, it was said in the opinion: "In this class of cases the form of the action should not be made to depend entirely upon the fact that the complainant has a remedy at law, but whether or not such remedy is adequate, and will do full justice between the parties. Technicalities should never be allowed to control in such cases, where the effect will be to impair or destroy substantial rights, but that form of action should be allowed and adopted which will best accomplish the ends of justice." See also **Ludlow v. Simond**, 2 Caines Cas. (N. Y.) 1, 2 Am. Dec. 291, to the same effect.

In **Church v. Anti-Kalsomine Co.**, 118 Mich. 219, 76 N. W. 383, the court held that the fact that many books and items of a party would have to be examined would not oust the jurisdiction of a court of law.

In **Grubb's Appeal**, 90 Pa. 228, the court held that a person who is not a



*First*, where the accounts are mutual,<sup>88</sup> and especially if they are

tenant in possession, but possesses a right to dig ores, is not guilty of committing waste when he takes out more ore than his contract or his rights call for, and a court of equity will not decree an account where the account is a mere matter of charge for ore, with no entries on the other side of the account.

**Obstruction of Legal Remedy.**—In *Sturtevant v. Goode*, 5 Leigh (Va.) 83, an action was brought by a carpenter on his contract, which had been left in the hands of his employer, who refused to give it up to enable plaintiff's attorney to frame his declaration, and consequently the action was dismissed by plaintiff, who immediately filed a bill in equity for an account and for a decree for the balance due on the contract. It was held that equity had jurisdiction.

Again, in *Johnson v. Roanoke Land & Imp. Co.*, 82 Va. 284, the building contract involved provided that no allowance should be made for extra work unless separate estimates therefor were signed by the architects. The owner agreed to have a duplicated copy of the contract made for the contractor, who demanded it, but failed to obtain a copy until the work was completed. During the work alterations were made; but in an action on the contract evidence of extra work under such alterations was excluded, because of non-compliance with the contract. The action was dismissed, and plaintiff sued in equity for an accounting. It was held that equity had jurisdiction, because defendant had obstructed plaintiff's remedy at law.

**Prior determination of Legal Question.**—The court held in *Barry v. Shelby*, 4 Hayw. (Tenn.) 228, that equity will not decree an accounting for timber cut until the plaintiff's title is established at law.

In *Frisbie's Appeal*, 88 Pa. 144, it was decided that until the question of title to an oil well is first determined at law, equity could not decree an accounting for profits, on a bill by one out of possession, claiming to be a joint owner.

See also *Tecumseh Iron Co. v. Camp*, 93 Ala. 572, 9 So. 343.

93. Ala.—*Attalla Min. & Mfg. Co. v. Winchester*, 102 Ala. 184, 14 So. 565; *Cullum v. Bloodgood*, 15 Ala. 34. Ark.—*State v. Churchill*, 48 Ark. 426, 3 S. W. 352, 880. Ill.—*Gleason & Bailey Mfg. Co. v. Hoffman*, 168 Ill. 25, 48 N. E. 143; *Hair Co. v. Daily*, 161 Ill. 379, 43 N. E. 1096; *Forster, Waterbury & Co. v. Webster Mfg. Co.*, 108 Ill. App. 41. Ind.—*Cummins v. White*, 4 Blackf. 356. Ia.—*Taville v. Lloyd*, 140 Iowa 501, 118 N. W. 871; *McMartin v. Bingham*, 27 Iowa 234, 1 Am. Rep. 265. Mass.—*Bartlett v. Parks*, 1 Cush. 82. Mich.—*Nash v. Burchard*, 87 Mich. 85, 49 N. W. 492. Minn.—*Garner v. Reis*, 25 Minn. 475. N. J.—*Woolley v. Osborne*, 39 N. J. Eq. 54. N. Y.—*Porter v. Spencer*, 2 Johns. Ch. 169; *Hawley v. Cramer*, 4 Cow. 717; *King v. Baldwin*, 17 Johns. 384; *Rathbone v. Warren*, 10 Johns. 587; *Post v. Kimberly*, 9 Johns. 470; *Armstrong v. Gilchrist*, 2 Johns. Cas. 424; *Ludlow v. Simond*, 2 Caines Cas. 1, 2 Am. Dec. 291; *Wilson v. Mallett*, 4 Sandf. 112. N. C.—*McLin v. McNamara*, 22 N. C. 82. Pa.—*Gloninger v. Hazard*, 42 Pa. 389. Tenn.—*Hay v. Marshall*, 3 Humph. 623; *Smiley v. Bell*, 1 Mart. & Yerg. 378, 17 Am. Dec. 813. Va.—*Coffman v. Sangston*, 21 Gratt. 263; *Hickman v. Stout*, 2 Leigh. 6. W. Va.—*Grafton v. Reed*, 26 W. Va. 437; *Lefever v. Billmyer*, 5 W. Va. 33. Eng.—*Kennington v. Houghton*, 2 Y. & C. C. 620, 63 Eng. Reprint 278; *Fluker v. Taylor*, 3 Drew. 183, 61 Eng. Reprint 873; *Padwick v. Hurst*, 18 Beav. 575, 52 Eng. Reprint 225; *Dinwiddie v. Bailey*, 6 Ves. Jr. 136, 31 Eng. Reprint 979; *Downam v. Matthews*, Prec. Ch. 580, 24 Eng. Reprint 260; *Edwards-Wood v. Baldwin*, 9 L. T. N. S. 474; *O'Connor v. Spaight*, 1 Sch. & Lef. 305.

In *Cummins v. White*, 4 Blackf. (Ind.) 356, it was said: "The jurisdiction of Courts of equity, in matters of account, has been gradually enlarged, until it has become concurrent with that of common-law Courts, to an almost unlimited extent, over the mutual dealings of parties, even when those dealings consist of items of purely legal character." See also U. S.—*McMullen Lumb. Co. v. Strother*, 136 Fed. 295, 69 C. C. A. 433. Ill.—*Forster, Waterbury & Co. v. Webster Mfg. Co.*, 108 Ill. App.

so complicated that a common law court cannot ferret them out."

41. Pa.—Stitzer v. Fonder, 214 Pa. 117, 63 Atl. 421. W. Va.—Petty v. Fogle, 16 W. Va. 497.

The difficulty of properly adjusting accounts is what confers jurisdiction upon equity, without much regard to the singleness or mutuality of the same. State v. Churchill, 48 Ark. 426, 3 S. W. 352, citing Ludlow v. Simond, 2 Caines Cas. (N. Y.) 1 (opinions by Thompson, J., and Kent, C. J.); Smiley v. Bell, 1 Mart. & Y. (Tenn.) 378.

99. U. S.—Parkersburg v. Brown, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. ed. 238; Gunn v. Brinkley Car Wks. & Mfg. Co., 66 Fed. 382, 13 C. C. A. 529; Crossley v. New Orleans, 20 Fed. 352; Pacific R. Co. v. Atlantic & P. R. Co., 20 Fed. 227; Gaines v. New Orleans, 17 Fed. 16; Mitchell v. Great Works Mill & Mfg. Co., 2 Story 648, 17 Fed. Cas. No. 9,662; Magic Ruffle Co. v. Elm City Co., 14 Blatchf. 109, 16 Fed. Cas. No. 8,950. Ala.—Friedman v. Fraser, 157 Ala. 191, 47 So. 320; Attalla Min. & Mfg. Co. v. Winchester, 102 Ala. 184, 14 So. 565; Beggs v. Edison Elec. Illum. Co., 96 Ala. 295, 11 So. 381, 38 Am. St. Rep. 94; Jackson v. King, 82 Ala. 432, 3 So. 232; Farris v. Houston, 78 Ala. 259; Dallas County v. Timberlake, 54 Ala. 403; Vincent v. Rogers, 30 Ala. 471; Cullum v. Bloodgood, 15 Ala. 34; Knotts v. Tarver, 8 Ala. 743; Kirkman v. Vanlier, 7 Ala. 217; Draughton v. French's Admr., 4 Port. 352. Ark.—Rogers v. Yarnell, 51 Ark. 198, 10 S. W. 622; State v. Churchill, 48 Ark. 426, 3 S. W. 352, 880. Del.—Farmers' & Mechanics' Bank v. Polk, 1 Del. Ch. 167. Ga.—Printup v. Mitchell, 17 Ga. 558, 63 Am. Dec. 258. Ill.—Crown Coal & Tow Co. v. Thomas, 177 Ill. 534, 52 N. E. 1042; Hair Co. v. Daily, 161 Ill. 379, 43 N. E. 1096; Tennessee Pkg. and Prov. Co. v. Fitzgerald, 140 Ill. App. 430; Crown Coal & Tow Co. v. Thomas, 73 Ill. App. 679. Ind.—Cummins v. White, 4 Blackf. 356. Ia.—Faville v. Lloyd, 140 Iowa 501, 118 N. W. 871. Ky.—Handley's Exr. v. Fitzhugh, 1 A. K. Marsh. 24. Mass.—Badger v. McNamara, 123 Mass. 117. Mich.—Blodgett v. Foster, 114 Mich. 688, 72 N. W. 1000, 68 Am. St. Rep. 504; Houghton v. State Mut. L. Assur.

Co., 110 Mich. 308, 68 N. W. 142; Holmes v. Malcolm McDonald Lumb. Co., 95 Mich. 606, 55 N. W. 450. Minn.—Fair v. Stickney Farm Co., 35 Minn. 380, 29 N. W. 311. Miss.—Watt v. Conger, 13 Smed. & M. 412. N. J.—Bellingham v. Palmer, 54 N. J. Eq. 136, 33 Atl. 199; Jones v. Davis, 48 N. J. Eq. 493, 21 Atl. 1035; Woolley v. Osborne, 39 N. J. Eq. 54; Ely v. Crane, 37 N. J. Eq. 157, 564. N. Y.—Marvin v. Brooks, 94 N. Y. 71, 80. N. C.—Jones v. Bullock, 17 N. C. 368. Pa.—Warner v. McMullin, 131 Pa. 370, 18 Atl. 1056; Baugher's Appeal, 8 Atl. 838, 841; Christy's Appeal, 92 Pa. 157; Passyunk Bldg. Company's Appeal, 83 Pa. 441; Russell v. Miller, 54 Pa. 154; Gonlinger v. Hazard, 42 Pa. 389; United States Bank v. Biddle, 2 Pars. Eq. Cas. 31. S. C.—Devereux v. McCrady, 46 S. C. 133, 24 S. E. 77; Buist v. Melchers, 44 S. C. 46, 21 S. E. 449; Taylor v. Smith's Admr. 1 Brev. 230. Tenn.—Taylor v. Tompkins, 2 Heisk. 89; Hay v. Marshall, 3 Humph. 623; Smiley v. Bell, 1 Mart. & Yerg. 378, 17 Am. Dec. 813. Vt.—Holt v. Daniels, 61 Vt. 89, 17 Atl. 786; Hathaway v. Hagan, 59 Vt. 75, 8 Atl. 678; Wiswell v. Wilkins, 4 Vt. 137; Lynde v. Wright, 1 Aik. 383. Va.—Penn v. Ingles, 82 Va. 65; Tillar v. Cook, 77 Va. 477; Coffman v. Sangston, 21 Gratt. 263; Hickman v. Stout, 2 Leigh 6; Hunter's Exrs. v. Spottswood, 1 Wash. 145. W. Va.—Petty v. Fogle, 16 W. Va. 497; Lafevre v. Billmyer, 5 W. Va. 33. Eng.—Croskey v. European & Amer. S. S. Co., 1 J. & H. 108, 70 Eng. Reprint 682; Kennington v. Houghton, 2 Y. & C. C. 620, 63 Eng. Reprint 278; Bliss v. Smith, 34 Beav. 508, 55 Eng. Reprint 732; Southeastern R. Co. v. Brogden, 3 Maen. & G. 8, 42 Eng. Reprint 163; Carlisle v. Wilson, 13 Ves. Jr. 276, 32 Eng. Reprint 297; St. Andrew's & Quebec R. Co. v. Brookfield, 13 Moore P. C. 510, 15 Eng. Reprint 192; Foley v. Hill, 2 H. L. Cas. 28, 9 Eng. Reprint 1002, affirming 1 Phill. Ch. 399; Taff Vale R. Co. v. Nixon, 1 H. L. Cas. 111, 9 Eng. Reprint 695, affirming 7 Hare 136, 68 Eng. Reprint 55; Kimberly v. Dick, 41 L. J. Ch. 38, L. R. 13 Eq. 1, 25 L. T. 476; Harrington v. Churchward, 89 L. J. Ch.

*Second*, where, although the accounts are on one side, a discovery is sought which is material to the relief asked by the plaintiff.<sup>1</sup>

521; *Blyth v. Whiffin*, 27 L. T. N. S. 330; *Hill v. South Staffordshire R. Co.*, 12 L. T. N. S. 63; *Dock Co. v. Huntington*, 2 Chit. 597; *Cooke v. Betham*, 4 Jur. 957; *O'Connor v. Spaight*, 1 Sch. & Lef. 305.

*Blodgett v. Foster*, 114 Mich. 688, 72 N. W. 1000, 68 Am. St. Rep. 504, was a suit for an accounting, in which a demurrer was filed to the bill on the ground that the plaintiff's remedy was at law. The court says, in its opinion: "It is conceded by all the parties that no fiduciary relations exist between the parties here, and that no discovery is necessary to enable the complainants to obtain relief. The only question, then, is whether the accounts are mutual and complicated, or whether the accounts are so complicated, though not mutual, that a court of equity will take cognizance of the case. It is contended by the defendants that the account must be not only complicated to such an extent as to render it practically impossible to take it in a suit at law, but must be mutual, while, on the part of the complainants, it is contended that where the accounts are all on one side, but there are circumstances of great complication or difficulty in the way of adequate relief, a bill for an accounting is well brought, on the sole ground that it is the most convenient remedy. We are satisfied, from a reading of the bill, that these accounts, of necessity, must be greatly complicated. Three contracts are set out, together with two supplemental ones. These contracts extend over a long period of time, and involve many thousands of dollars. There is a great variety of grades of lumber in each contract, each grade having a separate price. Payments were made under them, extending through a series of years. Great controversy arises over the insurance paid by the defendants, whether it was properly and legitimately paid. There is also controversy over some portions of the lumber burned, and whether other lumber was shipped in place of it. So that if a court of equity will take cognizance of a case of accounting where the accounts are complicated, and where there would be great difficulty in the way of adequate

relief by an action at law, it seems to us that this is one."

1. U. S.—*Gunn v. Brinkley Car Works & Mfg. Co.*, 66 Fed. 382, 13 C. A. 529; *Empire Circuit Co. v. Sullivan*, 169 Fed. 1009; *Crossley v. New Orleans*, 20 Fed. 352; *Gaines v. New Orleans*, 17 Fed. 16; *Mitchell v. Great Works Mill. & Mfg. Co.*, 2 Story 648, 17 Fed. Cas. No. 9,662; *Baker v. Biddle*, *Baldw.* 394, 2 Fed. Cas. No. 764. Ala.—*Attalla Min. & Mfg. Co. v. Winchester*, 102 Ala. 184, 14 So. 565; *Virginia & A. Min. & Mfg. Co. v. Hale*, 93 Ala. 542, 9 So. 256; *Dallas County v. Timberlake*, 54 Ala. 403; *Knotts v. Tarver*, 8 Ala. 743; *Kirkman v. Vanlier*, 7 Ala. 217; *Draughon v. French's Admr.*, 4 Port. 352. Ark.—*Rogers v. Yarnell*, 51 Ark. 198, 10 S. W. 622; *State v. Churchill*, 48 Ark. 426, 3 S. W. 352, 880. Fla.—*Gordon v. Clarke*, 10 Fla. 179; *Broome v. Alston*, 8 Fla. 307. Del.—*Farmers' & Mechanics' Bank v. Polk*, 1 Del. Ch. 167. Ga.—*Printup v. Mitchell*, 17 Ga. 558; *Sargent v. Caldwell*, 16 Ga. 64. Ill.—*Miller v. Russell*, 224 Ill. 68, 79 N. E. 434; *Gleason & Bailey Mfg. Co. v. Hoffman*, 168 Ill. 25, 48 N. E. 143; *Hair Co. v. Daily*, 161 Ill. 379, 43 N. E. 1096; *Higgs v. French*, 16 Ill. 343; *Tennessee Pkg. & Prov. Co. v. Fitzgerald*, 140 Ill. App. 430; *Foster, Waterbury & Co. v. Webster Mfg. Co.*, 108 Ill. App. 41; *Crown Coal & Tow Co. v. Thomas*, 73 Ill. App. 679. Ind.—*Cummins v. White*, 4 Blackf. 356. Ky.—*Handley's Exr. v. Fitzhugh*, 1 A. K. Marsh. 24. Mass.—*Badger v. McNamara*, 123 Mass. 117. Mich.—*Blodgett v. Foster*, 114 Mich. 688, 72 N. W. 1000, 68 Am. St. Rep. 504; *Houghton v. State Mut. L. Assur. Co.*, 110 Mich. 308, 68 N. W. 142; *Holmes v. Malcom McDonald Lbr. Co.* 95 Mich. 606, 55 N. W. 450. Miss.—*Watt v. Conger*, 13 Smed. & M. 412. N. J.—*Bellingham v. Palmer*, 54 N. J. Eq. 136, 33 Atl. 199; *Jones v. Davis*, 48 N. J. Eq. 493, 21 Atl. 1035; *Wooley v. Osborne*, 39 N. J. Eq. 54; *Ely v. Crane*, 37 N. J. Eq. 157, 564; *Jewett v. Bowman*, 29 N. J. Eq. 174. N. Y.—*Marvin v. Brooks*, 94 N. Y. 71, 80. N. C.—*Jones v. Bullock*, 17 N. C. 368. Pa.—*Christy's Appeal*, 92 Pa. 157; *Russell v. Miller*, 54 Pa. 154; *Glonginger v. Hazard*, 42 Pa. 389; *Cruise v. Walker*, 6 Phila. 294,



*Third*, where equity having jurisdiction on some proper ground may, by directing an accounting, avoid a multiplicity of suits.<sup>2</sup>

*Fourth*, in those cases where there is an agreement between the parties to render an account.<sup>3</sup>

c. *Test of Adequacy*.—The remedy at law is regarded as adequate:

*First*, where the demands are all on one side, and no discovery is sought.<sup>4</sup>

*Second*, where on one side there are mere demands, and on the other mere payments or set-offs, and no discovery is sought or required.<sup>5</sup>

2. *Under Statute*.—a. *In General*.—In some states jurisdiction in equity with reference to accounts is conferred by statute.<sup>6</sup>

24 Leg. Int. 141; United States Bank v. Biddle, 2 Pars. Eq. Cas. 31. S. C.—Devereux v. McCrady, 46 S. C. 133, 24 S. E. 77; Buist v. Melchers, 44 S. C. 46, 21 S. E. 449; Taylor v. Smith's Admr., 1 Brev. 230. Tenn.—Taylor v. Tompkins, 2 Heisk. 89; Hay v. Marshall, 3 Humph. 623. Vt.—Holt v. Daniels, 61 Vt. 89, 17 Atl. 786; Sanborn v. Kittredge, 20 Vt. 632, 50 Am. Dec. 58; Wiswell v. Wilkins, 4 Vt. 137; Lynde v. Wright, 1 Aik. 383. Va.—Coffman v. Sangston, 21 Gratt. 263; Hickman v. Stout, 2 Leigh 6; Hunter's Exrs. v. Spottswood, 1 Wash. 145. W. Va.—Boggs v. Johnson, 26 W. Va. 821; Petty v. Fogle, 16 W. Va. 497; Lafever v. Billmyer, 5 W. Va. 33. Eng.—Croskey v. European & Amer. S. S. Co., 1 J. & H. 108, 70 Eng. Reprint 682; Kennington v. Houghton, 2 Y. & C. C. 620, 63 Eng. Reprint 278; Bliss v. Smith, 34 Beav. 508, 55 Eng. Reprint 732; South-eastern R. Co. v. Brogden, 3 Macn. & G. 8, 42 Eng. Reprint 163; St. Andrew's & Q. R. Co. v. Brookfield, 13 Moore P. C. 510, 15 Eng. Reprint 192; Foley v. Hill, 2 H. L. Cas. 28, 9 Eng. Reprint 1002, *affirming* 1 Phill. Ch. 399; Taff Vale R. Co. v. Nixon, 1 H. L. Cas. 111, 9 Eng. Reprint 695, *affirming* 7 Hare 136, 68 Eng. Reprint 55; Kimbberly v. Dick, 41 L. J. Ch. 38, L. R. 13, Eq. 1, 25 L. T. 476; Harrington v. Churchward, 29 L. J. Ch. 521; Blyth v. Whiffin, 27 L. T. N. S. 330; Hill v. South Staffordshire R. Co., 12 L. T. N. S. 63; O'Connor v. Spaight, 1 Sch. & Lef. 305.

2. U. S.—Root v. Lake Shore & M. S. R. Co., 105 U. S. 189, 26 L. ed. 975, 981, 982; Western Union Tel. Co. v. Western & A. R. Co., 91 U. S. 283, 23

L. ed. 350. Ala.—Tecumseh Iron Co. v. Camp, 93 Ala. 572, 9 So. 343; Virginia & A. Min. & Mfg. Co. v. Hale, 93 Ala. 542, 9 So. 256. Ga.—McLaren v. Steapp, 1 Ga. 376. Ind.—Cummins v. White, 4 Blackf. 356. Ia.—White v. Hampton, 10 Iowa 238. Ky.—Jolly v. Miller, 124 Ky. 100, 98 S. W. 326. Va.—Billups v. Sears, 5 Gratt. 31, 50 Am. Dec. 105; Payne v. Graves, 5 Leigh 561; Hickman v. Stout, 2 Leigh 6. W. Va.—Boggs v. Johnson, 26 W. Va. 821.

But this is not so where the bill asks for a discovery only. Daab v. New York Cent. & H. R. Co., 70 N. J. Eq. 489, 62 Atl. 449; Casperson v. Casperson, 65 N. J. L. 402, 47 Atl. 428.

Equity Attaching for One Purpose Jurisdiction Exists for an Accounting, though it may involve the adjudication of purely legal questions. Virginia & A. Min. & Mfg. Co. v. Hale, 93 Ala. 542, 9 So. 256.

3. Empire Circuit Co. v. Sullivan, 169 Fed. 1009; Eccard v. Brush, 48 Mich. 3, 11 N. W. 756.

4. Ala.—Beggs v. Edison Elec. Co., 96 Ala. 295, 11 So. 381, 38 Am. St. Rep. 94, 11 So. 381, *Ill.*—McCormick v. Page, 96 Ill. App. 447. Pa.—Graham v. Cummings, 208 Pa. 516, 57 Atl. 943; Sprigg v. Commonwealth Title Ins. & Trust Co., 206 Pa. 548, 56 Atl. 33. S. C.—Latham v. Harby, 50 S. C. 428, 27 S. E. 862. W. Va.—White v. Cook, 51 W. Va. 201, 41 S. E. 410, 57 L. R. A. 417; Petty v. Fogle, 16 W. Va. 497.

5. U. S.—Hagenbeck v. Hagenbeck Zoological Arena Co., 59 Fed. 14. Va.—Smith v. Marks, 2 Rand. 449. W. Va.—Petty v. Fogle, 16 W. Va. 497.

6. Pierce v. Equitable Assur. Soc., 145 Mass. 56, 12 N. E. 858, 1 Am. St.

b. *Test of Jurisdiction Under Statute.*—The right to an accounting by virtue of statute depends upon the terms thereof. The usual provision is that the account must be of such a nature that it cannot be conveniently and properly adjusted and settled in an action at law.<sup>7</sup>

3. *Probate Settlements.*—In many of the states the settlement of accounts before probate and other courts of like character, being only *prima facie* correct,<sup>8</sup> will be re-examined in a proper suit in equity.<sup>9</sup> In several of the states, however, such settlements are conclusive, and no equity jurisdiction exists in such a case,<sup>10</sup> in the absence of fraud<sup>11</sup> or palpable mistake.<sup>12</sup>

4. *In Cases of Trust and Confidence.*—a. *Agency.*—The mere existence of the relation of principal and agent is not sufficient to authorize an accounting in equity.<sup>13</sup> To confer the jurisdiction it

Rep. 433; *New Haven Horse Nail Co. v. Linden Spgs. Co.*, 142 Mass. 349, 7 N. E. 773; *Dole v. Wooldredge*, 135 Mass. 140; *Hallett v. Cumston*, 110 Mass. 32; *Smith v. Mutual L. Ins. Co.*, 14 Allen (Mass.) 336; *Massachusetts Gen. Hospital v. State Mut. L. Assur. Co.*, 4 Gray (Mass.) 227; *Locke v. Bennett*, 7 Cush. (Mass.) 445; *Bartlett v. Parks*, 1 Cush. (Mass.) 82.

7. *Pierce v. Equitable Assur. Soc.*, 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433. See also other cases cited in the last preceding note.

8. *Ala.*—*Willis v. Rice*, 157 Ala. 252, 48 So. 397. *Ind.*—*Brackenridge v. Holland*, 2 Blackf. 377, 20 Am. Dec. 123. *Ia.*—*Warfield v. Warfield*, 74 Iowa 184, 37 N. W. 144. *La.*—*In re Beecroft*, 28 La. Ann. 824. *Mo.*—*State v. Jones*, 89 Mo. 470, 1 S. W. 355. *Va.*—*Carter v. Edmonds*, 80 Va. 58; *Chapman's Admr. v. Shepherd's Admr.*, 24 Gratt. 377; *Corbin v. Mills' Exrs.*, 19 Gratt. 438; *Peale v. Hickie*, 9 Gratt. 437; *Newton v. Poole*, 12 Leigh 112; *Preston v. Gressom's Distributees*, 4 Munf. 110. *W. Va.*—*Leach v. Buckner*, 19 W. Va. 36; *McGuire v. Wright*, 18 W. Va. 507.

9. *Ala.*—*Willis v. Rice*, 157 Ala. 252, 48 So. 397. *Ind.*—*Brackenridge v. Holland*, 2 Blackf. 377, 20 Am. Dec. 123. *Va.*—*Carter v. Edmonds*, 80 Va. 58; *Chapman's Admr. v. Shepherd's Admr.*, 24 Gratt. 377. *W. Va.*—*Leach v. Buckner*, 19 W. Va. 36.

10. *Ala.*—*Morrow v. Allison*, 39 Ala. 70; *Duckworth v. Dickworth's Admr.*, 35 Ala. 70; *Arnett v. Arnett*, 33 Ala. 273; *King v. Smith*, 15 Ala. 264. *Ark.*—*Osborne v. Graham*, 30

*Ark.* 66; *Dooley v. Dooley*, 14 Ark. 122. *Cal.*—*Reynolds v. Brumagim*, 54 Cal. 254; *Kingsley v. Miller*, 45 Cal. 95. *Conn.*—*Gates v. Treat*, 17 Conn. 388. *Mass.*—*Paine v. Stone*, 10 Pick. 75; *Jennison v. Hapgood*, 7 Pick. 1, 19 Am. Dec. 258. *Miss.*—*Green v. Creighton*, 10 Smed. & M. 159, 48 Am. Dec. 742. *N. J.*—*Shepherd v. Newkirk*, 21 N. J. L. 302; *Frey v. Demarest*, 16 N. J. Eq. 236; *Clarke v. Johnston*, 10 N. J. Eq. 287; *Salter v. Williamson*, 2 N. J. Eq. 480, 35 Am. Dec. 513. *N. Y.*—*Casoni v. Jerome*, 58 N. Y. 315; *Sipperly v. Baucus*, 24 N. Y. 46. *Pa.*—*Whiteside v. Whiteside*, 20 Pa. 473; *App v. Dreisbach*, 2 Rawle 287, 21 Am. Dec. 447. *R. I.*—*Blake v. Butler*, 10 R. I. 133.

11. *Mock's Heirs v. Steele*, 34 Ala. 198, 73 Am. Dec. 455; *Green v. Creighton*, 10 Smed. & M. (Miss.) 159, 48 Am. Dec. 742.

12. *Black v. Whitall*, 9 N. J. Eq. 572, 59 Am. Dec. 423; *Salter v. Williamson*, 2 N. J. Eq. 480, 35 Am. Dec. 513.

13. *U. S.*—*American Spirits Mfg. Co. v. Easton*, 129 Fed. 1004, 62 C. C. A. 679, reversing 120 Fed. 440. *Ala.*—*Hall v. McKeller*, 155 Ala. 508, 46 So. 460. *Me.*—*Webb v. Fuller*, 77 Me. 568, 1 Atl. 737. *Mass.*—*Campbell v. Cook*, 193 Mass. 251, 79 N. E. 261. *N. Y.*—*Marvin v. Brooks*, 94 N. Y. 71; *Conger v. Judson*, 69 App. Div. 121, 74 N. Y. Supp. 504; *Lafond v. Lassere*, 26 Misc. 77, 56 N. Y. Supp. 459. *Pa.*—*Fisher v. Riehl*, 219 Pa. 505, 69 Atl. 70; *Holland v. Hallahan*, 211 Pa. 223, 60 Atl. 735; *Paton v. Clark*, 156 Pa. 49, 27 Atl. 116. *Va.*—*Zetelle v. Myers*, 19



must appear that a discovery is necessary,<sup>14</sup> or that there are mutual or complicated accounts between the parties,<sup>15</sup> or the remedy at law is not adequate,<sup>16</sup> or a fiduciary relation amounting in character to a trust exists between the parties.<sup>17</sup>

b. *Attorney and Client*. — The relation of attorney and client is not such a one of trust and confidence as to confer jurisdiction in equity for an accounting.<sup>18</sup>

c. *Building and Loan Associations*. — The borrowing stockholders of a building and loan association, as such, cannot maintain a bill in

Gratt. 62, 68. **Eng.** — Barry v. Stevens, 31 Beav. 258, 54 Eng. Reprint 1137; Hunter v. Belcher, 2 De G., J. & S. 194.

14. **Ala.** — Hall. v. McKeller, 155 Ala. 508, 46 So. 460. **Ky.** — Fox v. Apperson's Exr., 6 Bush 653. **Va.** — Wilson v. Miller, 104 Va. 446, 51 S. E. 837; Coffman v. Sangston, 21 Gratt. 263.

15. Campbell v. Cook, 193 Mass. 251, 79 N. E. 261; Bay State Gas Co. v. Lawson, 188 Mass. 502, 74 N. E. 921; Coffman v. Sangston, 21 Gratt. (Va.) 263.

16. **U. S.** — Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. ed. 1005; Fenno v. Primrose, 116 Fed. 49. **Ia.** — White v. Hampton, 10 Iowa 238. **Mass.** — Campbell v. Cook, 193 Mass. 251, 79 N. E. 261; Brown v. Corey, 191 Mass. 189, 77 N. E. 838. **Tenn.** — Taylor v. Tompkins, 2 Heisk. 89. **Va.** — Coffman v. Sangston, 21 Gratt. 263.

**Remedy in Equity in Cases of Account Generally More Adequate Than at Law.** — In the case of Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. ed. 1005, it appears from the report that the suit in that case involved an accounting between principal and agent. It was contended in argument that the plaintiff had a plain, adequate and complete remedy at law. The supreme court, upholding the jurisdiction of the court of equity, decided the following point in that case: "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer" in like circumstances. The remedy in equity, in cases of account, is generally more complete and adequate than it is at

law; and where fraud is charged in fiduciary and trust relations is less embarrassed and doubtful.

17. **U. S.** — McKay v. Hudson, 118 Fed. 919; Colonial & U. S. Mtg. Co. v. Hutchinson Mtg. Co., 44 Fed. 219; Brewer v. Caldwell, 4 Fed. Cas. No. 1,849. **Ill.** — Weaver v. Fisher, 110 Ill. 146; Davis v. Hamlin, 108 Ill. 39; Clapp v. Emery, 98 Ill. 523; Smith v. Wright, 49 Ill. 403. **Mass.** — Bay State Gas Co. v. Lawson, 188 Mass. 502, 74 N. E. 921. **N. Y.** — Marvin v. Brooks, 94 N. Y. 71; Haight v. Haight, 46 Misc. 501, 92 N. Y. Supp. 934; West v. Brewster, 1 Duer 647; Ellas v. Lockwood, 1 Clarke Ch. 311. **Va.** — Simmons v. Simmons' Admr., 33 Gratt. 451; Thornton v. Thornton, 31 Gratt. 212; Segar v. Parrish, 20 Gratt. 672; Zetelle v. Myers, 19 Gratt. 62 (where it was held that an agency to manage, lease and sell property was of a fiduciary character, and the agent was liable in equity to account); Berkshire v. Evans, 4 Leigh 223. **Wis.** — Rippe v. Stogdill, 61 Wis. 38, 20 N. W. 645; Merrill v. Merrill, 53 Wis. 522, 10 N. W. 684. **Eng.** — Makepeace v. Rogers, 4 De G., J. & S. 649, 46 Eng. Reprint 1070; Pearse v. Green, 1 Jac. & W. 135, 37 Eng. Reprint 327; Moxon v. Bright, L. R. 4 Ch. 292, 20 L. T. 961; Attorney-General v. Edmunds, 37 L. J. Ch. 706, L. R. 6 Eq. 381, 8 L. T. 505 (citing Foley v. Hill, 2 H. L. Cas. 28, 9 Eng. Reprint 1002); Power v. Power, 13 Ir. L. Rep. 281. See the title "Principal and Agent."

18. **U. S.** — Earle v. Myers, 207 U. S. 244, 28 Sup. Ct. 86, 52 L. ed. 191. **Ga.** — Powers v. Gray, 7 Ga. 206. **N. Y.** — Mersereau v. Bennett, 62 Misc. 356, 115 N. Y. Supp. 20; Lynch v. Willard, 6 Johns. Ch. 342.



equity for an accounting.<sup>19</sup> Equitable ground must exist to enable him to do so.<sup>20</sup>

d. *Brokers.*—Inasmuch as there are many instances wherein the relation existing between a stock broker and his customer is fiduciary,<sup>21</sup> a suit for an accounting in such case will lie against the broker.<sup>22</sup>

e. *Executors and Administrators.*—A suit in equity will lie against executors and administrators by those interested in the estate for an accounting.<sup>23</sup>

f. *Guardians.*—The relation between a guardian and ward being a fiduciary one,<sup>24</sup> the former may be sued in equity by the latter for an accounting.<sup>25</sup>

g. *Joint Owners.*—As a general rule, equity will direct an accounting between joint owners of property, notwithstanding the existence of a remedy at law.<sup>26</sup>

19. *Johnson v. National Bldg. & L. Assn.*, 125 Ala. 465, 28 So. 2, 82 Am. St. Rep. 257; *The Security Loan Assn. v. Lake*, 69 Ala. 456; *Kenefick v. Co-Operative Bldg. Bank*, 62 Misc. 519, 115 N. Y. Supp. 966.

20. *Johnson v. National Bldg. & L. Assn.*, 125 Ala. 465, 28 So. 2, 82 Am. St. Rep. 257.

21. *Brown v. Corey*, 191 Mass. 189, 77 N. E. 838; *Levy v. Popper*, 104 App. Div. 457, 93 N. Y. Supp. 842; *Stewart v. Harris*, 101 App. Div. 181, 91 N. Y. Supp. 438; *Tuell v. Paine*, 39 Misc. 712, 80 N. Y. Supp. 956. *Contra*, ordinarily. *Brown v. Corey*, 191 Mass. 189, 77 N. E. 838.

22. *Brown v. Corey*, 191 Mass. 189, 77 N. E. 838. But in a particular case it must appear that a fiduciary relation exists and that the accounts are complicated. *Brown v. Corey*, 191 Mass. 189, 77 N. E. 838. When stocks or merchandise have been delivered to a broker or agent to sell, a bill in equity, praying for an accounting, will lie for fraud in effecting their sale. *Oil Co. v. Adams*, 6 Phila. (Pa.) 182, 23 Leg. Int. 349. The assignee of a factor may require an accounting between the assignor and his principal. *Wilson v. Mallett*, 4 Sandf. (N. Y.) 112.

23. *Ala.*—*Draughon v. French's Admr.*, 4 Port. 352. *Cal.*—*San Pedro Lumb. Co. v. Reynolds*, 111 Cal. 588, 44 Pac. 309. *Ky.*—*Fox v. Apperson's Exr.*, 6 Bush 653. *Miss.*—*Green v. Creighton*, 10 Smed. & M. 159, 48 Am. Dec. 742. *N. J.*—*Scudder v. Stout*, 10 N. J. Eq. 377; *Salter v. Williamson*, 2 N. J. Eq. 480, 35 Am. Dec. 513. *N.*

*Y.*—*Haddow v. Haddow*, 3 Thomp. & C. 777. *Pa.*—*In re Gordon's Appeal*, 4 Atl. 739; *In re Pittock's Estate*, 9 Pa. Co. Ct. 457. *S. C.*—*Devereaux v. McCrady*, 46 S. C. 133, 24 S. E. 77. *Va.*—*Graff v. Castleman*, 5 Rand. 195, 16 Am. Dec. 741.

24. *Stevenson v. Markley*, 72 N. J. Eq. 686, 66 Atl. 185; *Whitfield v. Burrell* (Tex. Civ. App.), 118 S. W. 153. See generally the title "Guardian and Ward."

25. *Ala.*—*Hall v. Hall*, 43 Ala. 488, 94 Am. Dec. 703. *Ark.*—*Nelson v. Cowling*, 89 Ark. 334, 116 S. W. 890. *N. J.*—*Stevenson v. Markley*, 72 N. J. Eq. 686, 66 Atl. 185. *S. C.*—*Moore v. Hood*, 9 Rich. Eq. 311, 70 Am. Dec. 210. *Va.*—*Pratt v. Wright*, 13 Gratt. 175, 67 Am. Dec. 767.

26. *Cal.*—*Garr v. Redman*, 6 Cal. 574. *Ga.*—*Smith v. King*, 50 Ga. 192. *Ill.*—*Channon v. Stewart*, 103 Ill. 541; *Crow v. Mark*, 52 Ill. 332. *Md.*—*Milburn v. Guyther*, 8 Gill 92. *Mass.*—*Pratt v. Tuttle*, 136 Mass. 233; *Hallett v. Cumston*, 110 Mass. 32; *Massachusetts Gen. Hospital v. State Mut. Life Assur. Co.*, 4 Gray 227; *Ferry v. Henry*, 4 Pick. 75. *Mich.*—*Murray v. Near*, 106 Mich. 59, 63 N. W. 980; *Petrie v. Torrent*, 88 Mich. 43, 49 N. W. 1076. *Mo.*—*Bates v. Hamilton*, 144 Mo. 1, 45 S. W. 641. *Neb.*—*Daugherty v. Gouff*, 23 Neb. 105, 36 N. W. 351. *N. J.*—*Scudder v. Budd*, 52 N. J. Eq. 320, 26 Atl. 904; *Thomas v. Hartshorne*, 45 N. J. Eq. 215, 16 Atl. 916, 3 L. R. A. 381; *Swallow v. Swallow*, 31 N. J. Eq. 390; *Hargrave v. Conroy*, 19 N. J. Eq. 281. *N. Y.*—*King v.*

**h. Officers.**—Public officers in the control and management of public moneys do not sustain such a fiduciary relation to such funds as to confer equity jurisdiction for an accounting in reference thereto.<sup>27</sup>

Barnes, 109 N. Y. 267, 16 N. E. 332; Whiton v. Spring, 74 N. Y. 169; Dyckman v. Valiente, 42 N. Y. 549; New York v. Manhattan R. Co., 25 N. Y. Supp. 860. N. C.—Darden v. Cowper, 52 N. C. 210. Ore.—Shirley v. Good-nough, 15 Ore. 642, 16 Pac. 871. Pa.—Johnston v. Price, 172 Pa. 427, 3 Atl. 688. R. I.—Bentley v. Harris, 10 R. I. 434. S. C.—Plunkett v. Carew, 1 Hill Eq. 169. Vt.—Paine v. Slocum, 46 Vt. 504. Va.—Early v. Friend, 16 Gratt. 21; Poage v. Willson, 2 Leigh 490. Eng.—Denys v. Shuckburg, 4 Y. & C. Exch. 42, 5 Jur. 21.

In Sanders v. Robertson, 57 Ala. 465, the court in the course of its opinion says: "Cases of account between tenants in common, between joint tenants, between partners, between part owners of ships, and between owners of ships and the masters, fall under the like considerations. They all involve peculiar agencies, like those of bailiffs, or managers of property, and require the same operative power of discovery, and the same interposition of equity. Indeed, in all cases of such joint interests, where one party receives all the profits, he is bound to account to the other parties in interest for their respective shares, deducting the proper charges and expenses; whether he acts expressly by their authority as bailiff, or only by implication as manager, without dissent, *jure domini*, over the property." In Darden v. Cowper, 7 Jones' Law 210, Chief-Justice Pearson said: "If a tenant in common receives more than his share of the profits, by an *excessive use of the property*, as by wearing out the land, or by an *improper use of it*, as by cutting down the timber and selling it, he cannot be treated as a tortfeasor, but the remedy of the co-tenant is by an action of account, or, a bill in equity for an account." In Leach v. Beatties, 33 Vt. 195, the court, after speaking of the inadequacy of the remedy at common law, added: "The only means of obtaining such an account by one tenant in common of another was by bill in the court of chancery; which court had original jurisdiction in that behalf, founded on the peculiar relation

of the parties, and not at all depending on the need of discovery, and the incidental right of administering full and final relief." In Parsons' Maritime Law, 103, it is said to be 'the custom for part owners of a ship to bring a bill in equity against each other for adjustment of accounts, in like manner as is done by partners.' And Story (1 Eq. Ju. § 451) states it as a 'principle on which courts of equity constantly act, by taking cognizance of matters which, though cognizable, at law, are yet so involved with a complex account, that it cannot be properly taken at law.' In Adams' Equity, 525, it is said, with same qualification, speaking of joint ownership, 'if either of the co-owners has been in the exclusive reception of the rents, [the court of equity will] decree an account of his receipts.'—See, also, Dyckman v. Valiente, 42 N. Y. (Hand.) 549; McLellan v. Osborne, 51 Me. 118."

27. Ala.—Hulsey v. Walker County, 147 Ala. 501, 40 So. 311; Sumter County v. Mitchell, 85 Ala. 313, 319, 320, 4 So. 705; State v. Bradshaw's Admr., 60 Ala. 239. Ga.—McNeil v. Ellis, 4 Ga. App. 530, 61 S. E. 1050; General Specialty Co. v. Tifton Ice & P. Co., 3 Ga. App. 502, 60 S. E. 121. Ill.—Clinton County v. Schuster, 82 Ill. 137, holding that the proper remedy is an action on the bond. Miss.—Rose v. Watson, 54 Miss. 673; Tichenor v. Woodburn S. Wheel Co., 54 Miss. 589; Bower v. Henshaw, 53 Miss. 345; Reinhardt v. Carter, Stewart & Co., 49 Miss. 315. W. Va.—Grafton v. Reed, 26 W. Va. 437.

**Suit Against Public Officers for an Accounting.**—In the case of Sumter County v. Mitchell, 85 Ala. 313, 319, 4 So. 705, the suit was for an accounting against a public officer. The defense was raised by demurrer to the bill, the demurrer thereto being sustained and the bill dismissed. From the action of the chancellor the complainant appealed. The supreme court of Alabama, in affirming the action of the court below, in the course of its opinion, said: "In such cases, adequate legal remedies are afforded by an ordinary action

Nor can a principal maintain a suit against his deputy for an accounting.<sup>28</sup> But the rule is otherwise as to the officers handling the funds of a private corporation;<sup>29</sup> in such case equity has jurisdiction.<sup>30</sup>

i. *Partners.*—Equity will enforce an accounting between partners.<sup>31</sup>

at law, or by summary proceedings. There must be some independent equity, such as the enforcement of a lien, the vacation and removal of fraudulent conveyances, the suppression of evidence necessary to correct information of the true state of accounts, or some other special ground of equitable interference. The following cases may be cited as illustrative of the rule, and its application, in each of which the general equity of the bill was maintained, on the ground that a subject-matter properly within the jurisdiction of a court of chancery was involved. *County of Dallas v. Timberlake*, 54 Ala. 403; *Lott v. Mobile County*, 79 Ala. 69; *Scheussler v. Dudley*, 80 Ala. 547. In every case where the suit has been entertained, there existed some special ground of equity, which took it out of the operation of the general rule. This principle was expressly decided in *State v. Bradshaw*, 60 Ala. 239. A bill was filed in the name of the State, for the use of Sumter county, against the administrator of the deceased county superintendent of education, and the sureties on his official bond, to compel the settlement of his accounts, and to vacate a settlement made by the administrator in the office of the superintendent of public instruction, in which he had obtained, by fraud or collusion, credits for vouchers which had been used and allowed in former settlements. It was held that a court of equity will not entertain a bill against a public officer, who has given bond for the performance of his duties, to compel a settlement of his accounts, or for the correction of errors in a settlement made with a proper officer, on the ground that he is trustee, or on the ground of fraud, or of complicated accounts, unless there is a strong case of entanglement."

28. *White v. Cook*, 51 W. Va. 201, 41 S. E. 410, 90 Am. St. Rep. 775, 57 L. R. A. 417, holding that "a sheriff cannot maintain a bill in equity against his deputy for an accounting without showing a sufficient allegation of circumstances entitling him to dis-

covery, as necessary to a complete relief, or that the accounts are complicated and intricate."

But see *Tyler v. Nelson's Admr.*, 14 Gratt. (Va.) 214, holding that a court of equity has jurisdiction in a suit by a high sheriff against his deputy and the sureties of the deputy to have a settlement of the accounts of several administrations upon estates committed to the high sheriff, and which went into the hands of the deputy. And the suit may be maintained though the deputy had settled the administration accounts before the probate court; and though the bill does not allege and it is not proved that the high sheriff had paid the balances reported to be due on the settled accounts, or any part of them.

29. *Cal.*—*San Pedro Lumb. Co. v. Reynolds*, 111 Cal. 588, 44 Pac. 309. *N. Y.*—*Schultz v. German-American Real Estate Co.*, 21 App. Div. 163, 47 N. Y. Supp. 500; *Silver Min. Co. v. Knowlton*, 26 Wkly. Dig. 241. *S. C.*—*Buist v. Melchers*, 44 S. C. 46, 21 S. E. 449.

30. *Bay City Bridge Co. v. Van Etten*, 36 Mich. 210, and cases cited in last preceding note.

31. *D. C.*—*Kilbourn v. Latta*, 5 Mackey 304, 60 Am. Rep. 373. *Iowa.*—*Fryer v. Harken*, 142 Iowa 708, 121 N. W. 526, 2 L. R. A. (N. S.) 477, and note. *Mass.*—*Jones v. Dexter*, 130 Mass. 380, 39 Am. Rep. 459, and note. *Mich.*—*Darrah v. Boyce*, 62 Mich. 480, 29 N. W. 102.

The jurisdiction of equity is practically exclusive in proceedings in the settlement of partnership matters (*King v. Barnes*, 109 N. Y. 267, 16 N. E. 332), for a jury is not fitted for the adjudication of unliquidated and controverted partnership accounts involving numerous transactions. *Colo.*—*Bean v. Gregg*, 7 Colo. 499, 4 Pac. 903. *Conn.*—*Bishop v. Bishop*, 54 Conn. 232, 6 Atl. 426; *Gillett v. Hall*, 13 Conn. 426. *Ga.*—*Epping v. Aiken*, 81 Ga. 682. *Ind.*—*Crossley v. Taylor*, 73 Ind. 337. *La.*—*Seelye v. Taylor*, 32 La. Ann. 1115. *Me.*—*Holyoke v.*



But the jurisdiction will not be exercised unless the suit seeks a dissolution and winding up of the partnership affairs.<sup>32</sup>

j. *Receivers*. — A receiver must account as to the property of which he has control before the court of his appointment,<sup>33</sup> but usually not by suit.<sup>34</sup>

k. *Rents and Profits of Real Estate*. — There are many instances of an accounting in equity as to the rents and profits of real estate, which are given in the notes.<sup>35</sup>

Mayo, 50 Me. 385. Mass. — Couilliard v. Eaton, 139 Mass. 105, 28 N. E. 579. Mich. — Perrin v. Lepper, 49 Mich. 347, 13 N. W. 768. Miss. — Ivy v. Walker, 58 Miss. 253. Mo. — Holt v. Simmons, 16 Mo. App. 97. N. Y. — Cunningham v. Littlefield, 1 Edw. Ch. 104. Pa. — Christy's Appeal, 92 Pa. 157. R. I. — Dowling v. Clarke, 13 R. I. 134.

32. U. S. — Ward v. Thompson, 22 How. 330, 16 L. ed. 249; Grant v. Poillon, 20 How. 162, 15 L. ed. 871; Vandewater v. Mills, 19 How. 82, 15 L. ed. 554; Steamboat Orleans v. Phoebus, 11 Pet. 175, 9 L. ed. 677; The Brothers, 7 Fed. 878; The Ocean Belle, 6 Ben. 253, 18 Fed. Cas. No. 10,402. Cal. — Griggs v. Clark, 23 Cal. 427. Conn. — Niles v. Williams, 24 Conn. 279; Gillett v. Hall, 13 Conn. 426. Fla. — Crescent Ins. Co. v. Bear, 23 Fla. 50, 1 So. 318, 11 Am. St. Rep. 331. Ga. — Bennett v. Woolfolk, 15 Ga. 213. Ill. — Bracken v. Kennedy, 4 Ill. 558; Waugh v. Schlenk, 23 Ill. App. 433. Kan. — Carter v. Christie, 57 Kan. 492, 46 Pac. 964; Krutz v. Paola Town Co., 20 Kan. 397. Me. — Reed v. Johnson, 24 Me. 322. Md. — Glenn v. Hebb, 12 Gill & J. 271. Mass. — White v. White, 169 Mass. 52, 47 N. E. 499. Mich. — Houghton v. State Mut. L. Assur. Co., 110 Mich. 308, 68 N. W. 142; Turnbull v. Monaghan, 94 Mich. 87, 53 N. W. 924; Near v. Lowe, 49 Mich. 482, 13 N. W. 825; Perrin v. Lepper, 49 Mich. 347, 13 N. W. 768. N. H. — Scott v. Buffum, 52 N. H. 345. N. J. — Lilliendahl v. Stegmair, 45 N. J. Eq. 648, 18 Atl. 216; Personette v. Pryme, 34 N. J. Eq. 26. N. Y. — Solomons v. Ruppert, 34 App. Div. 230, 54 N. Y. Supp. 729. N. C. — Rhyne v. Love, 4 S. E. 536. Va. — Stringfellow v. Wise, 27 S. E. 432. W. Va. — Childers v. Neely, 47 W. Va. 70, 34 S. E. 828, 81 Am. St. Rep. 777, 49 L. B. A. 468.

See the title "*Partners*."

33. Kelly v. Kelly, 3 Barb. (N. Y.) 419.

34. Cowdrey v. Railroad Co., 1 Woods 331, 6 Fed. Cas. No. 3,293; Chaude v. Chaude, 12 N. Y. Civ. Proc. 454.

See the title "*Receivers*."

35. U. S. — Gaines v. New Orleans, 17 Fed. 16; Goodyear v. Sawyer, 17 Fed. 2. N. Y. — Rice v. Peters, 128 App. Div. 776, 113 N. Y. Supp. 40. N. C. — Smith v. Smith, 150 N. C. 81, 63 S. E. 177; McPherson v. McPherson, 33 N. C. 391, 53 Am. Dec. 416. Tenn. — Nelson v. Allen, 1 Yerg. 360, 373.

A woman is entitled to an accounting under an agreement giving her a share in the profits of the sale of land, though her name was inserted therein in the place of her husband's to avoid claims of his creditors. Brady v. Jennings, 201 Pa. 473, 51 Atl. 343.

Plaintiff must be in possession. 1 Bac. Abr. 47.

*Tenants in Common*. — At common law (before the statute of Anne) one tenant in common was accountable to his co-tenants only under contract with his co-tenants, or if he had ousted them from the possession or had wasted the property. Dodson v. Hays, 29 W. Va. 577, 600, 2 S. E. 415. In England and in nearly all the states of this country the rule has been changed by statute, and the jurisdiction of equity in this regard does not depend on the necessity for a discovery. See the title "*Tenants in Common*."

*Mortgagor and Mortgagee*. — A mortgagor in possession can be proceeded against for an accounting. Childs v. Hurd, 32 W. Va. 66, 9 S. E. 362.

As to a mortgagee in possession the rule is otherwise. Horn v. Indianapolis Nat. Bank, 125 Ind. 381, 25 N. E. 558, 9 L. R. A. 676, 678. See further on this point title "*Mortgages*."

*Non-Compos Mentis*. — One who intrudes upon the lands of one non

1. *Trustees.* — It is well settled that a trustee may be made to account in equity regarding the trust fund.<sup>30</sup>

m. *Miscellaneous Cases.* — There are several instances not specially noticed in the text in which equity will compel an accounting, illustrations of which are given in the notes,<sup>37</sup> as well as cases refusing an accounting.<sup>38</sup>

5. *Concurrent Jurisdiction of Law and Equity.* — a. *No Precise Rule.* — While the general doctrine is announced that courts of law

*compos mentis* may be proceeded against for an accounting. Robinson v. Burritt, 66 Miss. 356, 6 So. 206.

36. U. S. — United States v. Ashville Nat. Bank, 73 Fed. 379; Norris v. Hassler, 22 Fed. 401. Ala. — Donovan v. Haynie, 67 Ala. 51. Ill. — Dole v. Olmstead, 36 Ill. 150, 85 Am. Dec. 397. Md. — Smith v. Townshend, 27 Md. 368, 92 Am. Dec. 637. Mass. — Tateum v. Ross, 150 Mass. 440, 23 N. E. 230; Dole v. Wooldredge, 135 Mass. 140. N. J. — Fay v. Fay (N. J. Eq.), 29 Atl. 356. N. Y. — Sweet v. Tinslar, 52 Barb. 271. N. C. — Oliver v. Wiley, 75 N. C. 320. W. Va. — Wilson v. Kennedy, 63 W. Va. 1, 59 S. E. 736.

See the title "Trusts and Trustees."

37. Ala. — Locke v. Locke, 57 Ala. 473. Conn. — Southworth v. Smith, 27 Conn. 355, 71 Am. Dec. 72. La. — State v. Judge Watts, 7 La. 440. Md. — Milburn v. Guyther, 8 Gill 92, 50 Am. Dec. 681; Dulaney v. Hoffman, 7 Gill & J. 170, 28 Am. Dec. 207. Mass. — Peters v. Equitable Life Assur. Soc., 200 Mass. 579, 86 N. E. 885; Pierce v. Equitable Assur. Soc., 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433. Minn. — Taylor v. Times Newspaper Co., 83 Minn. 523, 86 N. W. 760, 85 Am. St. Rep. 473. Mo. — Lieber v. Fourth Nat. Bank, 137 Mo. App. 158, 117 S. W. 672. N. H. — Gage v. Gage, 66 N. H. 282, 29 Atl. 543, 28 L. R. A. 829, and note. N. Y. — *In re Cowen*, 130 App. Div. 365, 114 N. Y. Supp. 797. Va. — Townes v. Birchett, 12 Leigh 173; Sturtevant v. Goode, 5 Leigh 83, 27 Am. Dec. 586. W. Va. — Reed v. Bachman, 61 W. Va. 452, 57 S. E. 769, 123 Am. St. Rep. 996; Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694.

Equity will not take jurisdiction where there is no relation of trust and the account is not complicated, and is

merely a basis for ascertaining damages. Holland v. Hallahan, 211 Pa. 223, 60 Atl. 735, 107 Am. St. Rep. 565.

The bill must show defendant's responsibility for the fraudulent act, when the right to an accounting is predicated upon the charge of fraud (Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. ed. 682); and that the legal remedy is inadequate. Morrison v. Chapman, 63 Misc. 195, 116 N. Y. Supp. 522.

Fraud as a Ground of Accounting. — The authorities are quite agreed that a bill in equity will lie for an accounting in cases in which the party against whom suit has been brought has been guilty of fraud, unless the remedy at law is adequate and complete. Ala. — Balkum v. Breare, 48 Ala. 75; Dickinson v. Lewis, 34 Ala. 638. Cal. — Wooster v. Nevills, 73 Cal. 58, 14 Pac. 390. Del. — McFarlan v. Frazier, 1 Del. Ch. 124. Ill. — Higgs v. French, 16 Ill. 343; Bunn v. Schnellbacher, 59 Ill. App. 222. Me. — Webb v. Fuller, 77 Me. 568, 1 Atl. 737. Mass. — Dole v. Wooldredge, 135 Mass. 140. Mich. — Shaw v. Chase, 77 Mich. 436, 43 N. W. 883. Miss. — Fulton v. Woodman, 40 Miss. 593; Phillips v. Hines, 33 Miss. 163. N. Y. — Getty v. Devlin, 70 N. Y. 504; Bird v. Lanphear, 11 App. Div. 613, 42 N. Y. Supp. 623. Pa. — Oil Co. v. Riddle, 6 Phila. 495; Oil Co. v. Adams, 6 Phila. 182; Pittock's Estate, 9 Pa. Co. Ct. 457.

See the title "Bill in Equity."

38. U. S. — Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 51, 29 Sup. Ct. 404, 53 L. ed. 682; Everson v. Equitable L. Assur. Co., 68 Fed. 258. Ala. — Terrell v. Southern R. Co., 51 So. 254. N. Y. — Morrison v. Chapman, 63 Misc. 195, 116 N. Y. Supp. 522; Niele v. Stokes, 61 Misc. 302, 113 N. Y. Supp. 704; Rice v. Peters, 58 Misc. 381, 111 N. Y. Supp. 5.

and equity have concurrent jurisdiction in matters of account,<sup>39</sup> yet no precise rule has been laid down fixing the extent and limits of the concurrent jurisdiction which courts of equity may exercise with courts of law in matters of this character.<sup>40</sup>

39. U. S.—Fowle v. Lawrason's *Exr.*, 5 Pet. 495, 8 L. ed. 204. Ga.—McLaren v. Steapp, 1 Ga. 376. Ind.—Cummins v. White, 4 Blackf. 356. Ky.—Power v. Reeder, 9 Dana 6; Bruce v. Burdet, 1 J. J. Marsh. 80; Breckenridge v. Brooks, 2 A. K. Marsh. 335. Mass.—Bartlett v. Parks, 1 Cush. 82. N. J.—Jewett v. Bowman, 29 N. J. Eq. 174; Seymour v. Long Dock Co., 20 N. J. Eq. 396. N. Y.—Myers v. Bolton, 89 Hun 342, 35 N. Y. Supp. 577; Southgate v. Montgomery, 1 Paige Ch. 41; Duncan v. Lyon, 3 Johns. Ch. 351; Hawley v. Cramer, 4 Cow. 717; King v. Baldwin, 2 Johns. Ch. 554; Rathbone v. Warren, 10 Johns. 587; Post v. Kimberly, 9 Johns. 470; Wilson v. Mallett, 4 Sandf. 112; Ludlow v. Simond, 2 Caines Cas. 1, 2 Am. Dec. 291. N. C.—Jones v. Bullock, 17 N. C. 368; Martin v. Spier, 2 N. C. 369. Pa.—*In re Adams'* Appeal, 113 Pa. 449, 6 Atl. 100; Gloninger v. Hazard, 42 Pa. 389; Shriver v. Nimick, 41 Pa. 80; Baugher v. Conn, 1 Pa. Co. Ct. 184. Tenn.—Hay v. Marshall, 3 Humph. 623; Nelson v. Allen, 1 Yerg. 360; Stothart v. Burnet, Cooke 417. Va.—Tillar v. Cook, 77 Va. 477; Hickman v. Stout, 2 Leigh 6. Eng.—Carlisle v. Wilson, 13 Ves. 276, 33 Eng. Reprint 297; Chapman v. Kreps, 2 Ball & B. 289; Shepard v. Brown, 4 Giff. 208, 66 Eng. Reprint 681; Scott v. Liverpool, 28 L. J. Ch. 230; Hill v. South Staffordshire R. Co., 12 L. T. N. S. 63; Northeastern R. Co. v. Martin, 2 Phill. Ch. 758, 41 Eng. Reprint 1136.
40. U. S.—Fowle v. Lawrason's *Exr.*, 5 Pet. 495, 8 L. ed. 204; London Guarantee & Acc. Co. v. Bell Tel. Co., 171 Fed. 278; Balfour v. San Joaquin Val. Bank, 156 Fed. 500; Guarantee Co. v. Mechanics' Sav. Bank, 80 Fed. 766, 771; Baker v. Biddle, Baldw. 394, 2 Fed. Cas. No. 764. Ill.—Forster, Waterbury & Co. v. Webster Mfg. Co., 108 Ill. App. 41. Ind.—Cummins v. White, 4 Blackf. 356. Ia.—Dickinson v. Stevenson, 142 Iowa 567, 120 N. W. 324. Ky.—Breckenridge v. Brooks, 1 Litt. 360. N. J.—Eggers v. Anderson, 63 N. J. Eq. 264, 49 Atl. 578, 55 L. R.
- A. 570. W. Va.—Grafton v. Reed, 26 W. Va. 437; Petty v. Fogle, 16 W. Va. 497; Lafever v. Billmyer, 5 W. Va. 33.

**Demarcation Between Law and Equity as to Accounting Not Exact.**—In Cummins v. White, 4 Blackf. (Ind.) 356, a suit was brought for an accounting involving a settlement which had been merged as principal in a judgment. It was alleged in the bill that the settlement did not include the price of certain land and other matters. Judgment was confessed "reserving all defense in equity as fully as if defense had been made at law," and an injunction was awarded staying execution until the final hearing of the suit in which the accounting was sought; upon such hearing the injunction was dissolved and the suit dismissed. The court in the course of its opinion in discussing the extent and limits of the concurrent jurisdiction of law and equity in matters of accounting says: "The appellant, assuming that in matters of account and fraud, Courts of law and equity have concurrent jurisdiction, and that in the present case he had a right to avail himself of either tribunal, contends that the decree of the Circuit Court is erroneous; 1st, because the bill discloses matter of account; and 2ndly, because fraud and mistake are alleged in the bill, and established by the proof. That the two Courts possess concurrent jurisdiction over these subjects cannot be denied; and it is equally true, that where there is a concurrency of jurisdiction over the cause of a suitor, he has a right to elect that to which he will resort for redress. At a very early stage of *English* jurisprudence, Courts of chancery began to take cognizance of matters of account, in consequence of the inadequacy of the remedy at law by the old action of account, and the great delay and expense of that mode of procedure; and have gradually enlarged the jurisdiction thus assumed, until it has become concurrent with that of the common law Courts, to an almost unlimited extent, over the



b. *Cases of Undoubted Concurrent Jurisdiction.*—In all cases in

mutual dealings of parties, even when those dealings consist of items of a purely legal character. 1 Story's Eq., 424. There is, however, a distinction in the power of the two tribunals with regard to this subject. It is certain that over multifarious and complicated mutual dealings, a Court of equity has jurisdiction, and that it has none over accounts consisting of but one item on a side; while the power of the law Court embraces both extremes. So, equity has no jurisdiction over accounts, however numerous and important the charges, where there is no mutuality of dealing, and discovery is not required; but law has. At what point between single mutual items, and dealings swelled to great complexity, the right of a Court of equity to take cognizance of the matter begins or ends, has not been denoted with certainty, and, from the nature of the subject, can never be very clearly defined. As we recede from the two extremes, and approach the line of commencing or terminating jurisdiction, much must necessarily be left to the discretion of the chancellor; he must decide each case upon its own peculiar features. It may, however, be safely stated, that in matters of account which are mutual and complicated, or where a discovery is required, or a multiplicity of suits will be avoided, or the remedy at law is not full and adequate, or fraud, accident, or mistake is connected with the subject, equity has jurisdiction: on the contrary, where none of these characteristics are present, the mutual dealings of parties result in causes of action, or matters of set-off, or other defense, cognizable only at law. Jer. Eq. 504—1 Story's Eq. 438, 441. *Dinwiddie v. Bailey*, 6 Ves. 136—*Corp. of Car. v. Wilson*, 13 Ves. 279—*Smith v. Marks*, 2 Rand. Rep., 449—2 Johns. Ch. R. 169—1 Dana's Rep. 584—1 Madd. Ch. Pr. 70, 71—*Moses v. Lewis*, 12 Price, 502."

When Remedy at Law Is Inadequate as Announced by the Federal Courts.—In *Balfour v. San Joaquin Val. Bank*, 156 Fed. 500, the court, discussing the doctrine announced in the text, in the course of its opinion said: "In matters of account the jurisdiction in

equity is concurrent with that at law. The object in either case is the recovery of a money judgment. The result sought is the same; the methods are different. *Pomeroy's Equity* (3d Ed.) §§ 173, 174. While an account, even though it be composed of many items, does not necessarily entitle a litigant to invoke the jurisdiction of equity, yet, the jurisdiction being concurrent, when it is clearly shown that the nature and extent of the dealings have been such as to require an accounting, which it would be impracticable for a jury to make, then a court of equity will assert its jurisdiction, and, in the interest of justice, apply its more flexible remedies, in order that a full hearing may be had with deliberation, and an accurate result be obtained. As to just when such a state of facts exists rests somewhat in discretion. 6 *Pomeroy's Equity*, § 930. At section 927, vol. 6, the author thus states the rule:

'It is not in every matter or account cognizable at law that equitable jurisdiction will be exercised; the general rule being that a proper case is presented when the remedies at law are inadequate.'

Section 723 of the Revised Statutes [U. S. Comp. St. 1901, p. 583] prohibits the federal courts from entertaining suits in equity where 'a plain, adequate and complete remedy may be had at law.' While it was said in *Buzard v. Houston*, 119 U. S. 347-351, 7 Sup. Ct. 249, 30 L. ed. 451, that the statute is only declaratory of the rule which existed before its passage, yet the language used certainly shows the intention of Congress to emphasize, at least, if not to enlarge upon, it; for, if an action at law cannot afford a 'complete' remedy, manifestly it was intended that equity should intervene to do so. The Supreme Court has often announced this view." See *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. ed. 341; *McMullen Lumb. Co. v. Strother*, 136 Fed. 295, 69 C. C. A. 433; *Hayden v. Thompson*, 71 Fed. 60, 64, 17 C. C. A. 592; *Fidelity & Dep. Co. v. Fidelity Tr. Co.*, 143 Fed. 152, 159; *Fenno v. Primrose*, 116 Fed. 49; *Lafever v. Billmyer*, 5 W. Va. 33.

which an action of account at common law would lie,<sup>41</sup> and in all cases involving trusts,<sup>42</sup> or confidential relations resulting in transactions which cannot be adequately adjusted at law, the jurisdiction of equity is undoubted.<sup>43</sup>

See generally the title "Bill in Equity."

41. *Empire Circuit Co. v. Sullivan*, 169 Fed. 1009; *Baker v. Biddle*, *Baldw.* 394, 2 Fed. Cas. No. 764; *Huff v. Thrash*, 75 Va. 546; *Cooper Tr.* 26; *Bispham Eq.* 483.

42. **U. S.**—*Fowle v. Lawrason's Exr.*, 5 Pet. 495, 8 L. ed. 204; *Colonial & U. S. Mtg. Co. v. Hutchinson*, 44 Fed. 219; *Bischoffsheim v. Baltzer*, 20 Fed. 890; *Pacific R. Co. v. Atlantic & P. R. Co.*, 20 Fed. 277; *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 19 Fed. 804; *Blakeley v. Biscoe*, 1 Hempst. 114. **Ala.**—*Crother's Admr. v. Lee*, 29 Ala. 337; *Knotts v. Tarver*, 8 Ala. 743; *Halsted v. Rabb*, 8 Port. 63. **Cal.**—*Adams v. Lambard*, 80 Cal. 426, 22 Pac. 180; *Garr v. Redman*, 6 Cal. 574. **Del.**—*Davis v. Davis*, 1 Del. Ch. 256. **Ga.**—*Powers v. Cray*, 7 Ga. 206. **Ill.**—*Clinton Co. v. Schuster*, 82 Ill. 137; *Patten v. Patten*, 75 Ill. 446; *Craig v. McKinney*, 72 Ill. 305; *Duval v. Duval*, 49 Ill. App. 469; *Gillett v. Hickling*, 16 Ill. App. 392; *Gates v. Fraser*, 9 Ill. App. 624; *Buel v. Selz*, 5 Ill. App. 116. **Ind.**—*Coquillard v. Suydam*, 8 Blackf. 24. **Me.**—*Webb v. Fuller*, 77 Me. 568, 1 Atl. 737; *McLellan v. Osborne*, 51 Me. 118. **Mass.**—*Hallett v. Cumston*, 110 Mass. 32; *Hodges v. Pingree*, 10 Gray 14; *Ferry v. Henry*, 4 Pick. 75. **Mich.**—*Warren v. Holbrook*, 95 Mich. 185, 54 N. W. 712, 35 Am. St. Rep. 554; *Petrie v. Torrent*, 88 Mich. 43, 49 N. W. 1076. **N. Y.**—*Marvin v. Brooks*, 94 N. Y. 71, 80. **Ore.**—*Paul v. Land*, 15 Ore. 442, 17 Pac. 81. **Va.**—*Penn v. Ingles*, 82 Va. 65; *Tillar v. Cook*, 77 Va. 477; *Coffman v. Sangston*, 21 Gratt. 263. **Eng.**—*Padwick v. Stanley*, 9 Hare 627, 68 Eng. Reprint 664; *Hemings v. Pugh*, 4 Giff. 456, 66 Eng. Reprint 785; *Shepard v. Brown*, 4 Giff. 208, 66 Eng. Reprint 681; *McKenzie v. Johnston*, 4 Madd. 373, 56 Eng. Reprint 742; *Smith v. Leveaux*, 2 De G., J. & S. 1, 46 Eng. Reprint 274; *Navulshaw v. Brownrigg*, 2 De G., M. & G. 441, 42 Eng. Reprint 943; *Strelly v. Winson*, 1 Vern. 297, 23 Eng. Reprint 480; *Makepeace v. Rog-*

*ers*, 11 Jur. (N. S.) 215, s. c. 13 W. R. 450; *Harrington v. Churchward*, 6 Jur. (N. S.) 576; *Southampton Dock Co. v. Southampton H. & P. Board*, 11 L. R. Eq. 254; *Moxon v. Bright*, 4 L. R. Ch. 292; *King v. Rossett*, 2 Y. & J. 33.

43. **U. S.**—*Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. ed. 1005. **Ala.**—*Glenn's Admr. v. Billingslea*, 64 Ala. 345. **Ill.**—*Gillett v. Hickling*, 16 Ill. App. 392. **Ia.**—*Dickinson v. Stevenson*, 142 Iowa 567, 120 N. W. 324. **Mich.**—*Warren v. Holbrooks*, 95 Mich. 185, 54 N. W. 712, 35 Am. St. Rep. 554; *Turnbull v. Monaghan*, 94 Mich. 87, 53 N. W. 924; *Darrab v. Boyce*, 62 Mich. 480, 29 N. W. 102; *Clarke v. Pierce*, 52 Mich. 157, 17 N. W. 780. **Mo.**—*Berlien v. Bieler*, 96 Mo. 491, 9 S. W. 916. **N. J.**—*Eggers v. Anderson*, 63 N. J. Eq. 264, 49 Atl. 578, 55 L. R. A. 570; *Fay v. Fay*, 50 N. J. Eq. 260, 24 Atl. 1036. **N. Y.**—*King v. Barnes*, 109 N. Y. 267, 16 N. E. 332; *Marvin v. Brooks*, 94 N. Y. 71; *Dyckman v. Valiente*, 42 N. Y. 549, *affirming* 43 Barb. 131; *Gould v. Seney*, 56 Hun 649, 9 N. Y. Supp. 818; *Wright v. Wright*, 59 How. Pr. 176; *Jones v. Butler*, 20 How. Pr. 189; *Cobb v. Goodhue*, 11 Paige 110; *Hawley v. Cramer*, 4 Cow. 717; *Walker v. Spencer*, 13 Jones & S. 71. **N. C.**—*State v. Quinn*, 74 N. C. 359; *Darden v. Cowper*, 52 N. C. 210. **Ohio.**—*Jaeger v. Herancourt* 1 Wkly. L. Bul. 10. **Ore.**—*Shirley v. Goodnough*, 15 Ore. 642, 16 Pac. 871. **Pa.**—*Darlington's Estate*, 147 Pa. 624, 23 Atl. 1046, 30 Am. St. Rep. 776; *Long v. Cochran*, 9 Phila. 267. **R. I.**—*Bentley v. Harris*, 10 R. I. 434. **S. C.**—*Kerr v. Camden Steamboat Co.*, *Cheves Eq.* 189. **Tenn.**—*Taylor v. Tompkins*, 2 Heisk. 89; *Hale v. Hale*, 4 Humph. 183. **Tex.**—*Brinson v. Cunliff*, 25 Tex. 760. **Vt.**—*Leach v. Beatties*, 33 Vt. 195; *Wiswell v. Wilkins*, 4 Vt. 137. **Va.**—*Vilwig v. Baltimore & O. R. Co.*, 79 Va. 449; *Early v. Friend*, 16 Gratt. 21. **Wash.**—*Seattle Nat. Bank v. School Dist.*, 20 Wash. 368, 55 Pac. 317. **Wis.**—*Rippe v. Stogdill*, 61 Wis. 38, 20 N. W. 645.

c. *Complications in the Account*.—In all other cases the accounts must involve complications to the extent that they cannot be adequately adjusted in a court of law to give equity jurisdiction.<sup>44</sup>

d. *Where Action of Assumpsit May Be Brought*.—It does not necessarily follow that in cases where the action of *indebitatus assumpsit* will lie equity may take jurisdiction.<sup>45</sup> Still there are cases in which equity may exercise jurisdiction, in which that action may be brought.<sup>46</sup>

6. *Objections to Jurisdiction*.—If equity may take jurisdiction for an accounting, the objection that there is a plain and adequate remedy at law should be taken at the earliest opportunity and before defendant enters upon full defense.<sup>47</sup>

C. PARTIES.—1. *Plaintiffs*.—a. *In General*.—Any person interested in the subject-matter of the account may bring a suit for an accounting.<sup>48</sup>

b. *Beneficiary of Trust*.—Thus, the beneficiaries of a trust fund may bring such suit.<sup>49</sup>

c. *Corporations*.—In a suit to compel an accounting by corporate officers or agents, the action must be in the name of the corporation,<sup>50</sup> and not in a stockholder's name.<sup>51</sup>

d. *Next of Kin*.—So the next of kin may maintain such suit against the personal representative of the decedent.<sup>52</sup>

44. **U. S.**—London Guarantee & Acc. Co. v. Bell Tel. Co., 171 Fed. 278; Balfour v. San Joaquin Val. Bank, 156 Fed. 500. **Ala.**—Hudson, Kennedy & Co. v. Vaughan's Exr., 57 Ala. 609. **Iowa**.—Dickinson v. Stevenson, 142 Iowa 567, 120 N. W. 324. **N. Y.**—Ludlow v. Simond, 2 Caines Cas. 1, 2 Am. Dec. 291.

45. **Ala.**—Dargin v. Hewlitt, 115 Ala. 510, 22 So. 128. **Mo.**—Willis v. Barron, 143 Mo. 450, 45 S. W. 289, 65 Am. St. Rep. 673. **S. C.**—Williamson v. King, McMull. Eq. 41, holding that where a sheriff has collected money on an execution, equity has no jurisdiction, assumpsit being ample. **Va.**—Goddin v. Bland, 87 Va. 706, 13 S. E. 145, 24 Am. St. Rep. 678.

46. **U. S.**—Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. ed. 1005. **Conn.**—Smith v. Lawrence, 26 Conn. 468. **Ill.**—Crawford v. Schmitz, 139 Ill. 564, 29 N. E. 40, affirming 41 Ill. App. 357. **Mass.**—Massachusetts Gen. Hospital v. State Mut. L. Assur. Co., 4 Gray 227. **Ohio**.—Nicholson v. Pim, 5 Ohio St. 25. **Pa.**—Evans v. Goodwin, 132 Pa. 136, 19 Atl. 49.

47. Simpson v. Summerville, 30 Pa. Super. 17, holding that equity has jurisdiction where four separate ac-

tions of assumpsit might be necessary for adjustment of the matters in dispute. Hickman v. Stout, 2 Leigh (Va.) 6.

48. **U. S.**—Parkersburg v. Brown, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. ed. 238. **Ala.**—Donovan v. Haynie, 67 Ala. 51; Bullock v. Governor, 2 Port. 484. **Conn.**—Smith's Exrs. v. Chapman's Exrs., 5 Conn. 14. **Ill.**—Gleason & Bailey Mfg. Co. v. Hoffman, 168 Ill. 25, 48 N. E. 143. **Me.**—Webb v. Fuller, 77 Me. 568, 1 Atl. 737. **Mass.**—Phillips v. Allen, 5 Allen 85. **Mo.**—Jones v. Real Estate Sav. Inst., 67 Mo. 109. **N. J.**—Dodge v. Brokaw, 32 N. J. Eq. 155. **N. Y.**—Ramsey v. Gould, 39 How. Pr. 62, 8 Abb. Pr. (N. S.) 174, 57 Barb. 398, affirmed, 3 Lans. 181. **N. C.**—Chalk v. Traders Bank, 87 N. C. 200. **S. C.**—Williams v. Gregg, 2 Strobb. Eq. 297.

49. Norris v. Hassler, 22 Fed. 401; Baker v. Biddle, Baldw. 394, 2 Fed. Cas. No. 764.

50. Brown v. Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250.

51. Brown v. Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250.

52. Haddow v. Haddow, 3 Thomp. & C. (N. Y.) 777.



**c. Partners.**—So one partner may maintain such suit against his copartners.<sup>53</sup>

**f. Ward.**—A ward may sue for an accounting against his guardian, either before the termination of the guardianship<sup>54</sup> or after the termination thereof.<sup>55</sup>

**g. Miscellaneous Cases.**—Other cases illustrative of the right of parties to bring suit for an accounting are given in the notes.<sup>56</sup>

**2. Parties Defendant.**—**a. In General.**—All persons who are interested in having the account taken,<sup>57</sup> or in the result of it, should

53. Ala.—McLaughlin v. Simpson, 3 Stew. & P. 85. Colo.—Tarabino v. Nicoli, 5 Colo. App. 545, 39 Pac. 362. Ind.—Miller v. Rapp, 7 Ind. App. 89, 34 N. E. 125. La.—Burton v. Maltby, 18 La. 531; Millaudon v. Sylvestre, 8 La. 262. N. Y.—Wade v. Rusher, 4 Bosw. 537. Pa.—Hudson v. Barrett, 1 Pars. Eq. Cas. 414. Wis.—Zimmerman v. Chambers, 79 Wis. 20, 47 N. W. 947.

54. Adams v. Quinn, 74 N. C. 359. Contra, Swan v. Dent, 2 Md. Ch. 111.

55. Ill.—Harvey v. Harvey, 87 Ill. 54. Md.—Swan v. Dent, 2 Md. Ch. 111. Minn.—Peel v. McCarthy, 33 Minn. 451, 38 N. W. 205. Pa.—Bowman v. Herr, 1 Pen. & W. 282. Va.—Lemon v. Hansbarger, 6 Gratt. 301.

56. Reed v. Bachman, 61 W. Va. 452, 57 S. E. 769, 123 Am. St. Rep. 996; Eisentraut v. Cornelius, 134 Wis. 532, 115 N. W. 142, 126 Am. St. Rep. 1027.

**Stockholders' Right to File Bill for an Accounting.**—In general a stockholder of a corporation cannot file a bill to compel corporate officers or agents to account. Brown v. Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250.

See the well considered case of Hodges v. New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624, and extended note, especially at pages 646-649.

See generally the title "Corporations."

**Right of Assignee to Sue.**—In Gleason & Bailey Mfg. Co. v. Hoffman, 168 Ill. 25, 48 N. E. 143, suit was brought by the assignee in his own name for an accounting. In sustaining the right the court says: "The corporation had no further interest in the agreement and was in no manner affected by the decree, and the rule is, where the assignment is absolute and valid, and no interest is retained by the assignor in equity, the assignee may institute a suit in his own name. (Frye v. Bank

of Illinois, 5 Gilm. 332; Montague v. Lobdell, 11 Cush. 114; Miller v. Bear, 3 Paige 466; Trocethie v. Austin, 4 Mason 44; Hobart v. Anderson, 21 Pick. 526; Whitney v. McKinney, 7 John. Ch. 144; Brace v. Harrington, 2 Atk. 235.)"

57. U. S.—Saloy v. Bloch, 136 U. S. 338, 10 Sup. Ct. 996, 34 L. ed. 468; Vose v. Philbrook, 3 Story 335, 28 Fed. Cas. No. 17,010. Cal.—McPherson v. Parker, 30 Cal. 455, 89 Am. Dec. 129. N. J.—Keeler v. Keeler, 11 N. J. Eq. 458. N. Y.—Levy v. Popper, 104 App. Div. 457, 93 N. Y. Supp. 842; Good v. Daland, 53 Hun 634, 6 N. Y. Supp. 204, affirmed, 121 N. Y. 1, 24 N. E. 15; Petrie v. Petrie, 7 Lans. 90. Pa.—Petitt v. Baird, 10 Phila. 57. S. C.—Moore v. Hood, 9 Rich. Eq. 311, 70 Am. Dec. 210.

**All Parties Interested Should Be Before the Court.**—In Moore v. Hood, 9 Rich. Eq. (S. C.) 311, 70 Am. Dec. 210, the bill was filed for an accounting. The court in the course of its opinion, discussing the necessity of all persons in interest being made parties to the suit, said: "In equity, the general rule is that all persons, whether adults or infants, shall be made parties to a suit who are materially interested in the object of the suit and the questions to be therein decided. As between trustees and beneficiaries all of both classes are necessary parties generally, although an exception is tolerated in suits by beneficiaries where one of several trustees is pursued for his particular breach of trust; and exceptions are allowed in suits by trustees, first, where the object of the suit is merely to obtain from some third person possession of the trust property and it is indifferent to the equitable claimants whether the trustees succeed or fail, and secondly, where the trustees fully represent the beneficiaries.

be made defendants so that they may be concluded by the proceeding.<sup>58</sup>

b. *Assignees*.—Thus in a suit by one joint assignee of a patent for an accounting the other assignees must be parties.<sup>59</sup> An assignee for the benefit of creditors may be compelled to account in a suit in which he is made defendant for that purpose.<sup>60</sup>

c. *Corporations*.—In a suit by a stockholder against the directors in reference to corporate funds, the corporation is a necessary party.<sup>61</sup>

d. *Estates of Decedent*.—In a suit for an accounting with reference to the estate of a decedent, involving the payment of the debts and the distribution of such estate, the personal representative and next of kin are necessary parties,<sup>62</sup> unless such next of kin are for any cause without any interest in the estate.<sup>63</sup>

e. *Guardianship Matters*.—In a suit by one of two or more wards

The last exception is the only one requiring consideration in this case. The most familiar instance of this exception is in suits by or against executors and administrators concerning the personality, as to which they are by law the owners and the representatives of the legatees and distributees; and usually in such suits the rights of the beneficiaries are held to be sufficiently represented and their interests protected in the names and persons of their said trustees: *Sto. Eq. Pl. secs. 207, 208*; *Calvert on Part. 8, 20, 207, 315.*"

While the general rule is that all parties in interest, whose rights may be affected by the suit, should be parties to the bill, there is an exception to this rule where the parties are very numerous and so scattered that their names and residences cannot be ascertained without great difficulty. *Smith v. Rotan, 44 Ill. 506.*

58. *Southal v. Shields, 81 N. C. 28*, and cases cited in last preceding note.

59. *Jordan v. Dobson, 13 Fed. Cas. No. 7,519*; *1 Danl. Ch. Pr. (6th Am. ed.) 216.*

60. *Ala.*—*Royall's Admr. v. McKenzie, 25 Ala. 363.* *N. Y.*—*In re Farnam, 75 N. Y. 187*; *In re Straus, 9 Abb. N. C. 131*; *Ex parte Parker, 5 Abb. N. C. 334*; *In re Ludington's Petition, 5 Abb. N. C. 307*; *Smith v. Tighe, 14 Jones & S. 270.* *Pa.*—*Appeal of Whitney, 22 Pa. 500.* *Tex.*—

*McIlhenny v. Todd, 71 Tex. 400, 9 S. W. 445, 10 Am. St. Rep. 753.* *Wis.*—*Geisse v. Beall, 3 Wis. 367.*

61. *Moyle v. Landers (Cal.), 21 Pac. 1133*; *Beach v. Cooper, 72 Cal. 99, 13 Pac. 161*; *Byers v. Rollins, 13 Colo. 22, 21 Pac. 894.* See *Davenport v. Dows, 18 Wall. (U. S.) 626, 21 L. ed. 938*, and note to *Hersey v. Veazie, 24 Me. 9, 41 Am. Dec. 364.*

62. *U. S.*—*Conolly v. Wells, 33 Fed. 205.* *Ala.*—*Word v. Word, 90 Ala. 81, 7 So. 412*; *Baines v. Barnes, 64 Ala. 375.* *Ill.*—*Diversey v. Johnson, 93 Ill. 547*; *Smith v. Rotan, 44 Ill. 506.* *Ky.*—*Quinn v. Stockton, 2 Litt. 343.* *N. J.*—*Van Mater v. Sickler, 9 N. J. Eq. 483.* *N. Y.*—*Rogers v. Ross, 4 Johns. Ch. 388, 8 Am. Dec. 575.* *N. C.*—*Hardy v. Miles, 91 N. C. 131*; *Wadsworth v. Davis, 63 N. C. 251*; *Raby v. Ellison, 40 N. C. 265*; *Cannon v. Jenkins, 16 N. C. 422*; *Goode v. Goode, 4 N. C. 255*; *s. c. 6 N. C. 335.* *Va.*—*Moring v. Lucas, 4 Call 577.* *W. Va.*—*Donahoe v. Fackler, 8 W. Va. 249.*

*In Suit Involving the Personalty Only of the Decedent.*—In a bill for an accounting filed against the administrators of the deceased obligors for a guardian fund it was held unnecessary to make the heirs of the deceased parties to the suit. *Smith v. Rotan, 44 Ill. 506.*

63. *Pennsylvania Ins. Co. v. Baerle, 143 Ill. 459, 33 N. E. 166.*

involving a settlement of the accounts of the guardianship, the other wards<sup>64</sup> and the guardian must be made defendants.<sup>65</sup>

f. *Partnership*.—In a suit brought to settle a partnership and for an accounting with reference to its affairs, all the partners are necessary parties.<sup>66</sup> In the case of the death of a partner, his personal representative should be made a party,<sup>67</sup> and in some instances the next of kin.<sup>68</sup> But as a rule partnership creditors are not necessary parties.<sup>69</sup>

g. *Trust Estates*.—In a suit for an accounting touching a trust, all the trustees should be before the court,<sup>70</sup> and all other persons interested therein.<sup>71</sup>

3. *Joinder of Parties Plaintiff*.—a *In General*.—All persons having a common interest may join in a suit for an accounting.<sup>72</sup>

b. *Beneficiaries of a Trust Fund*.—Beneficiaries in a trust fund, though having separate interests therein, may join in a suit for an accounting against the trustees.<sup>73</sup>

64. *Hendry v. Clardy*, 8 Fla. 77; *Crooks v. Turpen*, 1 B. Mon. (Ky.) 183. *Contra*, *Skipwith v. Glathary*, 34 La. Ann. 28.

It is no objection to a bill by one of several wards against the guardian for the proceeds of the sale of land that the others are not joined, where the petition for the sale and the settlement of the guardian ascertains the interest of the complainant, especially where the assignment of errors does not embrace such objection. *Taylor v. Taylor*, 6 B. Mon. (Ky.) 559.

*Joinder of Wards*.—In a suit where one of several wards files his bill for an accounting against his guardian, the other wards who may be interested in a general fund must be made parties thereto. *Hendry v. Clardy*, 8 Fla. 77.

65. Ala.—*Hailey v. Boyd's Admr.*, 64 Ala. 399. Fla.—*Hendry v. Clardy*, 8 Fla. 77. Ky.—*Crooks v. Turpen*, 1 B. Mon. 183. Md.—*O'Hara v. Shepherd*, 3 Md. Ch. 306.

The state is not a necessary party when obligee in guardian's bond. *Patty v. Williams*, 71 Miss. 837, 15 So. 43.

66. U. S.—*Fourth Nat. Bank v. New Orleans & C. R. Co.*, 11 Wall. 624, 20 L. ed. 82; *Parsons v. Howard*, 2 Woods 1, 18 Fed. Cas. No. 10,777; *Gray v. Larrimore*, 4 Sawy. 638, 10 Fed. Cas. No. 5,721. Ga.—*Elliott v. Deason*, 64 Ga. 63; *Wells v. Strange*, 5 Ia. 22. La.—*Francis v. Lavine*, 21 La. Ann. 265. Md.—*McKaig v. Hebb*, 42 Md. 227. Minn.—*Wilcox v. Com-*

*stock*, 37 Minn. 65, 33 N. W. 42. Va.—*Waggoner v. Cray's Admr.*, 2 Hen. & M. 603.

*Mining Partnership—Retiring Partner*.—In *Slater v. Haas*, 15 Colo. 574, 25 Pac. 1089, 22 Am. St. Rep. 440, it was held that a partner who had withdrawn without dissolving the co-partnership might sue the manager without joining the other partners.

67. U. S.—*Moore v. Huntington*, 17 Wall. 417, 21 L. ed. 642; *Bartle v. Nutt*, 4 Pet. 184, 7 L. ed. 825; *Bartle v. Coleman*, 3 Cranch C. C. 283, 2 Fed. Cas. No. 1,072. Ala.—*Cannon v. Copeland*, 43 Ala. 201. Ark.—*McGuire v. Ramsey*, 9 Ark. 518. Ga.—*Burchard v. Boyce*, 21 Ga. 6. Iowa.—*Frederick v. Cooper*, 3 Iowa 171.

68. U. S.—*Bartle v. Coleman*, 3 Cranch C. C. 283, 2 Fed. Cas. No. 1,072. Ala.—*Cannon v. Copeland*, 43 Ala. 201. La.—*Savage v. Williams*, 15 La. Ann. 250. Miss.—*Dilworth v. Mayfield*, 36 Miss. 40.

69. *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. ed. 1005.

70. *McKinley v. Irvine*, 13 Ala. 681; *Stevens v. Melcher*, 53 Hun 636, 6 N. Y. Supp. 811.

71. *Delaney v. O'Connor*, 138 Ill. App. 366; *Passaic Match Co. v. Helio Match Co.* (N. J. Eq.), 70 Atl. 466.

See the title "Trusts and Trustees."

72. *State v. Churchill*, 48 Ark. 426, 434, 3 S. W. 352, 880; *Rice v. Peters*, 128 App. Div. 776, 113 N. Y. Supp. 40.

73. *Norris v. Hassler*, 22 Fed. 401. See also the following cases: U. S.—*McArthur v. Scott*, 113 U. S. 340, 5



c. *Miscellaneous Cases*.—In the notes many illustrative cases are given of the joinder of plaintiffs in suits for an accounting.<sup>74</sup>

4. *Joinder of Defendants*.—a. *In General*.—Inasmuch as all persons in interest in a suit for an accounting must be before the court,<sup>75</sup> it follows that when such persons are not plaintiffs they must be defendants.<sup>76</sup>

Sup. Ct. 652, 28 L. ed. 1015; Reed v. Reed, 31 Fed. 49; Drake v. Delliker, 24 Fed. 527; McDonnell v. Eaton, 18 Fed. 710. **Ala.**—Sawyers v. Baker, 66 Ala. 292; Kingsbury v. Flowers, 65 Ala. 479; Gibbs v. Hodge, 65 Ala. 366. **Ark.**—Johnson v. Meyer, 54 Ark. 442, 16 S. W. 123; Theurer v. Brogan, 41 Ark. 88; Price v. Sanders, 39 Ark. 306; McCauley v. Six, 34 Ark. 379. **Cal.**—Louvall v. Gridley, 70 Cal. 507, 11 Pac. 777. **Fla.**—Anderson v. Northrop, 30 Fla. 612, 12 So. 318. **Ill.**—Pennsylvania Co. v. Bauerle, 143 Ill. 459, 33 N. E. 166; Temple v. Scott, 143 Ill. 290, 32 N. E. 366; Walters v. Walters, 132 Ill. 467, 23 N. E. 1120; Bonny v. Bonny, 36 Ill. App. 129; Seymour v. Edwards, 31 Ill. App. 50; Ryder v. Topping, 15 Ill. App. 216; Dayton v. Dayton, 7 Ill. App. 136. **Ind.**—Tinkler v. Swaynie, 71 Ind. 562. **Miss.**—Simmons v. Ingram, 60 Miss. 886. **Mo.**—Gartside v. Gartside, 113 Mo. 348, 20 S. W. 669; Weinreich v. Weinreich, 18 Mo. App. 364. **N. J.**—Hunt v. Van Derveer, 43 N. J. Eq. 414, 6 Atl. 20; Union M. E. Church v. Wilkinson, 36 N. J. Eq. 141. **N. Y.**—Applebee v. Duke, 66 Hun 634, 21 N. Y. Supp. 890; Mellen v. Banning, 61 Hun 627, 16 N. Y. Supp. 887. **Tenn.**—Smith v. Gooch, 6 Lea 536. **Tex.**—Dwyer v. Olivari, 16 S. W. 800; McNeill v. Masterson, 79 Tex. 670, 15 S. W. 673; Brundige v. Rutherford, 57 Tex. 22. **W. Va.**—Spencer v. Lee, 19 W. Va. 179.

74. In Gartside v. Gartside, 113 Mo. 348, 20 S. W. 669, the suit was for the removal of a trustee and for an accounting. In this suit there were several plaintiffs who owned estates in severalty. It was contended that the bill was multifarious, as these parties owning separate interests could not unite in one and the same suit. The court in refusing to follow this contention said: "We do not concur in defendant's contention that plaintiffs' petition is multifarious in joining therein three beneficiaries, each own-

ing estates in severalty. Plaintiffs have a common object,—the removal of defendant from the trust—and common ground upon which they seek that object. Defendant is trustee of the property of all of them. His conduct towards them and their property, and his relations with them, are the same. All having a common cause of action and common ground of relief may be joined in the same bill."

In Smith v. Gooch, 6 Lea (Tenn.) 536, the original bill was for an accounting and the recovery and distribution of the amount due from the estate of the guardian to his ward. It was held that the several defendant wards might properly join in the same suit against the defendant.

In Brinkley v. Willis, 22 Ark. 1, it was held that one of several legatees, there being a unity of legal interest between them, cannot sue for himself and for the other legatees, as in the instance of one or more creditors for the benefit of all that may be interested in a fund. It was held that in such a case as this the legatees should be united as parties in the suit, and thus be made co-plaintiffs for the accounting.

75. 1 Dan. Ch. Pr. (6th Am. ed.) 216, 217.

76. McPherson v. Parker, 30 Cal. 455, 89 Am. Dec. 129.

As to Making of Persons Interested Parties to the Suit.—"The rule that all persons interested in an account should be made parties to a suit against the accounting party, will not apply where it appears that some of the parties interested in such account have been accounted with and paid. Thus, in the case of a bill by an infant *cestui que trust* coming of age, for his share of a fund, an account will be ordered without requiring the other *cestui que trusts*, who have come of age and have received their shares, to be before the Court." 1 Dan. Ch. Pl. & Pr. (6th Am. ed.) 219.

b. *Necessary Joinder*.—If the parties are jointly liable to account, they must be joined as defendants.<sup>77</sup>

Illustrations.—In the notes are found cases illustrative of this principle.<sup>78</sup>

c. *Proper Joinder*.—In a suit for an accounting against a guardian, the sureties on his bond may be joined,<sup>79</sup> and the same principle ap-

77. *Conolly v. Wells*, 33 Fed. 205; *Howth v. Owens*, 29 Fed. 722; *Northwestern Pac. R. Co. v. Kindred*, 14 Fed. 77; *Haythorn v. Margerem*, 7 N. J. Eq. 324.

78. In a bill charging one administrator with fraud in relation to his trust, his co-administrator must be joined, no reason appearing for omitting him. *Bregaw v. Claw*, 4 Johns. Ch. (N. Y.) 116.

In order to obtain account of the personal estate which came into the hands of an administratrix, she being dead, her personal representatives are indispensable parties. *Silsbee v. Smith*, 60 Barb. (N. Y.) 372.

In an action against an executor, who is also a guardian and trustee, for an account and settlement, and for the payment of a bond given to the testator of the defendant, in trust for the defendant and others, and for a proper distribution of the proceeds of said bond, the obligor therein is a necessary party. *Oliver v. Wiley*, 75 N. C. 320.

If one of two administrators has taken no active participation in the administration of the estate, and has died, his administrator is not a necessary party to a bill filed by the distributee for an account of the administration of the estate. *Will's Admr. v. Dunn's Admr.*, 5 Gratt. (Va.) 384.

79. Fla.—*Pace v. Pace*, 19 Fla. 438. N. Y.—*Cuddeback v. Kent*, 5 Paige 92. N. C.—*Butler v. Durham*, 38 N. C. 589. Va.—*Sayers v. Cassell*, 23 Gratt. 525.

*Joinder of Sureties*.—In the case of *Wiser v. Blachly*, 1 Johns. Ch. (N. Y.) 607, the action was a suit for an accounting by an infant brought against his guardian and the representative of the surety. The chancellor remarked in that case that perhaps it would be premature to take an accounting of the assets in the hands of the executor of the surety, until the default of the surety and his inability is first

ascertained. The supreme court of Florida in the case of *Hendry v. Clardy*, 8 Fla. 77, commenting on that case, said: "In cases of this kind the surety ought always to be made a party to the taking of the account, but the execution should go out against him only in the event of the inability of the principal to pay."

*Joinder of Securities in Suit on Bond of Guardian for an Accounting*. In *Pace v. Pace*, 19 Fla. 438, 454, the court in the course of its opinion says: "But the plaintiff alleges that the defendant, who is now in possession of these funds, was appointed his guardian, and unquestionably he is liable in equity to account to him therefor. In this aspect of the case are the guardian's sureties necessary parties to this proceeding? This court, in the case of *Henry et ux v. Clardy*, 8 Fla. 82, which was a case of a bill by ward against guardian and sureties, remark: 'That in cases of this character the surety ought always to be made a party to the taking of the account.' If the court meant by this language that the surety not only *ought* to be made a party, but that he *must* be made a party, then such doctrine is not sustained by the authorities. We think with the court in that case that he ought to be made a party, because he is bound by the account by virtue of the general nature of his contract, and of the privity of contract between him and his principal, but the rule from the cases is that he is a proper but not a necessary party. *Hailey v. Boyd's Administrator*, 64 Ala. 400; *Payne v. Hook*, 7 Wall. 425; *Pfeiffer and Sullivan v. Knapp*, 17 Fla. 146; *Pratt. v. Wright*, 13 Gratt. 181."

*Where Two Bonds Have Been Given*. In *Sayers v. Cassell*, 23 Gratt. (Va.) 525, the guardian of an infant, when he was appointed, gave a bond and afterwards came into court and gave another bond with other sureties. It

plies to suits against personal representatives.<sup>80</sup> Nor is it necessary that a decree should first be obtained against the principal.<sup>81</sup>

d. *Unnecessary Parties*.—If parties who are not necessary are made defendants, an objection because of this cannot be raised by a necessary party.<sup>82</sup>

D. THE PLEADINGS.—1. *Bill or Complaint*.—a. *In General*.—The bill, petition or complaint should be so framed by the proper allegation of facts as to authorize a decree for an account.<sup>83</sup> General allegations that the plaintiff is entitled to an accounting are not sufficient.<sup>84</sup>

b. *Interest of Complainant*.—The pleading must show the interest of the plaintiff in the subject-matter to which the accounting sought relates.<sup>85</sup>

c. *Liability to Account*.—The bill or complaint must set forth such facts as will enable the court to determine whether or not the defendant is liable to account.<sup>86</sup>

d. *The Grounds for Accounting*.—The pleading of the plaintiff

was held that the second bond related back to his appointment, and that the sureties in the first bond were "not necessary or proper parties to a bill by the ward against the guardian and his sureties for the settlement of his accounts."

80. *State v. Churchill*, 48 Ark. 426, 3 S. W. 352, 880; *Spottswood v. Dandridge*, 4 Munf. (Va.) 289.

81. *N. J.*—*Rutherford v. Alyea*, 53 N. J. Eq. 580, 32 Atl. 70; *United Security L. Ins. Co. v. Vandegrift*, 51 N. J. Eq. 400, 26 Atl. 985. *Va.*—*Barnes v. Trafton*, 80 Va. 524; *Franklin's Admr. v. Depriest*, 13 Gratt. 257; *Pratt v. Wright*, 13 Gratt. 175, 181, 67 Am. Dec. 767; *Cookus v. Peyton's Exr.*, 1 Gratt. 431, 449; *Spottswood v. Dandridge*, 4 Munf. 289, 298; *Call v. Ruffin*, 1 Call 333; *Magruder v. Goodwin*, 2 Patt. & H. 561. *W. Va.*—*Reed v. Hedges*, 16 W. Va. 167.

82. *Buie v. Mechanic's B. & L. Assn.*, 74 N. C. 117.

See the title "*Parties*."

83. *Ala.*—*Phillips v. Birmingham Ind. Co.*, 161 Ala. 509, 50 So. 77. *Ark.*—*State v. Turner*, 49 Ark. 311, 5 S. W. 302. *Conn.*—*Southworth v. Smith*, 27 Conn. 355, 71 Am. Dec. 72. *Ill.*—*Fuller v. Davis' Sons*, 184 Ill. 505, 56 N. E. 791. *Mass.*—*Walker v. Brooks*, 125 Mass. 241. *Mich.*—*Moody v. Macomber*, 158 Mich. 209, 122 N. W. 517. *Mont.*—*Merrill v. Miller*, 28 Mont. 134, 72 Pac. 423. *N.*

*J.*—*Welch v. Arnett*, 46 N. J. Eq. 548, 22 Atl. 124. *N. Y.*—*Pierce v. McLaughlin Real Estate Co.*, 121 App. Div. 501, 106 N. Y. Supp. 28. *W. Va.*—*McGraw v. Trader's Nat. Bank*, 64 W. Va. 509, 63 S. E. 398.

*Bill Should State Case With Fullness and Certainty*.—In *Welch v. Arnett*, 46 N. J. Eq. 548, 22 Atl. 124, it is decided that the rules of equity pleading require that the complainant shall state the facts upon which his claim rests with such fullness and certainty as will give the defendant clear information of the case he is called upon to answer.

84. *Conn.*—*Southworth v. Smith*, 27 Conn. 355, 71 Am. Dec. 72. *Ill.*—*Gutsch Brew. Co. v. Fischbeck*, 41 Ill. App. 400; *Kennicott v. Leavitt*, 37 Ill. App. 435. *Md.*—*Berry v. Pierson*, 1 Gill 234. *Miss.*—*Smith v. Gill*, 52 Miss. 607.

85. *U. S.*—*Empire Circuit Co. v. Sullivan*, 169 Fed. 1009; *Hubbard v. Urton*, 67 Fed. 419. *Ala.*—*Wood v. Mathews*, 53 Ala. 1. *Conn.*—*Ryan v. Knights of Columbus*, 82 Conn. 91, 72 Atl. 574. *Fla.*—*West v. Reynolds*, 35 Fla. 317, 17 So. 740.

86. *Com. Tr. Co. v. Frick*, 120 Fed. 688; *Thompson v. Snyder*, 113 Fed. 531.

Contract under which accounting is sought may be alleged according to its legal effect. *U. S.*—*Everson v. Equitable L. Assur. Soc.*, 71 Fed. 570, 18 C. C. A. 251. *Ala.*—*Dargin v. Hewlitt*,



must specifically aver the grounds upon which the accounting is sought.<sup>87</sup>

**Illustrations.**—For illustration, if the ground be because the account is complicated, it must be shown in what respect such account is complicated.<sup>88</sup> If on the ground of fraud, the facts constituting such fraud must be averred.<sup>89</sup>

*e. Demand.*—If the right to an accounting depends upon a previous demand, such a demand and a refusal should be alleged.<sup>90</sup>

*f. Certainty.*—The bill, petition or complaint should be definite and certain as to the subject-matter respecting which the account is asked,<sup>91</sup> as an accounting will not be directed as to matters not contained in the pleading.<sup>92</sup>

115 Ala. 510, 22 So. 128. **Ill.**—Fuller v. Davis' Sons, 184 Ill. 505, 56 N. E. 791.

**87. U. S.**—Everson v. Equitable L. Assur. Soc., 71 Fed. 570, 18 C. C. A. 251. **Ill.**—Cook County v. Davis, 143 Ill. 151, 32 N. E. 176. **Mass.**—Walker v. Brooks, 125 Mass. 241; Badger v. McNamara, 123 Mass. 117; Bushnell v. Avery, 121 Mass. 148. **N. Y.**—Conger v. Judson, 69 App. Div. 121, 74 N. Y. Supp. 504; Rivelson v. Silverstein, 65 App. Div. 614, 72 N. Y. Supp. 594. **Wash.**—Seattle Nat. Bank v. School Dist., 20 Wash. 368, 55 Pac. 317. **W. Va.**—VanDorn v. Lewis County Court, 38 W. Va. 267, 18 S. E. 579.

**88. Ala.**—Beggs v. Edison Elec. Illum. Co., 96 Ala. 295, 11 So. 381, 38 Am. St. Rep. 94. **Conn.**—Norwich & W. R. Co. v. Storey, 17 Conn. 364. **Mass.**—Badger v. McNamara, 123 Mass. 117; Bartlett v. Parks, 1 Cush. 82. **N. J.**—Ely v. Crane, 37 N. J. Eq. 157. **R. I.**—Murphy v. Eddy, 19 R. I. 41, 13 Atl. 435; McCulla v. Beadelston, 17 R. I. 20, 20 Atl. 11. **W. Va.**—Van Dorn v. Lewis County Court, 38 W. Va. 267, 18 S. E. 579; Grafton v. Reed, 26 W. Va. 437; Lafave v. Billmyer, 5 W. Va. 33. **Eng.**—Phillips v. Phillips, 9 Hare 471, 68 Eng. Reprint 596; Fluker v. Taylor, 3 Drew 183, 61 Eng. Reprint 873; Padwick v. Hurst, 18 Beav. 575, 52 Eng. Reprint 225; Darthez v. Clemens, 6 Beav. 165, 49 Eng. Reprint 788; Foley v. Hill, 2 H. L. Cas. 28, 9 Eng. Reprint 1002, *affirming* 1 Phill. Ch. 399; McMahon v. Burchell, 2 Phill. 127, 41 Eng. Reprint 889; Leake v. Cordeaux, 4 W. R. 806; Bowles v. Orr, 1 Y. & C. 464.

In Beggs v. Edison Elec. Illum. Co., 96 Ala. 295, 11 So. 381, 38 Am. St. Rep. 94, a bill for an accounting, the court says: "The fact that the bill happens to contain a general, vague charge that there are voluminous and intricate accounts between the parties, and this general allegation is inserted merely as a predicate for the purpose of bringing the case within the jurisdiction of a court of equity, the court will not entertain the bill, if demurred to for want of equity. This rule was clearly laid down by Lord Langsdale in Darthez v. Clemens, 6 Beavan 165, and has been followed ever since. Vanlier v. Kirkman, 7 Ala. 217; Knotts v. Tarver, 8 Ala. 744; Dickerson v. Lewis, 34 Ala. 538; State v. Bradshaw, 60 Ala. 238; County of Dallas v. Timberlake, 54 Ala. 403; Lott v. Mobile Co., 79 Ala. 69."

**89. Fox v. Mackay**, 125 Cal. 54, 57 Pac. 672.

**90. Mass.**—Hobart v. Andrews, 21 Pick. 526. **Mont.**—Ayotte v. Nadeau, 32 Mont. 498, 81 Pac. 145. **Wash.**—Seattle Nat. Bank v. School Dist., 20 Wash. 368, 55 Pac. 317.

**91 Cal.**—Fox v. Mackay, 125 Cal. 54, 57 Pac. 672. **Mass.**—Hobart v. Andrews, 21 Pick. 526. **S. C.**—Chapman v. City Council, 28 S. C. 373, 6 So. 153, 13 Am. St. Rep. 681. **W. Va.**—Van Dorn v. Lewis County Court, 38 W. Va. 269, 18 S. E. 579.

**92. Beggs v. Edison Elec. L. & Illum. Co.**, 96 Ala. 295, 11 So. 381, 38 Am. St. Rep. 94; American Freehold Land & Mtg. Co. v. Jefferson, 69 Miss. 770, 12 So. 464, 30 Am. St. Rep. 587.

g. *Discovery*.—When the jurisdiction depends upon a discovery, the bill must allege facts which show the necessity for such discovery.<sup>93</sup>

h. *Offer to Do Equity*.—An allegation of an offer to do equity on the part of the plaintiff is not necessary.<sup>94</sup>

i. *Different Matters in Same Suit*.—The bill may properly unite different accounts between the same parties in one suit,<sup>95</sup> and an objection because of multifariousness by reason thereof will not avail.<sup>96</sup>

j. *The Prayer*.—It is not generally necessary that a specific prayer for an accounting be made in the bill.<sup>97</sup> It will be granted under a general prayer, if the facts alleged be sufficient to authorize an accounting.<sup>98</sup> But it is usual and proper to pray for an accounting,<sup>99</sup> and in some jurisdictions it is necessary.<sup>1</sup>

*Illustrations*.—In the note will be found many cases illustrative of the sufficiency and insufficiency of bills for an accounting.<sup>2</sup>

93. *Dickinson v. Lewis*, Garthwaite & Co., 34 Ala. 638; *Crother's Admr. v. Lee*, 29 Ala. 337; *Perrine v. Carlisle*, 19 Ala. 686.

A bill cannot be maintained on the ground of discovery alone, unless it is alleged that the complainant is unable to prove the facts upon which he relies for relief, otherwise than by the answer. *Crother's Admr. v. Lee*, 29 Ala. 337; *Perrine v. Carlisle*, 19 Ala. 686.

*Illustration as to Sufficiency of Bill Founded on Discovery*.—See *Virginia and A. Min. & Mfg. Co. v. Hale*, 93 Ala. 542, 9 So. 256.

See generally the titles "*Bill in Equity*," "*Discovery*."

94. Ala.—*Nelson v. Dunn*, 15 Ala. 501. Colo.—*Craig v. Chandler*, 6 Colo. 543. Ga.—*Wells v. Strange*, 5 Ga. 22.

The bill need not offer to pay the balance, if found against complainant. *Nelson v. Dunn*, 15 Ala. 501; *Wells v. Strange*, 5 Ga. 22.

"In an action to recover certain money the complainant sufficiently avers an offer to account by an allegation 'that he has made due demand.'"  
*Hill v. Haskin*, 51 Cal. 175.

95. U. S.—*Norris v. Hassler*, 22 Fed. 401. Cal.—*Garr v. Redman*, 6 Cal. 574. Miss.—*Graves v. Hull*, 5 Cushm. 419. N. C.—*Oliver v. Wiley*, 75 N. C. 320.

96. *Williams v. West's Admr.*, 2 Md. 174; *Graves v. Hull*, 5 Cushm. (Miss.) 419.

97. U. S.—*McKay v. Hudson*, 118 Fed. 919. Ill.—*Haworth v. Taylor*, 108 Ill. 275. Mo.—*Young v. Powell*, 13 Mo. App. 594. N. J.—*Chambers v.*

*Kunzman*, 59 N. J. Eq. 433, 45 Atl. 599. N. Y.—*Dyckman v. Valiente*, 42 N. Y. 549; *Wood v. Brown*, 34 N. Y. 337. N. C.—*Buffalow v. Buffalow*, 37 N. C. 113. Va.—*Marks v. Hill*, 15 Gratt. 400. Wis.—*North Side Loan & Bldg. Soc. v. Nakielski*, 127 Wis. 539, 106 N. W. 1097.

98. *Humphrey v. Foster*, 13 Gratt. (Va.) 653; *Sturm v. Chalfant*, 38 W. Va. 248, 253, 18 S. E. 451; *Rust v. Rust*, 17 W. Va. 901, 907.

99. *Beggs v. Edison Elec. L. & Illum. Co.*, 96 Ala. 295, 11 So. 381, 38 Am. St. Rep. 94.

1. *Dominguez v. Dominguez*, 7 Cal. 424; *Averill etc. Co. v. Verner*, 22 Ohio St. 372.

2. U. S.—*Balfour v. San Joaquin Val. Bank*, 156 Fed. 500. Fla.—*West v. Reynolds*, 35 Fla. 317, 17 So. 740 (not sufficient); *Anderson v. Northrop*, 30 Fla. 612, 12 So. 318 (a bill by heirs against an executrix). Ind.—*Lindley v. State ex rel. Wells*, 115 Ind. 502, 17 N. E. 611. Mass.—*Bay State Gas Co. v. Lawson*, 188 Mass. 502, 74 N. E. 921. Mont.—*Donovan v. McDitt*, 36 Mont. 61, 92 Pac. 49. N. Y.—*Mersereau v. Bennett*, 62 Misc. 356, 115 N. Y. Supp. 20.

See the title "*Bill in Equity*."

*Sufficiency of the Bill*.—See *Grand Lodge A. O. U. W. v. Grand Lodge A. O. U. W.*, 81 Conn. 189, 70 Atl. 617.

*Sufficiency of Bill Against Broker*.—In *Bay State Gas Co. v. Lawson*, 188 Mass. 502, 74 N. E. 921, the bill was against the defendants as brokers and fiscal agents of the plaintiffs. The bill,

2. **Pleading of the Defendant.**—a. *In General.*—The pleadings of the defendant may be demurrer,<sup>3</sup> plea,<sup>4</sup> and answer,<sup>5</sup> each dependent upon the nature of the defense sought to be made.<sup>6</sup>

b. *Grounds of Defense.*—*How Raised.*—Insufficiency of bill or complaint. If the ground of defense be the insufficiency of the bill or petition to disclose a case for an accounting, the proper mode of raising such defense is by demurrer.<sup>7</sup>

c. *Stated Account.*—If the account sought has already been stated between the parties in equity it may be interposed by a plea in bar,<sup>8</sup>

which was held sufficient, alleged that defendants acted as plaintiffs' brokers and fiscal agents for a series of years, and in that relation received and disposed of a great deal of property for which they were accountable, and that they rendered monthly accounts to plaintiffs which purported to be true statements, and that these accounts were received without objection by the plaintiffs and became accounts stated, and that such accounts were false and fraudulent in many particulars, and prayed amongst other things that the accounts be opened, or that they be surcharged and falsified on account of fraud.

**Accounting for Stock.**—In *Somer-ville v. Hellman*, 210 Mo. 567, 111 S. W. 35, it was held that a bill for an accounting for stock alleged to have been converted by a decedent through his agent must allege insolvency of decedent's estate or of the agent.

**Bill Insufficient Because of Adequate Remedy at Law.**—In *Hunt v. O'Connor*, 151 Fed. 707, there was an intricate account involving a railway construction contract.

3. **U. S.**—*Equitable L. Assur. Soc. v. Brown*, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. ed. 682; *Sweeney v. Smith*, 171 Fed. 645, 96 C. C. A. 91, *affirming* 167 Fed. 385; *Everson v. Equitable L. Assur. Soc.*, 71 Fed. 570, 18 C. C. A. 251; *Empire Circuit Co. v. Sullivan*, 169 Fed. 1009; *Hunt v. O'Connor*, 151 Fed. 707. **Ala.**—*Beggs v. Edison Elec. Illum. Co.*, 96 Ala. 295, 11 So. 381, 38 Am. St. Rep. 94. **Conn.**—*Grand Lodge A. O. U. W. v. Grand Lodge A. O. U. W.*, 81 Conn. 189, 70 Atl. 617. **Mass.**—*Peters v. Equitable L. Assur. Soc.*, 200 Mass. 579, 86 N. E. 885. **W. Va.**—*Lefever v. Billmyer*, 5 W. Va. 33.

4. **N. C.**—*Foyster v. Wright*, 118 N. C. 152, 24 S. E. 746; *Smith v. Bar-*

*ringer*, 74 N. C. 665; *Eaton v. Eaton*, 43 N. C. 102. **S. C.**—*Dunsford v. Brown*, 19 S. C. 560. **Wash.**—*Gerber v. Gerber*, 52 Wash. 253, 100 Pac. 735.

5. **La.**—*Ledoux v. Murray*, 14 La. Ann. 613. **Pa.**—*Lazarus v. Lehigh & W. B. Coal Co.*, 221 Pa. 415, 70 Atl. 817. **Va.**—*Lee County Justices v. Fulkerson*, 21 Gratt. 182; *Meze v. Mayse*, 6 Rand. 658.

6. *Empire Circuit Co. v. Sullivan*, 169 Fed. 1009.

7. **U. S.**—*Equitable L. Assur. Soc. v. Brown*, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. ed. 682; *Sweeney v. Smith*, 171 Fed. 645, 96 C. C. A. 91, *affirming* 167 Fed. 385; *London Guarantee & Acc. Co. v. Bell Tel. Co.*, 171 Fed. 278; *Empire Circuit Co. v. Sullivan*, 169 Fed. 1009; *Hunt v. O'Connor*, 151 Fed. 707. **N. Y.**—*Morrison v. Chapman*, 63 Misc. 195, 116 N. Y. Supp. 522; *Kenefick v. Co-Operative Bldg. Bank*, 62 Misc. 519, 115 N. Y. Supp. 966. **Va.**—*Smith v. Marks*, 2 Rand. 449. **W. Va.**—*Van Dorn v. Lewis County Court*, 38 W. Va. 269, 18 S. E. 579.

8. **U. S.**—*Chappedelaine v. Dechenaux*, 4 Cranch 306, 2 L. ed. 629; *Baker v. Biddle*, Baldw. 394, 2 Fed. Cas. No. 764. **Ill.**—*Craig v. McKinney*, 72 Ill. 305. **N. J.**—*Harrison v. Farrington*, 40 N. J. Eq. 353, 3 Atl. 80; *Driggs v. Garretson*, 25 N. J. Eq. 178; *Brown v. Vandyke*, 8 N. J. Eq. 795, 55 Am. Dec. 250. **N. C.**—*Grant v. Rogers*, 94 N. C. 755; *Suttle v. Doggett*, 87 N. C. 203; *Costin v. Baxter*, 41 N. C. 197. **Pa.**—*Rehill v. McTague*, 114 Pa. 82, 7 Atl. 224, 60 Am. Rep. 341; *Cruise v. Walker*, 6 Phila. 294, 24 Leg. Int. 141; *Spring Brook R. Co. v. Lehigh C. & N. Co.*, 1 Lack. Leg. N. 31. **W. Va.**—*McCarty v. Chalfant*, 14 W. Va. 531, 549; *Bell v. List*, 6 W. Va. 469; *McNeal v. Baker*, 6 W. Va. 153.



or it may be relied on in the answer.<sup>9</sup> Under the codes, such a defense must be specially pleaded in the answer.<sup>10</sup>

d. *What May Be Relied On as Stated Account.*—Any formal stated account,<sup>11</sup> a release of all matters of demand,<sup>12</sup> an award relating to the claim in suit,<sup>13</sup> and any other matters showing a final adjustment of account, may be pleaded as a stated account.<sup>14</sup>

e. *Averments of Plea of Stated Account.*—To make a plea of stated account sufficient it must allege that the account is just and true, to

9. Conn.—*Chatham v. Niles*, 36 Conn. 403. N. C.—*Costin v. Baxter*, 41 N. C. 197. W. Va.—*McCarty v. Chalfant*, 14 W. Va. 531, 549; *McNeel v. Baker*, 6 W. Va. 153, 163.

In *Bullock v. Boyd*, 2 Edw. Ch. (N. Y.) 293, the court in its opinion says: "The defendants undertake to answer, and it is true they are bound to answer fully—but I think they do answer fully on the point of indebtedness and as to its amount, when they say that, shortly before the complainant entered into the engagement with them to pay Lampson's debt, they and Lampson accepted together, struck a balance which he acknowledged in writing to be correct and justly due to them, and that the schedule annexed to their answer contained the account thus stated. This account must be deemed correct and conclusive, until it is impeached for fraud or error."

10. *Railroad Co. v. Morrison*, 82 N. C. 141.

11. U. S.—*Baker v. Biddle*, Baldwin 394, 2 Fed. Cas. No. 764. Conn.—*Grand Lodge A. O. U. W. v. Grand Lodge A. O. U. W.*, 81 Conn. 189, 70 Atl. 617. Ill.—*Craig v. McKinney*, 72 Ill. 305; *Logan v. Lucas*, 59 Ill. 237; *Pratt v. Grimes*, 48 Ill. 376. Ky.—*Dozier v. Edwards*, 3 Litt. 67. Md.—*Stiles v. Brown*, 1 Gill 350. Mass.—*Crane v. Brooks*, 189 Mass. 228, 75 N. E. 710. Mich.—*Churchill Tp. v. Cummings Tp.*, 51 Mich. 446, 16 N. W. 805. Miss.—*Calvit v. Markham*, 3 How. 343. Mo.—*Silver v. St. Louis, etc. R. Co.*, 5 Mo. App. 381. N. J.—*Driggs v. Garretson*, 25 N. J. Eq. 178; *Brown v. Vandyke*, 8 N. J. Eq. 795, 55 Am. Dec. 250. N. Y.—*Bullock v. Boyd*, 2 Edw. Ch. 293; *Weed v. Smull*, 7 Paige 573; *Short v. Barry*, 58 Barb. 177; *Weeks v.*

*Hoyt*, 5 Hun 347. N. C.—*Suttle v. Doggett*, 87 N. C. 203; *Grant v. Bell*, 87 N. C. 34; *Harrison v. Bradley*, 40 N. C. 136. Pa.—*In re Dampf's Appeal*, 106 Pa. 72; *Springbrook R. Co. v. Lehigh Coal, etc. Co.*, 1 Lack. Leg. N. 31. R. I.—*Seamans v. Burt*, 11 R. I. 320; *Greene v. Harris*, 9 R. I. 401. S. C.—*Miller v. Simonton*, 5 S. C. 20; *Maffit v. Read*, 11 Rich. Eq. 285; *Britton v. Lewis*, 8 Rich. Eq. 271; *Bartlett v. Thynes*, 2 Hill Eq. 171. Eng.—*Dawson v. Dawson*, 1 Atk. 1, 26 Eng. Reprint 1; *Buckeridge v. Whalley*, 33 L. J. Ch. 649; *Endo v. Caleham*, 1 Younge 306. See *Moxley v. Cowie*, 47 L. J. Ch. 271, 38 L. T. N. S. 908, 26 W. R. 854; *Gillespie v. Stephens*, 14 Can. Sup. Ct. 709; *Pierce v. Butters*, 3 Montreal Leg. N. 28, 24 L. C. Jur. 167.

12. *McClarie's Admx. v. Shepherd's Exrx.*, 21 N. J. Eq. 76.

13. U. S.—*Robinson v. Alabama & G. Mfg. Co.*, 89 Fed. 218; *Couscher v. Tulam*, 4 Wash. 442, 6 Fed. Cas. No. 3,287. Cal.—*Murdock v. Clarke*, 88 Cal. 384, 26 Pac. 601. Conn.—*Woodbridge v. Pratt & W. Co.*, 69 Conn. 304, 37 Atl. 688. Ga.—*Fricker v. Americus Mfg. & Imp. Co.*, 124 Ga. 165, 52 S. E. 65. Hawaii.—*Hawaiian C. & S. Co. v. Waikapu S. Co.*, 9 Hawaii 337. Ill.—*Rhodes v. Ashurt*, 71 Ill. App. 242. Me.—*Hagar v. Whitmore*, 82 Me. 248, 19 Atl. 444. N. Y.—*Boyd v. Foot*, 5 Bosw. 110; *Crosbie v. Leary*, 6 Bosw. 312. N. C.—*McCaskill v. McBryde*, 37 N. C. 52. Vt.—*Moore v. Swanton Tanning Co.*, 60 Vt. 459, 15 Atl. 114. Eng.—*Robinson v. Bland*, 2 Burr. 1077, 97 Eng. Reprint 717.

14. *Morse Dry Dock & Repair Co. v. Munson S. S. Line*, 155 Fed. 150, 160; *Railroad Co. v. Morrison*, 82 N. C. 141.

the best of his knowledge and belief;<sup>15</sup> that it is final;<sup>16</sup> that the account was in writing,<sup>17</sup> and the balance due on the account.<sup>18</sup> But it need not show that the account was signed by the parties.<sup>19</sup>

15. *Duggs v. Garretson*, 25 N. J. Eq. 178; *McNeel v. Baker*, 6 W. Va. 153, 165.

"Fully accounted" is not a good plea. *Bailey v. Westcott*, 6 Phila. Pa.) 525, 25 Leg. Int. 173.

It Must Appear From the Plea That the Account Stated is Just and True. In *Driggs v. Garretson*, 25 N. J. Eq. 178, the bill was filed for an accounting. The defendant pleaded "that at a date which appears by the bill to be subsequent to the time when he attained his majority, the complainant and defendant made up and stated an account in writing, of all sums of money received by the complainant as guardian of the defendant, and of all moneys paid out by her, and of her money transactions as such guardian; that the account was made out by, or under her direction, and that it was inspected and examined by him and was signed as correct by both of them, and was retained by the complainant, to counterpart or copy having been given to the defendant. The plea further avers, that the amount so stated and allowed, showed in writing a balance of \$2777.05, as due to the defendant from the complainant as his guardian, and that the defendant has since then received part of that balance." The court, in holding this plea defective, said: "A stated account is, *prima facie*, a bar to a suit for account. *Brown v. Van Dyke*, 4 Hall's Ch. 796; *Gilb. For. Rom.* 56. But the defendant in pleading it, must, by his plea, although neither fraud nor error be charged, aver that the stated account is just and true to the best of his knowledge and belief. *Story's Eq. Pl.* § 802; 3 *Atk.* 70; *Madd. Ch. Pr.* 101; *Roche v. Morgell*, 2 *Sch. & Lef.* 721. The plea is defective in this respect, and therefore must be overruled. Leave will be given, however, to amend."

16. 1 *Dan. Ch. Pr.* (6th Am. ed.) 666.

17. *McNeel v. Baker*, 6 W. Va. 153, 166.

18. 1 *Dan. Ch. Pr.* (6th Am. ed.) 666.

19. *Chace v. Trafford*, 116 Mass. 529, 17 Am. Rep. 171, 175.

In *Converse v. Scott*, 137 Cal. 239, 70 Pac. 13, the court discusses the question whether or not any writing is required to credit an account stated. The opinion is so clear and convincing touching this question that we here copy from the same as follows: "We have no statute requiring the contract known as an account stated to be in writing. Indeed, it is expressly conceded by respondent herein that the account need not be stated in writing, or in other words, that the balance due may be acquiesced in or agreed to by parol, and that the agreement to pay the balance struck need not be in writing. (*Auzerais v. Naglee*, 74 Cal. 67; *Kahn v. Edwards*, 75 Cal. 192; *Baird v. Crank*, 98 Cal. 293.) But it is earnestly contended by respondent that this oral agreement must of necessity be based upon some writing evidencing transactions between the parties to the account. But we ask why 'of necessity' must this be so? Accounts between parties sometimes exist without any memorandum or other written evidence of them. Can it be that such accounts are incapable of being incorporated into an account stated between the parties? The very essence and body of an account stated is the striking of the balance and the agreement to pay it. If this can all be done orally, how is it material that anything back of that should be in writing? If the oral agreement as to the balance due and the promise to pay it are undisputed and free from fraud you cannot go behind them to ascertain whether the accounting was correct or not. (*Auzerais v. Naglee*, 74 Cal. 67.) The account stated is a new and independent contract, and the whole action is based upon that contract. Then why should we go back of it to ascertain whether it is based on figures written on a piece of paper or on figures carried in the memory? If A sells on credit and delivers to B a horse, a sack of potatoes, and a cow, he immediately has an account against B for their price, and he con-

f. *Answer in Support of Plea of Account Stated*.—If the bill anticipates an account stated, setting out facts to avoid it, such plea in a suit in equity must be supported by an answer,<sup>20</sup> in which as well as in the plea such facts must be denied.<sup>21</sup>

g. *Laches*.—If the plaintiff has been guilty of laches in bringing his suit, this constitutes a defense thereto;<sup>22</sup> and in a proper case may

continue to have that account against B until it is extinguished by payment or otherwise, whether he makes any memorandum of it or not; and this account, though there is no written evidence of it anywhere to be found, may be stated between the parties by an oral agreement as to the whole amount due and an oral agreement to pay the same, (*Pinchon v. Chilcoat*, 3 Car. & P. 236; *Knowles v. Michel*, 13 East 249; *Watkins v. Ford*, 69 Mich. 361; *Burritt v. Villeneuve*, 92 Mich. 282; *Goodrich v. Coffin*, 83 Me. 324; *Wharton v. Caine*, 50 Ala. 408; *Powers v. New England Fire Ins. Co.*, 68 Vt. 390.)

20. *Greene v. Harris*, 9 R. I. 401, s. c. 11 R. I. 5 (where the authorities are fully considered); 1 Dan. Ch. Pr. (6th Am. ed.) 667, citing *Chadwick v. Broadwood*, 3 Beav. 530, 5 Jur. 359, 10 L. J. Ch. 242. 49 Eng. Reprint 209; *Phelps v. Sproule*, 1 M. & K. 231, 236; *Parker v. Alcock*, 1 Y. & J. 432.

21. *Harrison v. Farrington*, 38 N. J. Eq. 1 (fraud).

See the title "*Answers in Equity*."

22. U. S.—*Earle v. Myers*, 207 U. S. 244, 28 Sup. Ct. 86, 52 L. ed. 191, 193; *Hemmick v. Standard Oil Co.*, 91 Fed. 332, 33 C. C. A. 547; *Balfour v. San Joaquin Val. Bank*, 156 Fed. 500, 503; *Baker v. Biddle*, 1 Baldw. 394, 2 Fed. Cas. No. 764. Cal.—*Seculovich v. Morton*, 101 Cal. 673, 36 Pac. 387, 40 Am. St. Rep. 106. Del.—*Hall v. Walker*, 1 Del. Ch. 241. Ky.—*Blackerly v. Holton*, 5 Dana 520; *McCarty v. McCarty's Admr.*, 11 Ky. L. Rep. 366. Mich.—*Dowse v. Graynor*, 155 Mich. 38, 118 N. W. 615. N. J.—*Osborne v. O'Reilly*, 43 N. J. Eq. 647, 12 Atl. 377. N. Y.—*New York Automobile Co. v. Franklin*, 49 Misc. 8, 97 N. Y. Supp. 781; *Ellison v. Moffatt*, 1 Johns. Ch. 48; *Mooers v. White*, 6 Johns. Ch. 360; *Kingsland v. Roberts*, 2 Paige 193. Pa.—*Priestley's Appeal*, 127 Pa. 420, 17 Atl. 1084, 4 L. R. A. 503; *Tozier v. Brown*, 202 Pa. 359, 51 Atl. 998. S.

C.—*Rowland v. Best*, 2 McCord Eq. 317. Va.—*Branner v. Branner's Admr.*, 108 Va. 660, 62 S. E. 952; *Kavanaugh's Admr. v. Kavanaugh*, 98 Va. 649, 653, 37 S. E. 275; *Tate's Exr. v. Jones*, 98 Va. 544, 36 S. E. 984; *Covington v. Griffin's Admr.*, 98 Va. 124, 34 S. E. 974; *Wissler v. Craig's Admr.*, 80 Va. 29; *Harrison v. Gibson*, 23 Gratt. 212; *West's Admr. v. Thornton*, 7 Gratt. 177; *Caruthers v. Trustees of Lexington*, 12 Leigh 610; *Bolling v. Bolling*, 5 Munf. 334; *Randolph v. Randolph*, 2 Call 537. W. Va.—*Hays v. Freshwater*, 47 W. Va. 217, 34 S. E. 831. Wis.—*Glenwood Mfg. Co. v. Syme*, 109 Wis. 355, 85 N. W. 432. Eng.—*Harcourt v. White*, 28 Beav. 303, 54 Eng. Reprint 382; *Sherman v. Sherman*, 2 Vern. 276, 23 Eng. Reprint 778.

*Lapse of Time as Laches*.—Failure to bring suit for an accounting, under an agreement to divide the net attorneys' fees received in the prosecution of French Spoliation Claims, until two years after the enactment of the appropriation act of March 3, 1899 (30 Stat. at L. 1161, 1191, ch. 426, U. S. Comp. Stat. 1901, p. 751), from which payment might be made, is not such laches as defeats a recovery. *Earle v. Myers*, 207 U. S. 244, 28 Sup. Ct. 86, 52 L. ed. 191.

"The length of time during which the party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an equitable defense, controlled by equitable considerations, and lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit plaintiff to now assert them." *Halstead v. Grinnam*, 152 U. S. 412, 416, 14 Sup. Ct. 641, 38 L. ed. 495, 497; *Alsop v. Riker*, 155 U. S. 461, 15 Sup. Ct. 162, 39 L. ed. 223, 162.



be raised by demurrer,<sup>23</sup> otherwise by plea or answer,<sup>24</sup> or even upon the argument of the cause without pleading the same.<sup>25</sup> There is no fixed rule as to what constitutes laches,<sup>26</sup>

23. *Seculovich v. Morton*, 101 Cal. 673, 36 Pac. 387, 40 Am. St. Rep. 106, citing *Golden v. Kimmell*, 99 U. S. 201, 25 L. ed. 431; *Hume v. Beale*, 17 Wall. (U. S.) 336, 21 L. ed. 602; *Chapman v. Bank of California*, 97 Cal. 155, 31 Pac. 896; *West v. Russell*, 74 Cal. 544, 16 Pac. 392; *Bell v. Hudson*, 73 Cal. 285, 14 Pac. 791, 2 Am. St. Rep. 791. See also *Sullivan v. Portland & K. R. Co.*, 94 U. S. 806, 21 L. ed. 324; *Maxwell v. Kennedy*, 8 How. (U. S.) 210, 12 L. ed. 1051; *Miles v. Thorne*, 38 Cal. 385, 99 Am. Dec. 384.

**Demurrer.**—In *Maxwell v. Kennedy*, 8 How. (U. S.) 210, 12 L. ed. 1051, where it was decided that the defendant may demur where laches appears on the face of the bill, the court said: "Another question has been made in this case; and that is, whether the objection arising from lapse of time, apparent on the bill and exhibits, can be taken advantage of on demurrer. Undoubtedly the rule formerly was that it could not; and that doctrine was distinctly laid down by Lord Thurlow, in the case of *Dubouine v. Broome*, 1 Bro. Ch. R. 646. The rule was perhaps followed for some time afterwards. It was placed upon the ground, that this defence was founded upon the presumption that the debt must have been paid, and as a demurrer admits the fact stated in the bill, it admits that the debt is still due; and if admitted to be due, the debtor in equity and good conscience is bound to pay it. But the presumption of payment is not the only ground upon which a court of chancery refuses its aid to a stale demand. For there must appear to have been reasonable diligence, as well as good faith, to call its powers into action; and if either is wanting, it will remain passive and refuse its aid. This is the principle recognized by this court in *Piatt v. Vattier*, 9 Pet. 416; *McKnight v. Taylor*, 1 How., 168, and in *Bowman et al. v. Wathen et al.*, 1 How. 189. If, therefore, the complainant by his own showing has been guilty of laches, he is not entitled to the aid of the court, although the debt may be still unpaid. Upon this principle, the proper rule of

pleading would seem to be, that, when the case stated by the bill appears to be one in which a court of equity will refuse its aid, the defendant should be permitted to resist it by demurrer. And as the laches of the complainant in the assertion of his claim is a bar in equity, if that objection is apparent on the bill itself, there can be no good reason for requiring a plea or answer to bring it to the notice of the court. Accordingly, the rule stated by Lord Thurlow has not been always followed in later cases. In *Hovenden v. Annesley*, 2 Sch. & Lefr. 638, Lord Redesdale says:—"If the case of the plaintiff as stated in the bill will not entitle him to a decree, the judgment of the court may be required on demurrer whether the defendant ought to be compelled to answer the bill." And in *Story's Eq. Pl.*, § 503, and the note to it, he states the rule as laid down by Lord Redesdale to be now the established one. In the opinion of the court, it is the true rule."

24. *Hogg's Eq. Prin.*, § 300 and authorities there cited.

25. *Baker v. Biddle*, *Baldw.* 394, 2 ed. Cas. No. 764.

In *re Baker*, 2 Fed. Cas. No. 763, the court in discussing the mode of raising the defense of laches, in its opinion said: "The bar from lapse of time is a conclusion from acquiescence, an inference from facts, which need not be set up by demurrer, answer or plea, but may be suggested at the hearing. 3 *Brown*, Ch. 646; 4 *Brown*, Ch. 268; 2 *Ves. Jr.* 87, 572, 582; 2 *Schoales and L.* 637."

26. In *Sullivan v. Portland & K. R. Co.*, 94 U. S. 806, 24 L. ed. 324, the court said: "Every case is governed chiefly by its own circumstances; sometimes the analogy of the Statute of Limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient; and sometimes the rule is applied where there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence, and to decide accordingly.

and the question is determined by the facts of each case as it arises.<sup>27</sup>

*Excuse.*—If the effect of laches on the plaintiff's right to maintain the suit may be excused, such excuse must be made to appear by a proper showing in the bill of the facts as to the impediments and his diligence.<sup>28</sup>

h. *Res Judicata.*—The defense of *res judicata* may be made to a suit for an accounting,<sup>29</sup> but must be availed of by plea<sup>30</sup> or answer.<sup>31</sup>

i. *Statute of Limitations.*—If the statute of limitations be available as a defense to a suit for an accounting, and in many cases it is available,<sup>32</sup> such defense may be relied on by plea or answer,<sup>33</sup> although the prevailing rule in an equitable proceeding is that this defense may be raised by demurrer where the lapse of time is apparent upon the face of the pleading.<sup>34</sup> If the accounting is sought in relation to an

Wilson v. Anthony, 19 Barber (Ark.) 16; Adams v. Taylor, 14 id. 62; Johnson v. Johnson, 5 Ala. 90; Ferson v. Sanger, 2 Ware, 256; Fisher v. Boody, 1 Curtis, 219; Cholmondy v. Clinton, 2 Jac. & Walk. 141; 2 Story's Eq., sect. 1520 a."

27. U. S.—Earle v. Myers, 207 U. S. 244, 28 Sup. Ct. 86, 52 L. ed. 191. Md.—Glenn v. Hebb's Admr., 17 Md. 260. N. Y.—Rayner v. Pearsall, 3 Johns. Ch. 578. S. D.—McPherson v. Swift, 22 S. D. 165, 116 N. W. 76. Tenn.—Bolton v. Dickens, 4 Lea 569. 28. McMonagle v. McGlinn, 85 Fed. 88, 92.

29. Passaic Match Co. v. Helio Match Co. (N. J. Eq.), 70 Atl. 466; McPherson v. Swift, 22 S. D. 165, 116 N. W. 76.

30. Perkins v. Watson, 92 Miss. 452, 46 So. 80; Passaic Match Co. v. Helio Match Co. (N. J. Eq.), 70 Atl. 466.

31. Passaic Match Co. v. Helio Match Co. (N. J. Eq.), 70 Atl. 466; McPherson v. Swift, 22 S. D. 165, 116 N. W. 76.

32. Ala.—Willis v. Rice, 157 Ala. 256, 48 So. 397. Ark.—Nelson v. Cowling, 89 Ark. 334, 116 S. W. 890. Ga.—Teasley v. Bradley, 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 113. Ill.—Lancaster v. Springer, 239 Ill. 472, 88 N. E. 272; Parmalee v. Price, 208 Ill. 544, 70 N. E. 725; Conner v. Goodman, 104 Ill. 365. Ky.—Jolly v. Miller, 124 Ky. 100, 98 S. W. 326. Mich.—Dowse v. Gaynor, 155 Mich. 38, 118 N. W. 615. Tex.—Whitfield v.

Burrell (Tex. Civ. App.), 118 S. W. 153.

Running of the Statute of Limitations in Partnership Accountings.—In Boggs v. Johnson, 26 W. Va. 821, the court said: "By the Code of Virginia, which is also the law in this State, it is declared that 'an action by one partner against his co-partner for a settlement of the partnership accounts . . . the action may be brought until the expiration of five years from a cessation of the dealings in which they are interested together, but not after.' (Code Va. 1860, sec. 5, ch. 149; Acts 1882, sec. 6, ch. 102.) This statute has been repeatedly held to apply to suits in equity as well as actions at law. (Coalter v. Coalter, 1 Rob. 79; Marsteller v. Weaver, 1 Gratt. 391; Foster v. Rison, 17 Id. 321; Sandy v. Randall, 20 W. Va. 244.)"

33. Ia.—Sleeth v. Murphy, Morris 321, 4 Am. Dec. 232. Ky.—Jolly v. Miller, 124 Ky. 100, 98 S. W. 326. N. J.—Ruckman v. Decker, 23 N. J. Eq. 283.

34. Pa.—Worthy v. Hames, 8 Ga. 234, 52 Am. Dec. 399. N. Y.—Van Hook v. Whitlock, 7 Paige 373; Humbert v. Trinity Church, 7 Paige 195. Tex.—Hudson v. Wheeler, 34 Tex. 356; Hanks v. Enloe, 33 Tex. 624; Smith v. Fly, 24 Tex. 345, 76 Am. Dec. 109; McClenney v. McCluney, 3 Tex. 192, Coles v. Kelsey, 2 Tex. 541, 47 Am. Dec. 661.

Where part only of claim is barred by statute of limitations, a demurrer will not be sustained. London Guar. & Acc. Co. v. Bell Tel. Co., 171 Fed. 278.

express trust, the statute of limitations constitutes no defense,<sup>35</sup> until

35. Cal.—*Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384. Ga.—*Greer v. Andrew*, 133 Ga. 193, 65 S. E. 416; *Teasley v. Bradley*, 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 113. Mich.—*Jones v. Home Sav. Bank*, 118 Mich. 155, 76 N. W. 322, 74 Am. St. Rep. 377. N. J.—*Stevenson v. Markley*, 72 N. J. Eq. 686, 66 Atl. 185.

The relation of guardian and ward is one of trust, against which the statute of limitations does not operate in a matter of accounting. See *Stevenson v. Markley*, 72 N. J. Eq. 686, 66 Atl. 185.

**Laches As a Bar to the Enforcement of a Trust.**—In *Seculovich v. Morton*, 101 Cal. 673, 36 Pac. 387, 40 Am. St. Rep. 106, the court, in its opinion discussing the question of the bar of the statute of limitations, says: "True, it is a general rule that the statute does not run against an express trust where there is concealed fraud; but when the injured party has been guilty of great laches in the prosecution of his remedy he will be barred in equity on account of the paramount importance of having titles settled. (*Godden v. Kimmell*, 99 U. S. 202; *Hume v. Beale's Executrix*, 17 Wall. 348; *Bell v. Hudson*, 73 Cal. 287, 2 Am. St. Rep. 791; *West v. Russell*, 74 Cal. 544; *Chapman v. Bank of California*, 97 Cal. 159.)"

**Implied trusts and those which may be the subject of an action at law are subject to the statute of limitations.** *Fawcett v. Fawcett*, 85 Wis. 332, 55 N. W. 405, 39 Am. St. Rep. 844.

**Repudiation of Trust.**—In *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384, the action was brought to obtain a conveyance of an undivided half interest in a road franchise and an account and division of the tolls, all of which were charged to have been collected and received by the defendant. The bill was demurred to upon two grounds, one of which was that the cause of action was barred by the statute of limitations. The court below sustained the demurrer upon this ground. In reversing the court below the court held that the relationship between the plaintiff and defendant was that of beneficiary and trustee, and

that the statute could not therefore run against the plaintiff's right of action for a conveyance until the defendant had repudiated the trust and claimed to hold adversely to him with notice of such repudiation; and that as the complaint did not show a repudiation of the trust sufficiently long before the bringing of the suit to bar the plaintiff's cause of action, that the demurrer should have been overruled and it was accordingly overruled. See also note in 99 Am. Dec. 384.

In *Fawcett v. Fawcett*, 85 Wis. 332, 55 N. W. 405, the court said: "'As long as there is a continuing and subsisting trust, acknowledged or acted on by the parties, the statute does not apply; but if the trustee denies the right of his *cestui que trust*, and the possession of the property becomes adverse, lapse of time from that period may constitute a bar in equity; but other trusts, which are the ground of an action at law, are not exempted from the operation of the statute.' To the same effect are the cases of *Elmendorf v. Taylor*, 10 Wheat. 152; *Dow v. Jewell*, 18 N. H. 340; *Taylor v. Holmes* (N. C.), 14 Fed. Rep. 498, 508; *Springer v. Springer*, 114 Ill. 550; *Reynolds v. Sumner*, 126 Ill. 58; *Otto v. Schlapkahl*, 57 Iowa 226, 230; *Gebbard v. Sattler*, 40 Iowa 152; *Lakin v. Sierra B. G. M. Co.* (Cal.), 25 Fed. Rep. 337, 347."

*Seculovich v. Morton*, 101 Cal. 673, 36 Pac. 387, 40 Am. St. Rep. 106, holds the same doctrine. See also *Jones v. Home Savings Bank*, 118 Mich. 155, 76 N. W. 322, 74 Am. St. Rep. 377.

**Running of the Statute of Limitations in Cases of Factors and Agents.**—The supreme court of Georgia, in *Teasley v. Bradley*, 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 113, ably considered the question as to when the statute of limitations begins to run in cases involving the relationship of factors and agents, and decides with reference to this matter, the following propositions: "The factor in possession of funds belonging to his principal, when there is nothing in the contract or the custom of the place requiring that the funds should be paid over at any particular time, cannot set up title to such



after such trust has been expressly or in effect repudiated.<sup>56</sup>

j. *Unlawful or Inequitable Conduct*.—If the acts of the plaintiff in reference to the matter as to which he seeks an accounting have been unlawful<sup>57</sup> or inequitable, he will be denied relief.<sup>58</sup>

funds without notice to the principal that he no longer holds the same for his benefit, and the statute of limitations does not begin to run in his favor until such notice, or there are circumstances equivalent to notice, or until there has been a demand and refusal to pay, or there has been an account rendered accompanied by an offer to settle. . . . Where one receives money from another from time to time to invest and collect the principal or interest, and reinvest the same from time to time for the benefit of another, and it is contemplated by the agreement between the parties that the person receiving the money shall use the same for the benefit of the other, and there is no time specified when the money is to be returned, such person would hold the same subject to the demand of the other, and no limitation would run against the person owning the fund in favor of the one who had collected it until there had been a demand and refusal, or there had been such a lapse of time as that the law would presume a demand and refusal, or until an account had been rendered, accompanied by an offer to settle, or the one in possession notified the owner that he no longer held it as the owner's but claimed title to it himself. Trustees in technical trusts cannot, during the continuance of the trust, plead the statute of limitations against the claim of the *cestui que trust*. When an agent is appointed for the sole purpose of collecting and paying over money, the statute of limitations begins to run in favor of the agent from the time that the fact that the collection has been made came to the knowledge of the principal."

36. Greer v. Andrew, 133 Ga. 193, 65 S. E. 416; Teasley v. Bradley, 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 113.

37. U. S.—Wheeler v. Sage, 1 Wall. 518, 17 L. ed. 646; Bartle v. Nutt, 4 Pet. 184, 7 L. ed. 825; Pales v. Mayberry, 2 Gall. 560, 8 Fed. Cas. No. 4,622; Ala.—McGehee v. Lindsay, 6 Ala. 16. Cal.—Vulcan Powder Co. v. Hercules

Powder Co., 95 Cal. 510, 31 Pac. 581; *In re Groome's Estate*, 94 Cal. 69, 29 Pac. 487; Powell v. Maguire, 43 Cal. 11. Ill.—Jerome v. Bigelow, 66 Ill. 452, 16 Am. Rep. 597; Neustadt v. Hall, 58 Ill. 172; Skeels v. Phillips, 54 Ill. 309. Ind.—Hunter v. Pfeiffer, 108 Ind. 197, 9 N. E. 124. Ia.—Anderson v. Powell, 44 Iowa 20. Mass.—Riley v. Jordan, 122 Mass. 231; Dunham v. Presby, 120 Mass. 285; Snell v. Dwight, 120 Mass. 9. Minn.—Durant v. Rhener, 26 Minn. 362, 4 N. W. 610. Neb.—Gould v. Kendall, 15 Neb. 549, 19 N. W. 483. N. J.—Watson v. Murray, 23 N. J. Eq. 257. N. Y.—Sweet v. Tinslar, 52 Barb. 271; Kelly v. Devlin, 58 How. Pr. 487. N. C.—King v. Winauts, 71 N. C. 469. Ohio.—Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666. Pa.—Nester v. Continental Brew. Co., 161 Pa. 473, 484, 29 Atl. 102, affirming 12 Pa. Co. Ct. 417. Tex.—Wiggins v. Bisso, 92 Tex. 219, 47 S. W. 637; Read v. Smith, 60 Tex. 379; Lane v. Thomas, 37 Tex. 157. Va.—Watson v. Fletcher, 7 Gratt. 1. Eng.—Battersby v. Smyth, 3 Madd. 110, 56 Eng. Reprint 451; Knowles v. Haughton, 11 Ves. Jr. 168, 32 Eng. Reprint 1052; Thomson v. Thomson, 7 Ves. Jr. 470, 32 Eng. Reprint 190; *Ex parte Mather*, 3 Ves. Jr. 373, 30 Eng. Reprint 1060; Ottley v. Browne, 1 Ball. & B. 360; *In re South Wales Atlantic S. S. Co.*, L. R. 2 Ch. Div. 763; Rigby v. Connol, L. R. 14 Ch. Div. 482.

In *Watson v. Fletcher*, 7 Gratt. (Va.) 1, 13, it appeared that the settlement and adjustment of the transactions involved between the parties was for a gambling venture. The court, refusing relief, said: "But it is clear that a Court of equity will not lend its aid for such a purpose, nor give relief to either partner against the other, founded upon transactions arising out of their immoral and unlawful partnership, whether for profits, losses, expenses, contribution or reimbursement."

38. N. ghtingale v. Milwaukee Furniture Co., 71 Fed. 234; Sweet v. Tinslar,

**3. Balance in Favor of Plaintiff.**—It is not necessary to the decreeing of an account that a balance be *prima facie* shown in favor of the plaintiff.<sup>39</sup> It is only necessary to establish a right to an accounting.<sup>40</sup>

**Rationale of This Principle.**—Until the account has been examined it cannot be certainly known in whose favor the balance will fall.<sup>41</sup> Hence the account is ordered for both parties,<sup>42</sup> and both become actors in the statement of it,<sup>43</sup> and a decree is rendered for the one in whose favor the balance appears.<sup>44</sup>

**4. Averments of the Answer.**—*a. In General.*—Generally, the ordinary rules of equity practice apply to answers in suits for an accounting.<sup>45</sup>

*b. Admissions and Denial.*—Hence it may admit or deny material allegations of the bill, as in other cases.<sup>46</sup>

*c. Denial of Right to an Accounting.*—If the defendant denies in his answer the right to an accounting, which he may do,<sup>47</sup> the decisions are in conflict as to whether he shall set out the account in his answer.<sup>48</sup>

*d. Defenses Not Necessary to Set Up in the Answer.*—Inasmuch as the defendant may go fully into his case before the master or referee,<sup>49</sup> the matters of defense which he may desire to interpose with ref-

52 Barb. (N. Y.) 271 (a transaction in fraud of creditors). See also—Cal.—*Chateau v. Singla*, 114 Cal. 91, 45 Pac. 1015, 55 Am. St. Rep. 63, 33 L. R. A. 751. Ill.—*Wright v. Cudaky*, 163 Ill. 86, 48 N. E. 39; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171. Mass.—*Bowen v. Richardson*, 123 Mass. 293 (where there had been a misuse of funds by executors). Minn.—*Durant v. Phener*, 26 Minn. 362, 4 N. W. 610. Mo.—*Jackson v. McLean's Exrs.*, 100 Mo. 130, 13 S. W. 393. Tex.—*Wiggins v. Bisso*, 92 Tex. 219, 47 S. W. 637. Va.—*Watson v. Fletcher*, 7 Gratt. 1.

39. *Earle v. American Sugar Ref. Co.* (N. J. Eq.), 71 Atl. 391; *Payne v. Graves*, 5 Leigh (Va.) 561.

40. *Payne v. Graves*, 5 Leigh (Va.) 561.

But it has been held that the plaintiff must show that he will be benefited by an accounting before one will be decreed. *Gould v. Barrow*, 117 Ga. 458, 43 S. E. 702.

41. *Payne v. Graves*, 5 Leigh (Va.) 561.

42. *Payne v. Graves*, 5 Leigh (Va.) 561.

43. *Downes v. Worch*, 28 R. I. 99, 65 Atl. 603; *Payne v. Graves*, 5 Leigh (Va.) 561.

44. *Payne v. Graves*, 5 Leigh (Va.) 561.

45. *Leycraft v. Dempsey*, 15 Wend. (N. Y.) 83; *McKay v. McKay's Admr.*, 33 W. Va. 724, 11 S. E. 213.

46. Ark.—*Williams v. Thweatt*, 73 Ark. 36, 83 S. W. 331. N. Y.—*Perry v. Foster*, 62 How. Pr. 228. W. Va.—*McKay v. McKay's Admr.*, 33 W. Va. 724, 11 S. E. 213.

47. Mass.—*Armstrong v. Crocker* 10 Gray, 269. N. C.—*Smith v. Mallet*, 3 N. C. 182. W. Va.—*Livey v. Winton*, 30 W. Va. 554, 4 S. E. 451.

48. N. J.—*Rice v. Bartles*, 45 N. J. Eq. 371, 17 Atl. 636; *Hudson v. Trenton Locomotive etc. Co.*, 16 N. J. Eq. 475. S. C.—*Booth v. Sineath*, 2 Strob. Eq. 31. Tenn.—*French v. Rainey*, 2 Tenn. Ch. 640. Eng.—*Jerrard v. Saunders*, 2 Ves. Jr. 454, 30 Eng. Reprint 721.

49. U. S.—*Story v. Livingston*, 13 Pet. 359, 10 L. ed. 200; *Harding v. Handy*, 11 Wheat. 103, 6 L. ed. 429. Ala.—*Kirkman v. Vanlier*, 7 Ala. 217. Conn.—*Callender v. Colegrove*, 17 Conn. 1. Ill.—*Wilson v. Dowse*, 140 Ill. 18, 29 N. E. 726; *Farwell v. Huling*, 132 Ill. 112, 23 N. E. 438; *Union Mut. Life Ins. Co. v. Slee*, 123 Ill. 57, 12 N. E. 543; *Patterson v. Johnson*, 113 Ill. 559. N. J.—*Halstead v. Tyng*, 29

erence to the state of the accounts need not be stated in his answer as required in other cases.<sup>50</sup>

**5. Cross-Bill.**—It follows from this principle that ordinarily a defendant need not resort to a cross-bill to charge the plaintiff with what he has received,<sup>51</sup> and obtain a de-

N. J. Eq. 86; *Jackson v. Jackson's Exrs.*, 3 N. J. Eq. 96. N. Y.—*Story v. Brown*, 4 Paige 112; *Methodist Church v. Jaques*, 3 Johns. Ch. 77; *Remsen v. Remsen*, 2 Johns. Ch. 595; *De Mott v. Benson*, 4 Edw. Ch. 297; *McCartan v. Van Syckel*, 10 Bosw. 694; *Wiggin v. Gans*, 4 Sandf. 646. N. C.—*Turner v. Hughes*, 45 N. C. 116. Pa.—*Sneibly v. Linnell*, 13 Phila. 167. Tenn.—*Myers v. Bennett*, 3 Lea 184; *Hicks v. Chadwell*, 1 Tenn. Ch. 251. Va.—*Peers v. Barnett*, 12 Gratt. 410; *McCandlish v. Edloe*, 3 Gratt. 315.

50. The doctrine announced in the text is founded upon the principle which allows all defenses relating to the merits of the accounting to be made before the master. U. S.—*Chickering v. Hatch*, 1 Story 516, 5 Fed. Cas. No. 2,671. Ala.—*Aday v. Echols*, 18 Ala. 353, 52 Am. Dec. 225. Me.—*Gilmore v. Gilmore*, 40 Me. 50. N. J.—*Kuhl v. Martin*, 28 N. J. Eq. 370. Va.—*Harris v. Magee*, 3 Call 502.

In *Conrad v. Buck*, 21 W. Va. 396, the statute of limitations was allowed to be interposed before the commissioner. The court says: "In *Woodyard v. Polsey*, 14 W. Va. 211, this court held that: 'The statute of limitations may be relied on before the court prior to the order of reference.' And also: 'Where a reference is made to a commissioner to settle the accounts of an intestate, the creditors may appear before the commissioner and contest the claims of each other.' And they may so 'contest such claims on the ground that they are barred by the statute of limitations.' *Wordenbaugh v. Reid*, 20 W. Va. 588; *Crawford v. Carper*, 4 Id. 56, 71."

Before the master hand-writing is proved in the same way as upon the trial in court. The same rules apply in the one case as in the other. *Gibson v. Trowbridge Furniture Co.* 96 Ala. 357, 361, 11 So. 365. So hearsay evidence may be rejected upon a hearing before the master as upon a trial in court. *De la Riva v. Berreyesa*, 2 Cal.

195. And see *Henderson's Ch. Pr.* 296.

51. In *Downes v. Worch*, 28 R. I. 99, 65 Atl. 603, the rule as to filing of cross-bill in a suit for an accounting is clearly stated in the following language quoted from *Goldthwait v. Day*, 149 Mass. 185, 21 N. E. 359, where the court, through Holmes, J., said at page 187: "When a bill in equity is brought upon a mutual account, the cross-items in favor of the defendant are not matters of set-off. A set-off is a creation of statute. It is an independent claim which the statute allows the defendant to consolidate with the plaintiff's action by pleading it, if he chooses, subject to substantially the same defenses as if he had sued upon it separately. On the other hand a mutual account exists by agreement, and the effect of it is that the cross-items extinguish each other pro tanto at once, as they accrue. The only claim of either party is to the balance. See *Fanning v. Chadwick*, 3 Pick. (Mass.) 420, 15 Am. Dec. 233; *Tyler v. Boyce*, 135 Mass. 558, 561; *In re River Steamer Co.*, L. R. 6 Ch. (Eng.) 822, 223; *Grove v. Dubois*, 1 T. R. (Eng.) 112, 115, 116; *Tomkins v. Willshear*, 5 Taunt. (Eng.) 431, 432, and note a; *Farrington v. Lee*, 2 Mod. (Eng.) 311, 312, and 1 Mod. 268, 269. When a bill is brought upon such an account it implies that there are items on both sides and that the balance is uncertain, until ascertained by the aid of the court. It seeks to have the balance ascertained and paid, and as a condition of being entertained it imports an offer, which formerly it was required to express, on the part of the plaintiff, to pay the balance if it should turn out against him. *Colombian Government v. Rothschild*, 1 Sim. (Eng.) 94, 103; *Clarke v. Tipping*, 4 Beav. (Eng.) 588. 'Under such a bill the defendant has nothing to plead in order to get the advantage of it. His claim is not an independent one, but is admitted and asserted by the plaintiff, so far as the defendant can prove his items and provided they exceed those



eree for any balance that is shown to be in his favor.<sup>52</sup>

6. **Setting Out the Account.**—Whether the answer should set out the account in a suit brought for an accounting, the authorities are not entirely harmonious.<sup>53</sup> This principle is considered in the notes.<sup>54</sup>

7. **Under the Codes.**—Under the codes all defenses not in denial of the averments of the plaintiff's pleading must be specially pleaded.<sup>55</sup>

8. **Replication.**—a. *In Equity.*—If the suit be in equity, and the defense is that of stated account, and it is desired to impeach it, the bill must be amended so as to set out the ground of impeachment.<sup>56</sup>

on the plaintiff's side. Those items are not to be pleaded except when the defendant sets out the whole account in his answer."

52. U. S.—*Farmers' L. & T. Co. v. Denver, etc. R. Co.*, 126 Fed. 46, 60 C. C. A. 588. Ala.—*Alston v. Alston*, 34 Ala. 15; *Masterson v. Masterson*, 32 Ala. 437; *Goodwin v. McGehee*, 15 Ala. 232. Ark.—*Saunders v. Wood*, 15 Ark. 24. Cal.—*Vierra v. Fontes*, 135 Cal. 126, 66 Pac. 241. Colo.—*Craig v. Chandler*, 6 Colo. 543. Fla.—*Wooten v. Bellinger*, 17 Fla. 289. Ga.—*MacKenzie v. Flannery*, 90 Ga. 590, 16 S. E. 710. Ill.—*Nyburg v. Pearce*, 85 Ill. 393; *Atkinson v. Cash*, 79 Ill. 53. Ia.—*McGregor v. McGregor*, 21 Iowa 441. Me.—*Little v. Merrill*, 62 Me. 328. Md.—*Horne v. Nitch*, 103 Md. 498, 63 Atl. 1052. Mass.—*Goldthwait v. Day*, 149 Mass. 185, 21 N. E. 359. Mich.—*Wyatt v. Sweet*, 48 Mich. 539, 12 N. W. 692, 13 N. W. 525. N. H.—*Raymond v. Came*, 45 N. H. 201. N. J.—*Johnson v. Buttler*, 31 N. J. Eq. 35; *Scott v. Lalor's Exrs.*, 18 N. J. Eq. 301. Tenn.—*Griffith v. Security Home Bldg. & L. Assn.*, 100 Tenn. 410, 45 S. W. 670; *Allen v. Allen*, 11 Heisk. 387. Va.—*Payne v. Graves*, 5 Leigh 561; *Todd v. Bowyer*, 1 Munf. 447; *Fitzgerald v. Jones*, 1 Munf. 150; *Hill v. Southerland's Exrs.*, 1 Wash. 128, 134.

See the title "Cross-Bill."

53. See *Pace v. Bartles*, 45 N. J. Eq. 371, 17 Atl. 636; *McCarty v. Chalfant*, 14 W. Va. 549, and authorities cited under last preceding note 48.

54. In *Pace v. Bartles*, 45 N. J. Eq. 371, 17 Atl. 636, the learned court in discussing the question as to when the

accounts should be set out in the answer says: "I think that, upon principle, where a bill is filed for an account, and the account does not appear by the allegations and charges of the bill to be useful in establishing the complainant's right to it, but appears merely as that which must ultimately be rendered in fulfillment of an obligation, the enforcement of which is sought, the defendant need not set out the account in his answer, if it is necessary to resort to answer, rather than to plea or demurrer, in resisting the complainant's alleged right to the account; but if the title may be resisted by plea or demurrer, and the defendant, instead of availing himself of those pleadings, chooses to answer, he must do so fully and without reserve, setting out the account, for his submission to answer in such case is voluntary. The demurrer and plea both admit the facts stated in the bill."

55. This principle rests upon a well established rule of the reformed system of procedure. *Derby v. Yale*, 13 Hun (N. Y.) 273; *Allen v. Woonsocket Co.*, 11 R. I. 288.

56. *Brown v. Vandyke*, 8 N. J. Eq. 795, 55 Am. Dec. 250; *Gerber v. Gerber*, 52 Wash. 253, 100 Pac. 735.

In *Brown v. Vandyke*, *supra*, the suit was in equity for an accounting. To this bill an account stated was pleaded. In the course of the opinion holding that it was necessary to amend the bill in such a case, the court said: "It is the settled rule of courts of equity, that where a plaintiff files a bill for a general account, and the defendant sets forth a stated one, the plaintiff must amend his bill, because a stated ac-

as the impeachment cannot be made by means of a special replication in equity.<sup>57</sup>

b. *Under the Codes.*—But under the code system of pleading, in most of the states, the rule is otherwise, and the stated account pleaded may be impeached by means of a reply,<sup>58</sup> unless no provision has been made for a reply, the pleadings being restricted to complaint and answer, in which case the stated account is taken to be denied.<sup>59</sup>

9. *Amendments.*—In suits for an accounting, the courts are liberal in allowing amendments of the pleadings.<sup>60</sup>

count is *prima facie* a bar, until the particular errors in it are assigned:—*Dawson v. Dawson*, 1 Atk. 1; *Story's Eq. Pl. Sec. 798*. In this case, stated accounts are set forth in the answer, and are shown in evidence. The special and particular errors of those accounts are not made the subject of the bill or of the decree."

57. *Weed v. Smull*, 7 Paige (N. Y.) 573. This is by virtue of the rule which obtains in a court of equity forbidding the use of special replications. (Ill.—*White v. Morrison*, 11 Ill. 361; *Shaeffer v. Weed*, 8 Ill. 511. Mass.—*Newton v. Thayer*, 17 Pick. 129. N. J.—*McClane's Admr. v. Shepherd's Exrs.*, 21 N. J. Eq. 76. N. Y.—*Storms v. Storms*, 1 Edw. Ch. 358. W. Va.—*Harrison v. Brewster*, 38 W. Va. 294, 18 S. E. 568; *Elliot v. Trahern*, 35 W. Va. 634, 14 S. E. 223; *Enoch v. Min. & Petroleum Co.*, 23 W. Va. 314), and providing that where a matter of defense is disclosed by the answer such defense may be avoided by an amendment of the bill. Ala.—*Johnson v. Johnson*, 5 Ala. 90. Ill.—*Commissioners v. Deboe*, 43 Ill. App. 25. Mass.—*Gerrish v. Black*, 99 Mass. 315. Mich.—*Connerton v. Millar*, 41 Mich. 608, 2 N. W. 932. N. J.—*Redstrake v. Surron* (N. J. Eq.), 3 Atl. 693; *Delaware etc. R. Co. v. Raritan etc. R. Co.*, 14 N. J. Eq. 445. N. Y.—*Harris v. Knickerbacker*, 5 Wend. 638. W. Va.—*Chalfants v. Martin*, 25 W. Va. 394; *McNeel v. Baker*, 6 W. Va. 153.

58. *Colorado Fuel & Iron Co. v. Chappell*, 12 Colo. App. 385, 55 Pac. 606; *Barker v. Hoff*, 52 How. Pr. (N. Y.) 382.

This is deduced from the principle pervading this system of procedure allowing a reply in avoidance of the matter set up in the answer, while not abandoning the original cause of action

set up in the petition. Ind.—*Chrisman v. Chenoweth*, 81 Ind. 401; *Shirts v. Irons*, 47 Ind. 445. Ia.—*Kinhead v. McCormack Harv. Mach. Co.*, 106 Iowa 222, 76 N. W. 663; *Marder v. Wright*, 70 Iowa 42, 29 N. W. 799. Neb.—*Piper v. Woolman*, 43 Neb. 280, 61 N. W. 588; *Paxton Cattle Co. v. First Nat. Bank*, 21 Neb. 621, 33 N. W. 271; *Savage v. Aiken*, 21 Neb. 605, 33 N. W. 241; *Hastings School Dist. v. Caldwell*, 16 Neb. 68, 19 N. W. 634. Ore.—*Lilienthal v. Hotaling Co.*, 15 Ore. 371, 15 Pac. 630. *Contra*, *Gerber v. Gerber*, 52 Wash. 253, 100 Pac. 735.

59. Cal.—*Moore v. Copp*, 119 Cal. 429, 51 Pac. 630; *Grangers' Business Assn. v. Clark*, 84 Cal. 201, 23 Pac. 1081; *Colton Land etc. Co. v. Raynor*, 57 Cal. 588; *Curtiss v. Sprague*, 49 Cal. 301; *Doyle v. Franklin*, 40 Cal. 106; *Herold v. Smith*, 34 Cal. 122. La.—*Hickman v. Dawson*, 33 La. Ann. 438; *Bayly v. Stacey*, 30 La. Ann. 1210; *Planters' Bank v. Allard*, 8 Mart. (N. S.) 136; *Flood v. Shamburgh*, 3 Mart. (N. S.) 622. Nev.—*State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220.

See the titles "Replication;" "Reply."

60. Conn.—*Hoyt v. Smith*, 27 Conn. 467 (where amendment was allowed to enlarge the scope of the accounting). Mich.—*Dodson v. McKelvey*, 93 Mich. 263, 53 N. W. 517. N. Y.—*Crosby v. Watts*, 9 Jones & S. 208 (joint transactions); *Haddow v. Haddow*, 3 Thomp. & C. 777 (where plaintiff sued in wrong capacity). Va.—*Branner v. Branner's Admr.*, 108 Va. 660, 62 S. E. 952. Wash.—*Gerber v. Gerber*, 52 Wash. 253, 100 Pac. 735. W. Va.—*McCarty v. Chalfant*, 14 W. Va. 549; *McNeel v. Baker*, 6 W. Va. 153.

In *Branner v. Branner's Admr.*, 108 Va. 660, 62 S. E. 952, the object of the original bill in the suit was to obtain a settlement of the accounts of

**E. VENUE OF SUITS FOR ACCOUNTING.**—Inasmuch as suits for an accounting are personal in character,<sup>61</sup> they are necessarily transitory actions.<sup>62</sup>

**Place of Suit.**—It follows that a suit for an accounting may be brought in any county in which process to commence the same may be properly served on the defendant.<sup>63</sup>

**F. DECREE FOR AN ACCOUNTING.**—1. **Evidence.**—If the right to an accounting be controverted by the defendant, there must be proof of the plaintiff's case as made by his pleading to establish such right.<sup>64</sup>

Michael Branner, deceased, who in his lifetime had, as receiver, taken charge of a fund belonging to his nephew, an infant. It became necessary in this suit to amend the bill, and this was allowed in the court below. In the argument of the case on appeal, it was insisted that this was error, and that the suit should have been dismissed, without allowing any amendment to the bill. On this question the court said: "The contention that the amended bill, not being for an account generally, could not be maintained for the purpose of correcting this error in the settlement, is not tenable. The course pursued of amending the bill in order to point out the specific error and have the settlement corrected in that particular, is proper practice. *Shugart v. Thompson*, 10 Leigh 434; *McNeel v. Baker*, 6 W. Va. 153."

61. *Smith v. Smith*, 88 Cal. 572, 26 Pac. 356; *Wood v. Warner*, 15 N. J. Eq. 81.

62. **Mass.**—*Burlingame v. Hobbs*, 12 Gray 367. **N. J.**—*Wood v. Warner*, 15 N. J. Eq. 81. **N. Y.**—*Reading v. Haggin*, 58 Hun 450, 12 N. Y. Supp. 368. **Eng.**—*Hendrick v. Wood*, 30 L. J. Ch. 583.

63. **Conn.**—*Lewis v. Martin*, 1 Day 263. **Ga.**—*Johnson v. Jackson*, 56 Ga. 326. **Mass.**—*Burlingame v. Hobbs*, 12 Gray 367. **N. J.**—*Wood v. Warner*, 15 N. J. Eq. 81. **N. Y.**—*Reading v. Haggin*, 58 Hun 450, 12 N. Y. Supp. 368. **Ohio.**—*Pedan v. Robb*, 8 Ohio 227. **S. C.**—*Moore v. Hood*, 9 Rich. Eq. 311, 70 Am. Dec. 210. **Vt.**—*Whitmore v. Orcutt*, *Brayt*. 22.

64. **U. S.**—*Spalding v. Mason*, 161 U. S. 375, 16 Sup. Ct. 592, 40 L. ed. 738; *Columbian Equipment Co. v. Merc. Tr. & Dep. Co.*, 113 Fed. 23, 51 C. C. A. 33; *Peeler's Admx. v. Lathrop*, 48 Fed. 780, 1 C. C. A. 93, 2 U. S. App.

40. **Ark.**—*Crawford v. Norris*, 12 S. W. 707. **Ia.**—*Davenport v. Schutt*, 46 Iowa 510. **Md.**—*Frieze v. Glenn*, 2 Md. Ch. 361. **Miss.**—*McLoskey v. Gordon*, 26 Miss. 260; *Planters' Bank v. Stockman*, 1 Freem. Ch. 502. **N. J.**—*Standish v. Babcock*, 48 N. J. Eq. 386, 22 Atl. 734, 30 L. R. A. 604; *Farrington v. Harrison*, 44 N. J. Eq. 232, 10 Atl. 105, 15 Atl. 8; *Chew v. Corkery*, (N. J. Eq.), 10 Atl. 437. **N. Y.**—*Moore v. Reinhardt*, 132 App. Div. 707, 117 N. Y. Supp. 534. **N. C.**—*Grant v. Hughes*, 96 N. C. 177, 2 S. E. 339; *Commissioners v. Raleigh*, 88 N. C. 120; *Leak v. Corington*, 87 N. C. 501; *Atlantic T. & O. R. Co. v. Morrison*, 82 N. C. 141; *Douglas v. Caldwell*, 64 N. C. 372; *Dozier v. Sprouse*, 54 N. C. 152. **Pa.**—*New York Bay Cemetery Co. v. Buckmaster*, 33 Atl. 819; *Fidelity Title & Trust Co. v. Weitzel*, 152 Pa. 498, 25 Atl. 569, 31 W. N. C. 414; *Saake v. Dörner*, 3 Pa. Dist. 170. **Va.**—*Beale v. Hall*, 97 Va. 383, 34 S. E. 53; *Slater v. Arnett*, 81 Va. 432; *Lee County Justices v. Fulkerson*, 21 Gratt. 182; *Clarke v. Tinsley's Admrs.*, 4 Rand. 250; *Lewis' Exrs. v. Bacon's Legatee*, 3 Hen. & M. 89; *McConnico v. Curzen*, 2 Call 358.

If the bill presents a case in which it is absolutely necessary to take an account, it is the invariable practice to refer, and this may be done without proof or notice. *Briggs v. Neal*, 120 Fed. 224, 56 C. C. A. 572.

**Preliminary Proof for Accounting.**—The principle laid down in the text is fully considered and presented, supported by many authorities, in the case of *Bresee v. Bradfield* (Va.), 38 S. E. 196, where the court said: "Where a decree for an account is essential to the relief sought, it ought not to be granted until the plaintiff has established by proof at least a *prima facie* right to the relief he seeks,



An order for an accounting will not be made to enable a plaintiff to establish before the master his right to an accounting.<sup>65</sup>

**Nature of the Proof.**—The evidence to support the plaintiff's right to a decree for an accounting may be oral,<sup>66</sup> documentary,<sup>67</sup> or it may consist of admissions arising from the pleadings.<sup>68</sup>

**2. Variance.**—The right to a decree for an accounting depends upon the case made by the averments of the bill or petition,<sup>69</sup> and therefore the evidence must correspond to the pleadings of the plaintiff

and that an account is necessary to enable the court to render a proper decree in the cause. In 2 Bar. Ch. Prac. (2d. Ed.), at page 680, it is said: 'The settled rule, however, in respect to orders of reference, is that before an application for one shall be granted it must appear with reasonable certainty that an order will be necessary, and it will not be made upon the suggestion that in some contingency one will be required; for it will not do to put the defendant to the trouble and expense of rendering an account until it is ascertained that the plaintiff has a right to demand it; nor will a reference be made for the purpose of furnishing evidence in support of the allegations of a bill.' The question has frequently been before this court, and in every instance, so far as our investigation has gone, the rule under consideration has been applied in a case where a statement of accounts was necessary in order that the plaintiff might be given the relief asked in the bill. *Lee County Justices v. Fulkerson*, 21 Gratt. 182; *Sadler v. Whitehurst*, 83 Va. 46, 1 S. E. 410; *Steam-Packet Co. v. Williams*, 94 Va. 422, 26 S. E. 841; and *Beale v. Hall*, 97 Va. 383, 34 S. E. 53,—were all cases of this character. \* \* \* From all the authorities we deduce the conclusion that where, from the nature of the case and of the relief sought, an account is necessary to enable the court to do justice between the parties, an order of reference will not be entered until its propriety has been made to appear by the evidence; and if, in such a case, it be submitted upon the bill without proof and an answer denying its allegations, it should be dismissed; but where there is nothing in the pleadings and proofs to make an account proper and necessary, and the court has improvidently granted an order of reference, it is harmless error,

for which the cause should not be reversed. *Lancaster v. Barton*, 92 Va. 620, 24 S. E. 251."

65. U. S.—*Columbian Equipment Co. v. Mercantile T. & Dep. Co.*, 113 Fed. 23, 51 C. C. A. 33. Va.—*Millhiser v. McKinley*, 98 Va. 207, 35 S. E. 446; *Beale v. Hall*, 97 Va. 383, 34 S. E. 53; *Baltimore Steam-Packet Co. v. Williams*, 94 Va. 422, 26 S. E. 841; *Porter v. Young*, 85 Va. 49, 6 S. E. 803; *Sadler v. Whitehurst*, 83 Va. 46, 1 S. E. 410; *Lee County Justices v. Fulkerson*, 21 Gratt. 182. W. Va.—*Ammons v. South Penn. Oil Co.*, 47 W. Va. 610, 35 S. E. 1004; *Lively v. Winton*, 30 W. Va. 554, 4 S. E. 451; *Tilden v. Maslin*, 5 W. Va. 377.

66. Ala.—*Brantley v. Gunn*, 29 Ala. 387. S. C.—*Barksdale v. Hall*, 13 Rich. Eq. 180. Va.—*Lewis' Exrs. v. Bacon's Legatee*, 3 Hen. & M. 89.

67. Clapp v. Emery, 98 Ill. 523; *Dozier v. Edwards*, 3 Litt. (Ky.) 67.

68. Ala.—*May v. Barnard*, 20 Ala. 200; *T. & J. Kirkman v. Vanlier*, 7 Ala. 217. Fla.—*King v. Bell*, 54 Fla. 568, 45 So. 488. Ga.—*Dillard v. Ellington*, 57 Ga. 567. Miss.—*Williamson v. Downs*, 34 Miss. 402. N. J.—*Bradshaw v. Clark*, 31 N. J. Eq. 39. N. C.—*Neal v. Becknell*, 85 N. C. 299; *Atlantic T. & O. R. Co. v. Morrison*, 82 N. C. 141. S. C.—*McClure v. Miller*, 1 Bailey Eq. 107, 21 Am. Dec. 522. Va.—*Porter v. Young*, 85 Va. 49, 6 S. E. 803.

See 1 *ENCYCLOPAEDIA OF EVIDENCE* 132-138, where this subject is fully treated and the authorities cited.

69. Ala.—*Crothers' Admrs. v. Lee*, 29 Ala. 337. Nev.—*Mitchell v. O'Neale*, 4 Nev. 504. N. J.—*Welch v. Arnett*, 46 N. J. Eq. 548, 22 Atl. 124. N. Y.—*Manning v. Manning*, 89 Hun 471, 35 N. Y. Supp. 333. W. Va.—*Purdy v. Rutter*, 3 W. Va. 262.

iff," otherwise a variance will arise and the plaintiff's case may not be properly made out."<sup>1</sup>

**Curing Variance.**—If a variance arises between the plaintiff's pleadings and his proof, it may be cured by amendment."<sup>2</sup>

**3. Preliminary Hearing.**—a. *In General.*—To determine whether or not a decree for an accounting, usually called a reference," shall be made, a preliminary hearing of the cause is had before the court for such purpose."<sup>4</sup>

b. *Extent of the Hearing.*—Upon the preliminary hearing the court ordinarily considers only the evidence bearing on the right to an accounting," and not that relating to the validity of the amount," except as this may bear on the question as to such right."<sup>7</sup>

c. *When a Preliminary Hearing Not Necessary.*—Of course, if the defendant admits the right of the plaintiff to an accounting," or the bill is taken for confessed, a decree for an accounting may be entered without a preliminary hearing."<sup>8</sup>

**4. Decree of Dismissal of Suit for an Accounting.**—When a suit proper for an accounting has been brought, ordinarily the plaintiff cannot dismiss it against the objection of the defendant."<sup>9</sup>

70. Ala.—Crothers' Admr. v. Lee, 29 Ala. 337; Montgomery v. Givhan, 24 Ala. 568; Julian v. Reynolds, 11 Ala. 960. Mass.—Hobart v. Andrews, 21 Pick. 526. Miss.—Perkins v. Sturdevant, 4 So. 555. Nev.—Mitchell v. O'Neale, 4 Nev. 504. N. J.—Welch v. Arnett, 46 N. J. Eq. 548, 22 Atl. 124. N. Y.—Manning v. Manning, 89 Hun 471, 35 N. Y. Supp. 333; Stiles v. Burch, 5 Paige 132. Vt.—Sanborn v. Kittredge, 20 Vt. 632, 50 Am. Dec. 58. W. Va.—Purdy v. Rutter, 3 W. Va. 262.

71. Crothers' Admr. v. Lee, 29 Ala. 337; Sanborn v. Kittredge, 20 Vt. 632, 50 Am. Dec. 58.

See 13 ENCYCLOPEDIA OF EVIDENCE, title "Variance," pp. 611-616, and especially pp. 620-654.

72. Brown v. Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250.

73. Union Sugar Refinery v. Mathiessen, 3 Cliff. 146, 24 Fed. Cas. No. 14,398.

74. N. Y.—Weldon v. Brown, 84 App. Div. 482, 82 N. Y. Supp. 1051; Jordan v. Underhill, 71 App. Div. 559, 76 N. Y. Supp. 95. Tenn.—Cobb v. Jameson, 1 Tenn. Ch. 604. Va.—Cutting v. Carter, 4 Hen. & M. 478; Winston v. Campbell, 4 Hen. & M. 477.

75. Hudson v. Trenton L. & Mach. Mfg. Co., 16 N. J. Eq. 475; Royster v. Wright, 118 N. C. 152, 24 S. E. 746;

Bridgers v. Bridgers, 101 N. C. 71, 7 S. E. 586 (settlement); Atlantic T. & O. E. Co. v. Morrison, 82 N. C. 141 (settlement); Smith v. Barringer, 74 N. C. 665 (release).

76. Hudson v. Trenton Locomotive & Mach. Mfg. Co., 16 N. J. Eq. 475.

77. Albright v. Albright, 91 N. C. 220.

78. Md.—Berry v. Pierson, 1 Gill 234. S. C.—E. A. Beall Co. v. Weston, 83 S. C. 491, 65 S. E. 823. Va.—Cutting v. Carter, 4 Hen. & M. 478.

79. King v. Bell, 54 Fla. 568, 45 So. 488; Chapman v. Evans, 44 Mass. 113.

80. Ill.—Wilcoxon v. Wilcoxon, 111 Ill. App. 90. Md.—Hall v. McPherson, 3 Bland 529. Mich.—Wyatt v. Sweet, 48 Mich. 539, 12 N. W. 692. R. I.—Jenks v. Smith, 14 R. I. 634; Cozzens v. Sisson, 5 R. I. 489. Tenn.—Polk v. Mitchell, 85 Tenn. 634, 4 S. W. 221; Fisher v. Stovall, 85 Tenn. 316, 2 S. W. 567; Croft v. Johnson, 3 Baxt. 390. Wis.—Hutchinson v. Paige, 67 Wis. 206, 29 N. W. 908.

This is so even though a decree dismisses the bill as to part (Cozzens v. Sisson, 5 R. I. 489); and though the defendant has interposed no cross-bill or counter claim (Hutchinson v. Paige, 67 Wis. 206, 29 N. W. 908).

It has been held that the defendant in a suit in equity for an accounting,



**5. Nature and Essentials of Decree.**—a. *Interlocutory.*—A decree of reference is not final, but is regarded as interlocutory.<sup>81</sup>

b. *Essentials.*—The essentials of a decree of reference depend to some extent upon the character of the suit.<sup>82</sup> If it be in a creditor's suit, the amount, nature and priority of the liens upon the debtor's property are directed to be ascertained,<sup>83</sup> the extent and character of his property,<sup>84</sup> and such other matters as may be deemed pertinent.<sup>85</sup> Ordinarily, the decree provides for an accounting,<sup>86</sup> establishes the principles upon which the accounting shall be stated when the nature of the case calls for it,<sup>87</sup> provides for notice of the time and place of taking the account,<sup>88</sup> and designates a master before whom it will be taken.<sup>89</sup> It is common practice to give directions as to the taking of the account,<sup>90</sup> and to settle the principles upon which the account is to be stated, in the decree of reference.<sup>91</sup>

after the decree for an accounting, may revive the suit on the ground that he may have an interest in the execution of the decree. *Horwood v. Schmedes*, 12 Ves. Jr. 311, 33 Eng. Reprint 118; *Anonymous*, 3 Atk. 691, 26 Eng. Reprint 1197; *Done's Case*, 1 P. Wms. 263, 24 Eng. Reprint 380; *Stowell v. Cole*, 2 Vern. 296, 23 Eng. Reprint 791.

81. *U. S.*—*Spalding v. Mason*, 161 U. S. 375, 16 Sup. Ct. 592, 40 L. ed. 738. *Ala.*—*Richardson v. Peagler*, 111 Ala. 478, 20 So. 434. *Cal.*—*Duff v. Duff*, 71 Cal. 513, 12 Pac. 570; *Hinds v. Gage*, 56 Cal. 486. *Ill.*—*Mosier v. Norton*, 83 Ill. 519; *Hollahan v. Dowers*, 111 Ill. App. 263. *Miss.*—*Prewett v. Crump*, 23 Miss. 574. *N. Y.*—*Walker v. Spencer*, 86 N. Y. 162. *Pa.*—*Com. v. Archbald*, 195 Pa. 317, 46 Atl. 5; *Keller v. Swartz*, 137 Pa. 65, 20 Atl. 627. *Tenn.*—*Cobb v. Jameson*, 1 Tenn. Ch. 604. *Va.*—*Penn v. Chesapeake & O. R. Co.*, 23 S. E. 3; *Humphrey v. Foster*, 13 Gratt. 653; *Bowyer v. Lewis*, 1 Hen. & M. 553. *W. Va.*—*Kanawha Lodge v. Swann*, 37 W. Va. 176, 16 S. E. 462; *Hooper v. Hooper*, 29 W. Va. 276, 1 S. E. 280.

82. *Powers v. Dickie*, 49 Ala. 81.

83. 1 Hogg's Eq. Proc. § 596.

84. 1 Hogg's Eq. Proc. § 596.

85. *Strum v. Chalfant*, 38 W. Va. 248, 253, 18 S. E. 451.

86. *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 422, 27 L. ed. 238; *Cobb v. Jameson*, 1 Tenn. Ch. 604.

87. *U. S.*—*Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 422, 27 L. ed. 238. *Ill.*—*Mosier v. Norton*, 83 Ill. 519. *N. J.*—*Hudson v. Trenton L. &*

*Mach. Mfg. Co.*, 16 N. J. Eq. 475. *S. C.*—*Dunlap v. O'Dena*, 1 Rich. Eq. 272. *Tenn.*—*Cobb v. Jameson*, 1 Tenn. Ch. 604. *Va.*—*Humphrey v. Foster*, 13 Gratt. 653.

*Contra*, *Vanderwick v. Summerl*, 2 Wash. C. C. 41, 28 Fed. Cas. No. 16,845.

On a decree for an accounting the court will not make a declaration of facts and of their opinion to save the master trouble. *Dozier v. Sprouse*, 54 N. C. 152.

88. 1 Hogg's Eq. Proc. § 634.

89. 1 Hogg's Eq. Proc. § 632.

90. *Hunt v. Gordon*, 52 Miss. 194; *Hudson v. Trenton Locomotive & Mach. Mfg. Co.*, 16 N. J. Eq. 475.

91. *N. J.*—*Hudson v. Trenton Locomotive & Mach. Mfg. Co.*, 16 N. J. Eq. 475. *S. C.*—*Dunlap v. O'Dena*, 1 Rich. Eq. 272. *Tenn.*—*Carey v. Williams*, 1 Lea 51.

The case of *Carey v. Williams*, 1 Lea (Tenn.) 51, was a suit brought for an account of a partnership. The chancellor before whom the case was heard made an order based on the statement that an accounting would be necessary in the case, referring the whole matter between the parties to the clerk of the court to take, prove and report the state of the accounts with reference to the matter of the original bill and the matter set up in the answer. The clerk, acting as master, heard, considered and included in his report many matters not properly in the case. The supreme court, commenting on the failure of the court to give directions in the decree of reference for the guidance of the clerk in making up and



6. **Appealability of Decree for an Accounting.**—As a decree for an accounting is only interlocutory, in most jurisdictions an appeal cannot be taken from such a decree.<sup>92</sup> And this is so even in those states allowing an appeal from a decree which settles the principles of the cause.<sup>93</sup>

7. **Stating the Account.**—a. *In General.*—The account is nearly always taken and stated by the master designated by the court,<sup>94</sup> and

constituting the account, said: "It is proper to say here that this case furnishes a striking illustration of the evil of the practice of referring a case to the master without any adjudication of or ascertainment of the rights of the parties to guide him as to what is properly to be inquired into. Much trouble and expense could have been saved by first submitting the issues between the parties to the chancellor, having his judgment upon them, and definite directions given the master for his guidance in the investigation he was required to make. No such practice ought to be tolerated by the Chancellor, as it can serve no good purpose, and in most cases leads to complication and expense."

92. **U. S.**—*McGourkey v. Toledo & O. C. R. Co.*, 146 U. S. 536, 13 Sup. Ct. 170, 36 L. ed. 1079; *Winters v. Ethell*, 132 U. S. 207, 10 Sup. Ct. 56, 33 L. ed. 339; *Keystone etc. Co. v. Martin*, 132 U. S. 91, 10 Sup. Ct. 32, 33 L. ed. 276; *Parsons v. Robinson*, 122 U. S. 112, 7 Sup. Ct. 1153, 30 L. ed. 1122; *Dainese v. Kendall*, 119 U. S. 53, 7 Sup. Ct. 65, 30 L. ed. 305; *Grant v. Phoenix Mut. L. Ins. Co.*, 106 U. S. 429, 1 Sup. Ct. 414, 27 L. ed. 237; *Merriam v. Chicago etc. R. Co.*, 64 Fed. 535, 12 C. C. A. 275, 24 U. S. App. 428. **Ala.**—*Thompson v. Maddux*, 105 Ala. 326, 16 So. 885; *Jackson County v. Gullatt*, 84 Ala. 243, 3 So. 906; *Walker v. Crawford*, 70 Ala. 567. **Ark.**—*Davie v. Davie*, 52 Ark. 224, 12 S. W. 558, 20 Am. St. Rep. 170; *Johnson's Exr. v. Clark*, 4 Ark. 235. **Cal.**—*Duff v. Duff*, 71 Cal. 513, 12 Pac. 570; *Gray v. Palmer*, 9 Cal. 616. **Ill.**—*McParland v. Larkin*, 21 N. E. 565; *Hunter v. Hunter*, 100 Ill. 519; *Anderson v. Lundburg*, 41 Ill. App. 248; *Williamson v. Borscheuius*, 26 Ill. App. 65. **Kan.**—*Savage v. Challiss*, 4 Kan. 319.

**Ky.**—*Vinson v. Freeze*, 1 S. W. 478; *Bolinger v. Hanson's Admr.*, 5 Ky. L. Rep. 186. **La.**—*Junek v. Hezean*, 12 La. Ann. 248. **Md.**—*Roberts v. Salisbury*, 3 Gill & J. 425; *Hungerford v. Bourne*, 3 Gill & J. 133. **Mich.**—*Kingsbury v. Kingsbury*, 20 Mich. 212; *Caswell v. Comstock*, 6 Mich. 391. **Minn.**—*Bond v. Welcome*, 61 Minn. 43, 63 N. W. 3. **Mo.**—*Deickhart v. Rutgers*, 45 Mo. 132. **N. Y.**—*Jaques v. M. E. Church*, 17 Johns. 548, 8 Am. Dec. 447. **N. C.**—*Williams v. Walker*, 107 N. C. 334, 12 S. E. 43; *University v. State Nat. Bank*, 92 N. C. 651. **Ohio.**—*Kelley v. Stanbery*, 13 Ohio 408; *Evans v. Dunn*, 26 Ohio St. 439. **Pa.**—*Offerle v. Reynolds Lumb. Co.*, 170 Pa. 29, 32 Atl. 540. **S. C.**—*Belcher v. Conner*, 1 S. C. 88. **Tenn.**—*Meek v. Mathis*, 1 Heisk. 534. **Va.**—*Bowyer v. Lewis*, 1 Hen. & M. 553. **W. Va.**—*Kanawha Lodge v. Swann*, 37 W. Va. 176, 16 S. E. 462.

93. *Craighead v. Wilson*, 18 How. (U. S.) 199, 15 L. ed. 332; *Pittsburgh etc. R. Co. v. Baltimore etc. R. Co.*, 61 Fed. 705, 10 C. C. A. 20, 22 U. S. App. 359; *Humphrey v. Foster*, 13 Gratt. (Va.) 653. See, however, *Mobile Bank v. Hall*, 6 Ala. 141, 41 Am. Dec. 41.

See the title "Judgments."

94. **Ala.**—*T. & J. Kirkman v. Vancier*, 7 Ala. 217. **Ill.**—*Beale v. Beale*, 116 Ill. 292, 5 N. E. 540; *Thomas v. Piper*, 66 Ill. App. 599; *Weary v. Andrews*, 58 Ill. App. 380. **Va.**—*Newman v. Chapman*, 2 Rand. 93; *Anderson v. Gest*, 2 Hen. & M. 26; *Bland v. Wyatt*, 1 Hen. & M. 543.

**Interest.**—The person designated must be disinterested. *Dillard v. Krise*, 86 Va. 410, 10 S. E. 430.

One who is a creditor and a party is incompetent to take and report an account in a general creditors' suit. *Dillard v. Krise*, 86 Va. 410, 10 S. E. 430.

this is the correct practice.<sup>95</sup> However, there are cases which hold that the court may state the account.<sup>96</sup>

b. *Duty of the Master.*—(I.) *In General.*—In taking the account, the master should follow the directions, if any are given, of the decree of reference,<sup>97</sup> and restrict his examination to the controversy made by the pleadings.<sup>98</sup>

(II.) *Evidence before the Master.*—The master is at liberty to hear oral testimony,<sup>99</sup> and receive such other evidence as will enable him properly to state the account.<sup>1</sup>

95. **Ark.**—Franklin *v.* Meyer, 36 Ark. 96; Bryan *v.* Morgan, 35 Ark. 113; Stirman *v.* Cravens, 33 Ark. 376. **Ga.**—Bolton *v.* Flournoy, R. M. Charl. 125. **Ill.**—Beale *v.* Beale, 116 Ill. 292, 5 N. E. 540; French *v.* Gibbs, 105 Ill. 523; Koon *v.* Hollingsworth, 97 Ill. 52; Daly *v.* St. Patrick's Catholic Church, 97 Ill. 19; Quayle *v.* Guild, 83 Ill. 553; Mosier *v.* Norton, 83 Ill. 519; Bressler *v.* McCune, 56 Ill. 475; Thomas *v.* Piper, 66 Ill. App. 599; Weary *v.* Andrews, 58 Ill. App. 380. **Ky.**—Robert *v.* Dale, 7 B. Mon. 199; Blackerby *v.* Holton, 5 Dana 520. **Md.**—Bratt *v.* Bratt's Admr., 21 Md. 578. **N. Y.**—O'Brien *v.* Bowes, 4 Bosw. 657, 10 Abb. Pr. 106. **Va.**—Newman *v.* Chapman, 2 Rand. 93, 14 Am. Dec. 766; Bland *v.* Wyatt, 1 Hen & M. 543.

96. **U. S.**—Wheeler *v.* Billings, 72 Fed. 301, 18 C. C. A. 573. **Ark.**—Franklin *v.* Meyer, 36 Ark. 96; Bryan *v.* Morgan, 35 Ark. 113. **Cal.**—Hidden *v.* Jordan, 28 Cal. 301. **Fla.**—May *v.* May, 19 Fla. 373. **Me.**—Glover *v.* Jones, 95 Me. 303, 49 Atl. 1104. **Ore.**—Davis *v.* Hofer, 38 Ore. 150, 63 Pac. 56. **Pa.**—Com. *v.* Archbald, 195 Pa. 317, 46 Atl. 5. **W. Va.**—Darby *v.* Gilligan, 43 W. Va. 755, 28 S. E. 737.

97. **U. S.**—Union Sugar Refinery *v.* Mathiesson, 3 Cliff. 146, 24 Fed. Cas. No. 14,398. **Ala.**—Henderson's Admr. *v.* Huey, 45 Ala. 275; Lang *v.* Brown, 21 Ala. 179, 56 Am. Dec. 244. **Md.**—Wisner *v.* Wilhelm, 48 Md. 1. **N. J.**—Izard *v.* Bodine, 9 N. J. Eq. 309; Schlicher *v.* Whyte, 71 Atl. 337.

When the order is ambiguous and indefinite or incomplete, it is probably the general practice for the master to report the case back for more specific instruction. Union Sugar Refinery *v.* Mathiesson, 3 Cliff. 146, 24 Fed. Cas. No. 14,398.

98. **D. C.**—Dayton *v.* District of Columbia, 18 Ct. Cl. 13. **Md.**—Calvert

*v.* Carter, 18 Md. 73. **N. J.**—Petrick *v.* Ashcroft, 20 N. J. Eq. 198; Izard *v.* Bodine, 9 N. J. Eq. 309; Scott *v.* Gamble, 9 N. J. Eq. 218. **N. Y.**—Consequa *v.* Fanning, 3 Johns. Ch. 587. **W. Va.**—Ruffner, Donnally & Co. *v.* Hewitt, K. & Co., 7 W. Va. 585.

99. **U. S.**—Story *v.* Livingston, 13 Pet. 359, 10 L. ed. 200; Shapleigh *v.* Chester Elec. L. & P. Co., 47 Fed. 848. **Ala.**—Pearson *v.* Darrington, 32 Ala. 227; Alexander *v.* Alexander, 8 Ala. 796; T. & J. Kirkman *v.* Vanlier, 7 Ala. 217. **Conn.**—Callender *v.* Colegrove, 17 Conn. 1. **Ga.**—McDougald *v.* Dougherty, 11 Ga. 570; Dougherty *v.* Jones, 11 Ga. 432. **Ill.**—Union Mut. Life Ins. Co. *v.* Slee, 123 Ill. 57, 12 N. E. 543, 13 N. E. 222. **Ky.**—Winter *v.* Wheeler, 7 B. Mon. 25. **N. H.**—Hollister *v.* Barkley, 11 N. H. 501. **N. J.**—Halsted *v.* Tyng, 29 N. J. Eq. 86; Jackson *v.* Jackson's Exrs., 3 N. J. Eq. 96. **N. Y.**—Mason *v.* Roosevelt, 3 Johns. Ch. 627; Remsen *v.* Remsen, 2 Johns. Ch. 595; McCartan *v.* Van Syckel, 10 Bosw. 694; Wiggin *v.* Gans, 4 Sandf. 646. **Pa.**—City of Philadelphia *v.* McManes, 17 Phila. 50, 42 Leg. Int. 160. **Va.**—Templeman *v.* Fauntleroy, 3 Rand. 434.

The master may examine witnesses, neither party objecting. Story *v.* Livingston, 13 Pet. (U. S.) 359, 10 L. ed. 200.

1. **Ala.**—Powers *v.* Dickie, 49 Ala. 81; Pearson *v.* Darrington, 32 Ala. 227; Halstead *v.* Shepard, 23 Ala. 558; T. & J. Kirkman *v.* Vanlier, 7 Ala. 217. **Mich.**—Warren *v.* Holbrook, 95 Mich. 185, 54 N. W. 712, 35 Am. St. Rep. 534. **N. J.**—Brown *v.* Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250, 257. **N. Y.**—Remsen *v.* Remsen, 2 Johns. Ch. 595. **Va.**—Bressee *v.* Bradfield, 99 Va. 331, 38 S. E. 196; Gibson *v.* Burgess, 82 Va. 650; Penn's Admr. *v.* Spencer, 17 Gratt. 85; Peers *v.* Barnett, 12 Gratt.

(III.) Notice of Taking Account.—The master to whom the cause has been referred should give notice to the parties of the time and place of taking the account.<sup>2</sup>

(IV.) Postponement of Taking Account.—The commissioner should ad-

410; Hampton, Smith & Co. v. Michael, 6 Gratt. 151; Lipsecomb's Admsrs. v. Winston, 1 Hen. & M. 453; McConico v. Curzen, 2 Call 358. W. Va.—Purdy v. Rutter, 3 W. Va. 262.

Partnership books are admissible in an accounting between partners under a general order of reference. Powers v. Dickie, 49 Ala. 81.

Under a general order of reference either party may produce books before the register and examine witnesses *viva voce*, in aid or explanation thereof. Kirkman v. Vanlier, 7 Ala. 217.

Burden of Proof.—Guardianship Accounting.—In Willis v. Rice, 157 Ala. 252, 48 So. 397, it is held that in an action by former wards to compel a settlement and to set aside a decree entered shortly after majority discharging the guardian, the burden is on the guardian to prove that he dealt fairly and made full communication to his wards of every fact that was calculated to influence their conduct, and obtained nothing from them without their free consent.

In Alexander v. Alexander, 8 Ala. 796, the court holds that the account receipted for the board of the lunatic, is not a sufficient voucher, without proving that the services were rendered, the money paid, and the charge reasonable.

2. Ill.—Craig v. McKinney, 72 Ill. 305 (where bill taken *pro confesso*); Acme Copying Co. v. McLure, 41 Ill. App. 397. Miss.—Wilkins v. Humphreys, 23 Miss. 311; Poindexter v. La Roche, 7 Smed. & M. 699. Va.—Martin v. South Salem Land Co., 94 Va. 28, 26 S. E. 591; Dillard v. Krise, 86 Va. 410, 10 S. E. 430; Moore v. Bruce, 85 Va. 139, 7 S. E. 195; Hill v. Bowyer, 18 Gratt. 364; McCandlish v. Enloe, 3 Gratt. 315; Winston v. Campbell, 4 Hen. & M. 477. W. Va.—Marling v. Robrecht, 13 W. Va. 440.

See the title "Reference."

Bill of Particulars When Used in Another Suit.—In Starkweather v. Kittle, 17 Wend. (N. Y.) 20, the court says: "When the bill is furnished, it is deemed a part of the declaration, plea or notice to which it relates, and is

construed in the same way as though it had originally been incorporated in it. The particulars cannot be evidence against the party furnishing them, in any case, or for any purpose, where the pleading or notice to which the bill relates would not be evidence. . . . No principle has ever been recognized by this court which would sanction the receiving of a bill of particulars in evidence against the party who furnished it, for any other purpose than that of restricting his proofs, and limiting his recovery or set-off to the matters which have been put in issue by the pleadings. In England, as is true in relation to many other matters, there are a few contradictory decisions at Nisi Prius, having some bearing on this question; but neither of the courts of Westminster Hall has sanctioned any other use of the bill of particulars than that which has been mentioned. In Harrington v. Macmorris, 5 Taunt., 88, Sir James Mansfield had received the bill of particulars in evidence at the circuit as containing an admission against the defendant; but he afterwards united with his brethren in correcting the error, and ordered the verdict set aside and a non-suit to be entered."

Depositions may be taken before the master under a general notice for an accounting. McCandlish v. Edloe, 3 Gratt. (Va.) 315.

The Notice Must Be Reasonable. In Moore v. Bruce, 85 Va. 139, 7 S. E. 195, the court decided that three days was not a sufficient notice.

"Code Va. 1887, § 5, declares that where a statute requires a notice to be given a certain time before any proceeding, there must be that time exclusive of the day set for such proceeding; and if publication is had under section 3321, which provides for four weeks' publication of the time and place of taking of an account by a commissioner, there must be 28 days from the first insertion to the day fixed for taking the account." Dillard v. Krise, 86 Va. 410, 10 S. E. 430.



journal the taking of the account whenever the situation of either of the parties requires it.<sup>3</sup>

(V.) **Adjournments by the Master.**—The master may adjourn the taking of the account from time to time, as the case may require.<sup>4</sup>

(VI.) **Adjustment of Accounts.**—(A.) **IN GENERAL.**—The extent to which the master may proceed in the adjustment of the account<sup>5</sup> and the principles upon which it should be stated,<sup>6</sup> in the absence of express directions, will depend upon the character of the account,<sup>7</sup> as well as upon the directions contained in the decree of reference.<sup>8</sup>

(B.) **THE ACCOUNT AS AN ENTIRETY.**—The court will see that the entire account involved in the suit is examined, so that the rights of the parties may be fully adjusted.<sup>9</sup>

(C.) **RENTS AND PROFITS.**—In stating the account of rents, issues and profits of real estate, the rent or income should be ascertained for each year separately.<sup>10</sup>

(D.) **INTEREST.**—As interest is not payable on an open account,<sup>11</sup> unless there is an agreement to pay interest<sup>12</sup> ordinarily it will not be

3. *Pittinger v. Marshall*, 50 W. Va. 229, 40 S. E. 342.

4. *Hill v. Bowyer*, 18 Gratt. (Va.) 364.

Adjournments of taking of the account will be presumed to be regular if no specific objections showing otherwise are made. *Hill v. Bowyer*, 18 Gratt. (Va.) 364.

5. *Henderson's Ch. Pr.* 419, § 299.

6. **U. S.**—*Ward v. P. & M. R. Co.*, 4 Fed. 862. **Ark.**—*Hicks v. Hogan*, 36 Ark. 298, 301, 302; *Franklin v. Meyer*, 36 Ark. 96, 109, 110. **Ill.**—*Mosier v. Norton*, 83 Ill. 519, 525; *Danforth v. McIntyre*, 11 Ill. App. 417, 421. **Md.**—*Neale v. Hagthorp*, 3 Bland 551. **N. Y.**—*Remsen v. Remsen*, 2 Johns. Ch. 595. **N. C.**—*McLin v. McNamara*, 21 N. C. 407. **Tenn.**—*Cobb v. Jameson*, 1 Tenn. Ch. 604.

*Daniell's Ch. Pr.*, vol. 2, p. 1169.

7. *Paul v. Land*, 15 Ore. 442, 17 Pac. 87.

8. *Henderson's Ch. Pr.* 218, § 160.

9. The accounting should be as to the entire account, even though amendment be necessary to include prior items. *Moore v. Swanton Tanning Co.*, 60 Vt. 459, 15 Atl. 114.

Where a number of voyages form one connected partnership transaction there cannot be an accounting for the profits of one voyage alone. *Williams v. Lawrence*, 53 Barb. (N. Y.) 320.

10. *Gaines v. New Orleans*, 17 Fed. 16; *Rust v. Rust*, 17 W. Va. 901.

11. **U. S.**—*Williams v. Craig*, 1 Dall. 313, 1 L. ed. 153; *Henry v. Risk*, 1 Dall. 265, 1 L. ed. 130. **Conn.**—*Temple v. Belding*, 1 Root 314; *Broom v. Henman*, 1 Root 248. **Ind.**—*Shewel v. Givan*, 2 Blackf. 312. **Ky.**—*Neal v. Keel*, 4 T. B. Mon. 162; *South v. Leavy*, Hard. 518. **Nev.**—*Flannery v. Anderson*, 4 Nev. 437. **N. J.**—*Polhemus v. Annin*, 1 N. J. L. 176. **N. Y.**—*In re Strickland's Estate*, 1 Con. Sur. 435, 5 N. Y. Supp. 851; *Hadley v. Ayres*, 12 Abb. Pr. (N. S.) 240; *Godfrey v. Moser*, 3 Hun 218, 5 Thomp. & C. 677. **Pa.**—*Appeal of McClintock*, 29 Pa. 360. **S. C.**—*Shirving v. Stobo*, 2 Bay 233. **Tex.**—*Cloud v. Smith*, 1 Tex. 102. **Va.**—*Waggoner v. Gray's Admr.*, 2 Hen. & M. 603; *McConnico v. Curzen*, 2 Call 358. **Wis.**—*Marsh v. Fraser*, 37 Wis. 149.

12. **Conn.**—*Crosby v. Mason*, 32 Conn. 482. **Ill.**—*Bassett v. Noble*, 15 Ill. App. 360. **Kan.**—*Williams v. HERSHEY*, 17 Kan. 18. **Ky.**—*Hays v. Williams*, 10 Ky. L. Rep. 319. **Mich.**—*Sweeney v. Neely*, 53 Mich. 421, 19 N. W. 127. **N. Y.**—*Esterly v. Cole*, 1 Barb. 235; *Consequa v. Fanning*, 3 Johns. Ch. 587; *Tucker v. Ives*, 6 Cow. 193; *Rensselaer Glass Factory v. Reid*, 5 Cow. 587; *Van Beuren v. Van Gaasbeck*, 4 Cow. 496; *Reid v. Rensselaer Glass Factory*, 3 Cow. 393; *Newell v. Griswold*, 6 Johns. 45. **S. C.**—*Holmes v. Misroon*, Tread. Const. 210. **Wash.**—*Baxter v. Waite*, 2 Wash. Ter. 228, 6

allowed in the statement of an account,<sup>12</sup> except as to items that actually bear interest.<sup>14</sup>

(E.) TIME TO WHICH ACCOUNT IS STATED. —The master in stating the account should include all matters between the parties to the date of its conclusion in his report.<sup>15</sup>

(VII.) The Report. —The report should show the true state of the account between the parties,<sup>16</sup> the items entering into the account,<sup>17</sup> and those rejected.<sup>18</sup> The evidence upon which the account is based need not accompany the report,<sup>19</sup> unless this is required by statute<sup>20</sup> or by the decree of reference.<sup>21</sup> Upon a bill for a general accounting

Pac. 429. Wis. — *Yates v. Shepardson*, 39 Wis. 173; *Marsh v. Fraser*, 37 Wis. 149.

13. *Flake v. Carson*, 33 Ill. 518.

14. *Hite's Exr. v. Hite's Legatees*, 2 Rand. (Va.) 409; *Hayes v. Freshwater*, 47 W. Va. 217, 235, 34 S. E. 831; *Rust v. Rust*, 17 W. Va. 901.

15. Ill. — *Rhodes v. Ashhurst*, 71 Ill. App. 242, *affirmed*, 176 Ill. 351, 52 N. E. 118. Mo. — *Standard Fireproofing Co. v. St. Louis etc. Co.*, 177 Mo. 559, 76 S. W. 1008. N. Y. — *Tyler v. Willis*, 35 Barb. 213. Va. — *Harris v. Magee*, 3 Call 502.

16. Fla. — *Prout v. Dade County Security Co.*, 47 So. 12. Ill. — *Craig v. McKinney*, 72 Ill. 305. Va. — *Slater v. Arnett*, 81 Va. 432; *Nelson's Admr. v. Kownslar's Exr.*, 79 Va. 468; *Hannah's Admr. v. Boyd*, 25 62 Gratt. 692; *Harris v. Magee*, 3 Call 502.

This is the province of the court, and if it cannot be done with the aid of the master equity will not act. *Slater, Myers & Co. v. Arnett*, 81 Va. 232.

Sufficiency of Report. — In *Prout v. Dade County Security Company (Fla.)*, 47 So. 12, 18, the court, in overruling an objection, said:

"It is further contended by appellants that the final decree is erroneous because the master simply recapitulated immaterial portions of the testimony, without stating an account in detail. We do not think this contention is sustained by the master's report. We have examined the report carefully, and it seems to set out the testimony in full — not merely immaterial portions thereof. The report seems to us to state an account in detail. It states the sums due for principal of the note and mortgage, for premiums, dues, and interest, for fines, for advance for insurance, for taxes, for interest on money

advanced for insurance, for interest on money advanced for taxes, for solicitor's fees, for court costs, for sheriff's costs, for master's fees, and then the total of all these sums."

17. U. S. — *Ranson v. Winn*, 18 How. 295; 15 L. ed. 388. Tenn. — *Green v. Lanier*, 5 Heisk. 662. Tex. — *Whitehead v. Perie*, 15 Tex. 7. Vt. — *Herrick v. Belknap's Estate*, 27 Vt. 673. Wis. — *Reed v. Jones*, 15 Wis. 40.

18. *Reed v. Jones*, 15 Wis. 40.

19. Ala. — *Vaughan v. Smith*, 69 Ala. 92; *Mahone v. Williams*, 39 Ala. 202. Conn. — *Goodman v. Jones*, 26 Conn. 263. Fla. — *Nims v. Nims*, 20 Fla. 204. Ill. — *Friedman v. Schoengen*, 59 Ill. App. 376. Ind. — *McKinney v. Pierce*, 5 Ind. 422. Me. — *Simmons v. Jacobs*, 52 Me. 147; *Bailey v. Myrick*, 52 Me. 132; *Gilmore v. Gilmore*, 40 Me. 50; *Howe v. Russell*, 36 Me. 115. Mass. — *Silva v. Turner*, 166 Mass. 407, 44 N. E. 532; *Bowers v. Cutler*, 165 Mass. 441, 43 N. E. 188; *Parker v. Nickerson*, 137 Mass. 487. N. Y. — *In re Hemiup*, 3 Paige 305. N. C. — *Pilkington v. Cotten*, 55 N. C. 238. Vt. — *Enright v. Amsden*, 70 Vt. 183, 40 Atl. 37; *Mott v. Harrington*, 15 Vt. 185. See also U. S. — *Donnell v. Columbian Ins. Co.*, 2 Sumn. 336, 7 Fed. Cas. No. 3,987. Mass. — *Sparhawk v. Wills*, 5 Gray 423. B. I. — *Clapp v. Sherman*, 16 R. I. 370, 17 Atl. 130. W. Va. — *Holt v. Holt*, 37 W. Va. 305, 16 S. E. 675.

20. *Johnson v. Meyer*, 54 Ark. 437, 16 S. W. 121; *Ronan v. Bluhm*, 173 Ill. 277, 50 N. E. 694; *Hayes v. Hammond*, 162 Ill. 133, 44 N. E. 422.

21. *Fordyce v. Shriver*, 115 Ill. 530, 5 N. E. 87.

Practice in Alabama. — In *Kinsey v. Kinsey*, 37 Ala. 393, the court says: "The rule is said to be, not to re-

the whole matter between the parties is before the referee or master.<sup>22</sup>

(VIII.) **Exceptions to the Report.**—(A.) **IN GENERAL.**—If either party feels himself aggrieved by the report of the master, he is at liberty to except to the objectionable parts thereof.<sup>23</sup>

*The exceptions thereto should be specific.*<sup>24</sup> General exceptions will not be considered.<sup>25</sup>

(B.) **TIME AND PLACE OF TAKING EXCEPTIONS TO REPORT.**—In many jurisdictions exceptions to the report made under a decree of reference must be taken while it remains in the office of the master or other person designated to take the accounts.<sup>26</sup> In other jurisdictions such exceptions may be taken after the report has been returned to the court.<sup>27</sup>

(C.) **HEARING OF THE EXCEPTIONS.**—In hearing the exceptions to the report the court will not consider evidence that was not before the

port testimony taken before the register, unless the decree of reference so directs. When the register is directed to examine and report as to the existence of a fact, or as to any other matter, it is his duty to draw the conclusion from the evidence produced, and to report that conclusion only. *Kirkman v. Vanlier*, 7 Ala. 228; In matter of *Hemiup*, 3 Paige 305; 2 Dan. Ch. Pr. 1481, and note. Under our practice, however, when a party files an exception to some particular conclusion or decision of the register, as unauthorized by the evidence before him, it becomes the duty of the register to report the evidence relating to that matter to the chancellor. *Alexander v. Alexander*, 8 Ala. 796; *Darrington v. Borland*, 3 Port. 39, 40."

22. *King v. Bell*, 54 Fla. 568, 45 So. 488; *Eisentraut v. Cornelius*, 134 Wis. 532, 115 N. W. 142.

23. **U. S.**—*Ranson v. Winn*, 18 How. 295, 15 L. ed. 388. **Ala.**—*Alexander v. Alexander*, 8 Ala. 796. **Ia.**—*White v. Hampton*, 10 Iowa 238. **Md.**—*Calvert v. Carter*, 18 Md. 73. **Mass.**—*O'Brien v. McNeil*, 199 Mass. 164, 85 N. E. 402. **Mich.**—*Barnebee v. Beckley*, 43 Mich. 613, 5 N. W. 976. **W. Va.**—*Poling v. Huffman*, 48 W. Va. 639, 37 S. E. 526; *Hooper v. Hooper*, 29 W. Va. 276, 1 S. E. 280.

24. **Ala.**—*Vaughan v. Smith*, 69 Ala. 92; *Powers v. Dickie*, 49 Ala. 81; *Kinsey v. Kinsey*, 37 Ala. 393; *Pearson v. Darrington*, 32 Ala. 227; *Royall's*

*Admrs. v. McKenzie*, 25 Ala. 363; *Alexander v. Alexander*, 8 Ala. 796. **Ill.**—*Snell v. Deland*, 138 Ill. 5, 27 N. E. 707. **Ia.**—*White v. Hampton*, 10 Iowa 238. **La.**—*King v. Wartelle*, 14 La. Ann. 740. **Md.**—*Scrivener's Admr. v. Scrivener's Exrs.*, 1 Har. & J. 743. **Mass.**—*O'Brien v. McNeil*, 199 Mass. 164, 85 N. E. 402. **N. C.**—*State v. Foy*, 71 N. C. 527. **S. C.**—*Brown v. Rogers*, 76 S. C. 180, 56 S. E. 680. **Tenn.**—*Ridley's Admr. v. Ridley*, 1 Coldw. 323. **Tex.**—*Whitehead v. Perie*, 15 Tex. 7; *Moore v. Waco Bldg. Assn.*, 19 Tex. Civ. App. 68, 45 S. W. 974. **W. Va.**—*McCarty v. Chalfant*, 14 W. Va. 549. **Wis.**—*Reed v. Jones*, 15 Wis. 40.

25. See cases in last preceding note.

26. **U. S.**—*Story v. Livingston*, 13 Pet. 359, 10 L. ed. 200. **Ala.**—*Lewis v. Lewis*, Minor 35. **Ark.**—*Roberts v. Totten*, 13 Ark. 609. **Mass.**—*Copeland v. Crane*, 9 Pick. 73. **N. Y.**—*Byington v. Wood*, 1 Paige 145; *Slee v. Bloom*, 7 Johns. Ch. 137; *Methodist Epis. Church v. Jaques*, 3 Johns. Ch. 77; *Wilkes v. Rogers*, 6 Johns. 566. **S. C.**—*Wright v. Wright*, 2 McCord Eq. 185. **Eng.**—*Ballard v. White*, 2 Hare 158, 67 Eng. Reprint 66; *Ottey v. Pensam*, 1 Hare 322, 66 Eng. Reprint 1056; *Pennington v. Lord Muncaster*, 1 Madd. 555, 56 Eng. Reprint 204; 2 Danl. Ch. Pr. 1492, 1493, 1497.

27. *T. & J. Kirkman v. Vanlier*, 7 Ala. 217; *Roberts v. Totten*, 13 Ark. 609.



master.<sup>28</sup> It will not disturb his findings based on a conflict of evidence.<sup>29</sup>

(D.) **IRREGULARITIES INCIDENT TO THE REPORT.**—Irregularities incident to the proceedings of the master are not the subject of exceptions,<sup>30</sup> as the proper practice in such case is to set aside the report<sup>31</sup> or recommit it.<sup>32</sup>

**Failure of Master to Report.**—If the master fails to report on all matters referred to him, the practice is to set aside the report or recommit it.<sup>33</sup>

(IX.) **Objections to Report in Appellate Court.**—As a rule objections to a report of a master or commissioner cannot be made for the first time in an appellate court.<sup>34</sup> The practice is otherwise when the errors complained of appear on the face of the report.<sup>35</sup>

(X.) **Recommitment of Report.**—If upon a hearing of the exceptions to the report the court sustains such exceptions, it may either recommit the report,<sup>36</sup> or correct the report without recommitment;<sup>37</sup> and the

28. Ill.—*Cox v. Pierce*, 120 Ill. 556, 12 N. E. 194. Ia.—*White v. Hampton*, 10 Iowa 238. Tenn.—*White v. Cox*, 3 Hayw. 213. Va.—*Read v. Winston*, 4 Hen. & M. 450.

29. Ill.—*Ennesser v. Hudek*, 169 Ill. 494, 48 N. E. 673; *Williams v. Lindblom*, 163 Ill. 346, 45 N. E. 245; *Herrick v. Lynch*, 49 Ill. App. 657. Mass.—*Adams v. Brown*, 7 Cush. 220. N. Y.—*Kemp v. Peck*, 59 Hun 118, 13 N. Y. Supp. 112.

Exceptions to the commissioner's account must show as to each item the grounds of the objection. *Crawford v. Osmun*, 90 Mich. 77, 51 N. W. 356.

And the court may determine for itself on the record. *Kemp v. Peck*, 59 Hun 118, 13 N. Y. Supp. 112; *Roots v. Kilbreth*, 32 W. Va. 585, 9 S. E. 927.

The report is conclusive as to the items not excepted to. *Moore v. Waco Bldg. Assn.*, 9 Tex. Civ. App. 404, 28 S. W. 1033, 19 Tex. Civ. App. 68, 45 S. W. 974.

30. *Johnson v. Swart*, 11 Paige Ch. (N. Y.) 385; *Tyler v. Simmons*, 6 Paige Ch. (N. Y.) 127; *Connor v. Edwards*, 36 S. C. 563, 15 S. E. 706.

31. N. Y.—*Tyler v. Simmons*, 6 Paige Ch. 127. S. C.—*Connor v. Edwards*, 36 S. C. 563, 15 S. E. 706. W. Va.—*Crislip v. Cain*, 19 W. Va. 438.

32. N. J.—*Blauvelt v. Ackerman*, 20 N. J. Eq. 141. N. Y.—*Tyler v. Simmons*, 6 Paige Ch. 127. S. C.—

*Connor v. Edwards*, 36 S. C. 563, 15 S. E. 706.

33. Conn.—*Callender v. Colegrove*, 17 Conn. 1. Ill.—*Prince v. Cutler*, 69 Ill. 267; *Laswell v. Robbins*, 39 Ill. 209. Ky.—*Bolware v. Bolware*, 1 Litt. 124. Mass.—*Freeland v. Wright*, 154 Mass. 492, 28 N. E. 678. Miss.—*Beard v. Green*, 51 Miss. 856. N. Y.—*Taylor v. Read*, 4 Paige 561. W. Va.—*White v. Drew*, 9 W. Va. 695.

34. *Simmons v. Simmons*, 33 Gratt. (Va.) 451; *Chapman v. Shepherd*, 24 Gratt. (Va.) 377; *Humphrey v. Foster*, 13 Gratt. (Va.) 653; *Foreman v. Murray*, 7 Leigh (Va.) 412; *Brewer v. Hastie*, 3 Call (Va.) 22; *Bank v. Shirley*, 26 W. Va. 563.

35. *Osborne v. Colliery Co.*, 96 Va. 58, 30 S. E. 446; *Bank v. Shirley*, 26 W. Va. 563.

36. Ala.—*American Freehold Land Mtg. Co. v. Pollard*, 132 Ala. 155, 32 So. 630. Ia.—*White v. Hampton*, 10 Iowa 238. N. C.—*Turner v. Haughton*, 71 N. C. 370.

**Lost Evidence.**—If part of the evidence upon which the report is based was lost by the master the report should be recommitted. *Williams' Admr. v. Clark's Rep.*, 93 Va. 690, 25 S. E. 1013.

**Restatement by the court of the whole account without reference to the account stated by the master, or to the exceptions or want thereof, is not allowable.** *Poling v. Huffman*, 48 W. Va. 639, 37 S. E. 526.

37. *Whittemore v. Fisher*, 132 Ill.

court may in any proper case recommit the report with instructions.<sup>38</sup>

G. FINAL DECREE.—The final decree confirms the report,<sup>39</sup> and provides for the payment of the balance to him in whose favor the report shows it to be.<sup>40</sup>

H. OPENING THE DECREE.—A final decree will not be reopened in order to allow the plaintiff to charge the defendant with additional items, unless the plaintiff had no knowledge of the existence of such items before the rendition of the decree, and that such knowledge could not have been obtained by the exercise of due diligence.<sup>41</sup>

I. APPEALABILITY.—1. In General.—Of course an appeal from a final decree in a suit for an accounting may be taken as in other cases.<sup>42</sup>

243, 24 N. E. 636; *Beale v. Beale* (Ill.), 2 N. E. 65; *Curry v. Beveridge*, 94 Ill. 424; *Smyth v. McKernan*, 41 Ill. App. 132.

See also the title "**Reference.**"

38. *Dillard v. Krise*, 86 Va. 410, 10 S. E. 430; *Watson v. Fletcher*, 7 Gratt. (Va.) 1; *Ward v. Ward*, 21 W. Va. 262.

39. Ia. — *McGregor v. McGregor*, 21 Iowa 441; *White v. Hampton*, 10 Iowa 238. Md. — *Lee v. Boteler*, 12 Gill & J. 323. Miss. — *Perkins v. Watson*, 46 So. 80. N. H. — *Raymond v. Came*, 45 N. H. 201. N. Y. — *Consolidated Fruit Jar Co. v. Wisner*, 110 App. Div. 99, 97 N. Y. Supp. 52. Tex. — *Farley v. Ward*, 1 Tex. 646. Va. — *Payne v. Graves*, 5 Leigh 561; *Fitzgerald v. Jones*, 1 Munf. 150; *Hill v. Southerland's Exr.*, 1 Wash. 128. Wis. — *Eisentraut v. Cornelius*, 134 Wis. 532, 115 N. W. 142.

40. Ia. — *McGregor v. McGregor*, 21 Iowa 441. Miss. — *Perkins v. Watson*, 46 So. 80. N. H. — *Raymond v. Came*, 45 N. H. 201. N. Y. — *Consolidated Fruit Jar Co. v. Wisner*, 110 App. Div. 99, 97 N. Y. Supp. 52. Va. — *Payne v. Graves*, 5 Leigh 561; *Fitzgerald v. Jones*, 1 Munf. 150; *Hill v. Southerland's Exr.*, 1 Wash. 128. Wis. — *Eisentraut v. Cornelius*, 134 Wis. 532, 115 N. W. 142.

This is an exception to the rule that a defendant in equity is not entitled to affirmative relief except upon the averments of a cross petition. *McGregor v. McGregor*, 21 Iowa 441.

41. *Fischer v. Hayes*, 16 Fed. 469; *Camac v. Francis*, 3 Wash. C. C. 108, 4 Fed. Cas. No. 2,329; *Gunn v. Byrom*, 107 Ga. 147, 32 S. E. 833.

42. *In re Richards*, 6 Serg. & R. (Pa.) 462. See the title "**Appeal.**"

#### Decree Which Should Have Been

Rendered Below.—In *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18

Am. Dec. 250, the following decree was rendered: "Decreed, that the decree of the court of chancery, given

and rendered on these causes, be reversed, except as to the amount and sum of money, hereby decreed to be

payable to the appellees in the first and the appellants in the second of these causes. And this court proceeding

to pronounce such decree in the premises as the court of chancery ought to have pronounced: Decreed also, that

there is due from the appellants in the first and appellees in the second of these causes, and that they do pay to the appellees in the first and appellants

in the second of these causes, in the manner hereinafter mentioned, the sum of thirty-nine thousand three hundred

and eighteen dollars and fifty-four cents, with interest on the sum of twenty-eight thousand five hundred and

seventy-six dollars and eighty-seven cents, part thereof, from the first day of July, 1822, the said sum, with interest,

having been ascertained by and agreeably to the accounts hereto annexed. Decreed also, that the parties in the

said causes pay their respective costs incurred by them in this court, on their appeals, but that the appellants

in the first and appellees in the second of these causes pay to the appellees in the first and the appellants in the

second thereof the costs incurred by the said appellees in the first and the appellants in the second of said causes, in the court of chancery. Decreed, also, that the chancellor make

and pass all necessary orders for carrying this decree into full and complete

**2. Extent of Review.**—The findings of the facts by the master are treated as conclusive by the appellate court when not excepted to in the court below,<sup>42</sup> unless the error is apparent upon the face of the report.<sup>44</sup>

**Questions Not Reviewable.**—Questions not raised in the court below, as a rule, will not be considered on appeal.<sup>45</sup>

effect, by ordering and directing that the said sum of money, with interest as aforesaid, and the costs as aforesaid, incurred in the court of chancery, be brought into the said court of chancery, by the appellants in the first and appellees in the second of these causes, to be distributed and paid under the directions of the chancellor to the said appellees in the first and the appellants in the second of said causes, according to their respective rights and interests; and also, that the chancellor order and direct that the said appellees in the first and appellants in the second of said causes, pay to the auditor of the court of chancery the sum of twenty-three dollars and thirty-three cents, allowed by this court to the auditor, for his fees in auditing and stating the accounts directed by this court to be made between the parties. Decreed also, that all the equity and equitable rights and claims of the said appellees in the first and appellants in the second of said causes, be, and the same is hereby reserved and maintained to them, against the said — and —, or either of them as to all or any personal estate, of the late —, or the proceeds of sales or dispositions thereof, of any kind, and interest on such proceeds, except as to so much of such personal estate and proceeds, as has by the accounts hereto annexed and by this decree, been applied to or in reference to the payments and disbursements, by the said — and —, or either of them; and also, that the like equity be reserved and maintained to the said ap-

pellees in the first and appellants in the second of said causes, against the said — and —, or each or either of them, as to any legacies bequeathed to or for the benefit of the said — by the last will and testament of his mother, —.

Decree reversed, etc.”

43. *Ill.*—*Singer v. Steele*, 125 *Ill.* 426, 17 *N. E.* 751. *Mass.*—*Adams v. Brown*, 7 *Cush.* 220. *Pa.*—*Chew's Appeal*, 45 *Pa.* 228. *Va.*—*Saunders v. Prunty*, 89 *Va.* 921; 17 *S. E.* 231; *Hildreth v. Turner*, 89 *Va.* 858, 17 *S. E.* 471; *Cralle v. Cralle*, 84 *Va.* 198, 6 *S. E.* 12; *Morrison v. Householder*, 79 *Va.* 627; *Hansucker v. Walker*, 76 *Va.* 753; *Peters v. Neville*, 26 *Gratt.* 549; *Chapman v. Shepherd*, 24 *Gratt.* 377; *Coffman v. Sangston*, 21 *Gratt.* 263; *Mosby v. Mosby*, 9 *Gratt.* 584. *W. Va.*—*State v. King*, 47 *W. Va.* 437, 35 *S. E.* 30; *Lynch v. Henry*, 25 *W. Va.* 416.

44. *Hildreth v. Turner*, 89 *Va.* 858, 17 *S. E.* 471; *Nutt v. Summers*, 78 *Va.* 164; *Cookus v. Peyton*, 1 *Gratt.* (Va.) 431; *Dunbar v. Woodcock*, 10 *Leigh* (Va.) 628; *Walker v. Walke*, 2 *Wash.* (Va.) 195; *Windon v. Stewart*, 48 *W. Va.* 488, 37 *S. E.* 603; *State v. King*, 47 *W. Va.* 437, 35 *S. E.* 30; *Ward v. Ward's Heirs*, 40 *W. Va.* 611, 21 *S. E.* 746; *Evans v. Shroyer*, 22 *W. Va.* 581.

45. *Jackson v. Pleasanton*, 101 *Va.* 282, 43 *S. E.* 573; *Redd v. Dyer*, 83 *Va.* 331, 2 *S. E.* 283; *Strange's Admrs. v. Strange*, 76 *Va.* 240; *Jones's Exrs. v. Watson*, 3 *Call* (Va.) 254; *Rust v. Rust*, 17 *W. Va.* 901.

See the title “Appeal,” where this subject is fully presented.

**ACTION ON THE CASE.**—See Case.

**Vol. I**



# ADJOINING LANDOWNERS

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## CROSS-REFERENCES:

Boundaries;  
Easements;  
Municipal Corporations;

Nuisances;  
Waters and Watercourses.

**I. LATERAL SUPPORT.—A. IN GENERAL.—1. Right Extends to Land Only.**—At common law the owner of land is entitled to have his soil in its natural condition, unencumbered by the weight of buildings or other structures, supported by the adjoining land.<sup>1</sup>

1. U. S.—Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; Johnson v. City of St. Louis, 172 Fed. 31. Ala.—Moody v. McClelland, 39 Ala. 45, 84 Am. Dec. 770. Cal.—Green v. Berge, 105 Cal. 52, 59, 38 Pac. 539, 45 Am. St. Rep. 25; Western G. & M. Co. v. Knickerbocker, 103 Cal. 111, 37 Pac. 192; Sullivan v. Zeiner, 98 Cal. 346, 33 Pac. 209, 20 L. R. A. 730. Conn.—Barnes v. City of Waterbury, 74 Atl. 902; Ceffarelli v. Landino, 72 Atl. 564; Trowbridge v. True, 52 Conn. 190, 52 Am. Rep. 579. Del.—Stimmel v. Brown, 7 Houst. 219, 30 Atl. 996. Ga.—Morrison v. Latimer, 51 Ga. 519. Ill.—Mamer v. Lussem, 65 Ill. 484; City of Joliet v. Schroeder, 92 Ill. App. 63. Ind.—Moellering v. Evans, 121 Ind. 195, 22 N. E. 989, 6 L. R. A. 449; Bohrer v. Dienhart Harness Co., 19 Ind. App. 489, 49 N. E. 296. Kan.—Winn v. Abeles, 35 Kan. 85, 10 Pac. 443, 57 Am. Rep. 138. Ky.—Louisville & N. R. Co. v. Bonhays, 94 Ky. 67, 21 S. W. 526; City of Covington v. Geyler, 93 Ky. 275, 280, 19 S. W. 741; O'Neil v. Harkins, 8 Bush 650. Mass.—Cabot v. Kingman, 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45; White v. Dresser, 135 Mass. 150, 46 Am. Rep. 454; Foley v. Wyeth, 2 Allen 131, 133, 79 Am. Dec. 771; Thurston v. Hancock, 12 Mass. 220, 229, 7 Am. Dec. 57. Mich.—Hemoworth v. Cushing, 115 Mich. 92, 72 N. W. 1108; Gildersleeve v. Hammond, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46; Buskirk v. Strickland, 47 Mich. 389, 11 N. W. 210. Minn.—Schultz v. Bower, 57 Minn. 493, 59 N. W. 631, 47 Am. St. Rep. 630. Mo.—Obert v. Dunn, 140 Mo. 476, 41 S. W. 901; Busby v. Holthaus, 46 Mo. 161; Charles v. Rankin, 22 Mo. 566, 66 Am. Dec. 642; Walters v. Hamilton, 75 Mo. App. 237; Eads v. Gains, 58 Mo. App. 586. N. J.—Pullan v. Stallman, 70 N. J. L. 10, 56 Atl. 116; McGuire v. Grant, 25 N. J. L. 356, 67 Am. Dec. 49. N. Y.—Dorrity v. Rapp, 72 N. Y. 307; Paltey v. Egan, 122 App. Div. 512, 107 N. Y. Supp. 444; Gillies v. Eckerson, 97 App. Div. 153, 89 N. Y. Supp. 609. Pa.—Sharpless v. Boldt, 218 Pa. 372, 67 Atl. 652; McGettigan v. Potts, 149 Pa. 155, 162, 24 Atl. 198; Richart v. Scott, 7 Watts 460, 32 Am. Dec. 779; Jones

2. **May Be Acquired as to Buildings.**—The right to lateral support extending to buildings, as well as to land in its natural condition, may be acquired by grant.<sup>2</sup>

3. **Cannot Be Acquired by Prescription.**—The doctrine of prescriptive rights to lateral support for buildings is not recognized by American courts.<sup>3</sup>

4. **Not Applicable to Mining Claims.**—The doctrine of lateral support does not apply to mining claims.<sup>4</sup>

**B. RIGHTS OF ACTION.**—1. **For Removing Lateral Support.**—A party injured by the removal of lateral support to his land may main-

*v. Greenfield*, 25 Pa. Super. 315.  
**R. I.**—*Gobeille v. Meunier*, 21 R. I. 103, 41 Atl. 1001. **S. C.**—*Contos v. Jamison*, 81 S. C. 488, 62 S. E. 867, 19 L. R. A. (N. S.) 498. **S. D.**—*Ulrick v. Dakota L. & T. Co.*, 2 S. D. 285, 49 N. W. 1054. **Tex.**—*Simon v. Nance* (Tex. Civ. App.), 100 S. W. 1038 **Vt.**—*Graves v. Mattison*, 67 Vt. 630, 638, 32 Atl. 498; *Beard v. Murphy*, 37 Vt. 99, 102, 86 Am. Dec. 693; *Richardson v. Vt. Cent. R. Co.*, 25 Vt. 465, 60 Am. Dec. 283. **Va.**—*Tunstall Tr. v. Christian Tr.*, 80 Va. 1, 56 Am. Rep. 581; *Stevenson v. Wallace*, 27 Gratt. 77, 87. **Wash.**—*Farnandis v. Great Northern R. Co.*, 41 Wash. 486, 492, 84 Pac. 18, 111 Am. St. Rep. 1027, 5 L. R. A. (N. S.) 1086. **Wis.**—*Laycock v. Parker*, 103 Wis. 161, 79 N. W. 327.

In *Gilmore v. Driscoll*, 122 Mass. 199, 201, 23 Am. Rep. 312, the court said: "While each owner may build upon and improve his own estate at his pleasure, provided he does not infringe upon the natural right of his neighbor, no one can by his own act enlarge the liability of his neighbor for an interference with this natural right. If a man is not content to enjoy his land in its natural condition, but wishes to build upon or improve it, he must either make an agreement with his neighbor, or dig his foundations so deep, or take such other precautions, as to insure the stability of his buildings or improvements, whatever excavations the neighbor may afterwards make upon his own land in the exercise of his right."

This is a right of property and does not depend upon any presumption as to a grant. "This doctrine stands on natural justice, and is essential to the enjoyment and protection of property

in the soil." *Humphries v. Brogden*, 12 Ad. & El. (N. S.) 739, 64 E. C. L. 738, *per* Lord Campbell, C. J.

**A Right, Not an Easement.**—*Village of Haverstraw v. Eckerson*, 192 N. Y. 54, 84 N. E. 578, 20 L. R. A. (N. S.) 287.

**Statutes.**—The rule is declared by statute in several states, as for example, California, Massachusetts, New York, and South Dakota.

**Land Under Tide Water.**—This right does not extend to land under tide water which is used in commerce under grant from the State. In any event it would not extend to support such land on which a pier had been built. *White v. Nassau Trust Co.*, 168 N. Y. 149, 61 N. E. 169, 64 L. R. A. 275.

2. An easement for lateral support, extending to buildings as well as to land in its natural condition may be acquired by different modes, but all are reducible to one by grant, which may be express, implied, or presumed. When the owner of land acquires such easement of support, his natural right of support in respect of the soil is enlarged so as to embrace the buildings which he may erect on his land, and invests him with the same right of support in respect of his buildings that he has *ex jure naturae* in respect of the soil. *Stevenson v. Wallace*, 27 Gratt. (Va.) 77, 87.

3. **Ill.**—*Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243. **Mo.**—*Charles v. Rankin*, 22 Mo. 566, 66 Am. Dec. 642; *Carpenter v. Reliance Realty Co.*, 103 Mo. App. 480, 491, 77 S. W. 1004; *Handlan v. McManus*, 42 Mo. App. 551. **N. Y.**—*Austin v. Hudson River R. Co.*, 25 N. Y. 334.

4. *Hendricks v. Spring Val. M. & I. Co.*, 58 Cal. 190, 41 Am. Rep. 257.



tain an action for damages, and for equitable relief by injunction.<sup>5</sup> The actionable wrong consists not in removing adjoining soil, but in allowing the adjoining owner's land to fall.<sup>6</sup>

**2. Double Relief on One Count.**—In an action for the infringement of the right to lateral support such facts may be presented in a complaint containing but one count as will authorize injunctive re-

**5. Conn.**—*Ceffarelli v. Landino*, 72 Atl. 564. **Del.**—*Stimmel v. Brown*, 7 Houst. 219, 30 Atl. 996. **Ind.**—*Moel-lering v. Evans*, 121 Ind. 195, 22 N. E. 289, 6 L. R. A. 449. **Pa.**—*Pettit v. Jamestown & F. R. Co.*, 222 Pa. 490, 71 Atl. 1048, 21 L. R. A. (N. S.) 318. **E. I.**—*Gobeille v. Meunier*, 21 R. I. 103, 41 Atl. 1001. **Tex.**—*Simon v. Nance* (Tex. Civ. App.) 100 S. W. 1038. **Eng.**—*Backhouse v. Bonomi*, 9 H. L. Cas. 503, 11 Eng. Reprint 825.

Trespass is the proper form in which to seek damages. *Perry County Coal Co. v. Maclin*, 70 Ill. App. 444; *Buskirk v. Strickland*, 47 Mich. 389, 11 N. W. 210.

**Questions of Fact for the Jury.**—Whether an excavation on land adjacent to a highway is so close as to endanger the safety of the highway and therefore be a nuisance is a question of fact. The closeness of the crest to the street, the perpendicular depth of the excavation, the length of the slope, the base of the section, the nature of the earth and the like, are all to be considered by the jury. *Adlin v. Excelsior Brick Co.*, 129 App. Div. 713, 113 N. Y. Supp. 1017.

An injunction will not issue unless it is apparent that the damage will be irreparable. **Conn.**—*Trowbridge v. True*, 52 Conn. 190, 52 Am. Rep. 579. **Ga.**—*Morrison v. Latimer*, 51 Ga. 519. **Ill.**—*Lloyd v. Catlin Coal Co.*, 210 Ill. 460, 71 N. E. 335. **E. I.**—*McMaugh v. Burke*, 12 R. I. 499.

It must be shown also that the injury is reasonably certain to occur. **Mo.**—*Chicago & A. R. Co. v. Brandau*, 81 Mo. App. 1. **N. Y.**—*Farrand v. Marshall*, 21 Barb. 409. **E. I.**—*Gobeille v. Meunier*, 21 R. I. 103, 41 Atl. 1001. **Eng.**—*Siddens v. Short*, 46 L. J. C. P. 795, L. R. 2 C. P. D. 572, 37 L. T. 230.

Where a person owning land adjacent to a highway menaces the condition of it in a direct manner, or indirectly, by so digging or excavating on his land as to affect the lateral support, and to cause, or to threaten the sub-

sidence of the highway, the exercise of the equitable power of the court may properly be invoked by the municipality in restraint of its continuance. *Village of Haverstraw v. Eckerson*, 192 N. Y. 54, 60, 84 N. E. 578, 20 L. R. A. (N. S.) 287.

Where landowners excavate upon their property in such a manner as to endanger an adjacent street by causing its subsidence, a mandatory injunction will be granted enjoining them from excavating so as to further endanger the street, and requiring them to restore the necessary support to the street where excavation has been made. *Village of Haverstraw v. Eckerson*, 192 N. Y. 54, 84 N. E. 578, 20 L. R. A. (N. S.) 287.

A municipal corporation is liable for removing lateral support of land belonging to a private owner, by grading the street adjacent thereto, just as a private person would be. **Minn.**—*Munger v. St. Paul*, 57 Minn. 9, 58 N. W. 601; *Dyer v. St. Paul*, 27 Minn. 457, 8 N. W. 272. **Ohio.**—See *Keating v. Cincinnati*, 38 Ohio St. 141, 43 Am. Rep. 421. **Va.**—*Stearns v. Richmond*, 88 Va. 992, 14 S. E. 847, 29 Am. St. Rep. 758. **Wash.**—See *Compton v. Seattle*, 38 Wash. 514, 80 Pac. 757; *Parke v. Seattle*, 5 Wash. 1, 31 Pac. 310, 32 Pac. 82, 34 Am. St. Rep. 839, 20 L. R. A. 68. **Can.**—*New Westminster v. Brighouse*, 20 Can. 520.

To the contrary, see: **Conn.**—*Fellows v. New Haven*, 44 Conn. 240, 26 Am. Rep. 447n. **Ga.**—*Rome v. Omberg*, 28 Ga. 46, 73 Am. Dec. 748. **Kan.**—*Methodist Episcopal Church v. Wyandotte*, 31 Kan. 721, 3 Pac. 527.

**6. Kan.**—*Kansas City N. W. R. Co. v. Schwake*, 70 Kan. 141, 78 Pac. 431, 68 L. R. A. 673. **Minn.**—*Schultz v. Bower*, 57 Minn. 493, 59 N. W. 631, 47 Am. St. Rep. 630. **Mo.**—*Johnson v. Daw*, 53 Mo. App. 372. **Eng.**—*Backhouse v. Bonomi*, 1 Best & S. 970, 101 E. C. L. 970 (where it was held that the statute of limitations commenced to run not from the time of excavation

lief, and also a judgment for damages.' But a landowner will not be enjoined from making excavations on his own land unless serious injury to the adjoining owner is imminent.<sup>8</sup>

3. **When Right of Action Accrues.**—A right of action on account of the removal of lateral support accrues, not at the date of the act of removal, but at the time when injury actually results therefrom.<sup>9</sup>

4. **The Complaint.**—The complaint, in connection with inducement showing the relative title and right, should allege in substance the facts showing that the support of the plaintiff's land in its natural condition was removed by the defendant, and that in consequence thereof the plaintiff suffered damage.<sup>10</sup>

Negligence not being the gist of the action, need not be alleged in order to recover for injury to the soil.<sup>11</sup> Nor is it necessary to allege malice or wilfulness in a complaint for permitting an excavation on land adjoining plaintiff's premises to their injury.<sup>12</sup>

5. **Measure of Damages.—Lateral Support.**—The generally accepted measure of damages for wrongfully removing lateral support

but from the subsidence of the soil); *Greenwell v. Low Beechburn Coal Co.* (1897), 2 Q. B. 165.

7. The right to lateral support is an incident of the ownership of land, and its infringement is a nuisance against which an injunction may be granted. And facts warranting such relief, and also a claim for damages, may be presented in a complaint containing but one count, and praying for such double relief. *Trowbridge v. True*, 52 Conn. 190, 197, 52 Am. Rep. 579. See *infra*, VI; and the title "Nuisance."

8. *Gobeille v. Meunier*, 21 R. I. 103, 41 Atl. 1001.

An injunction will not be granted to restrain a landowner from erecting the foundations of his building upon such a level, that the adjoining owner cannot rebuild his foundations without removing the lateral support of the first. *Graves v. Mattison*, 67 Vt. 630, 638, 32 Atl. 498.

9. *Smith v. Seattle*, 18 Wash. 484, 51 Pac. 1057; *Backhouse v. Bonomi*, 9 H. L. Cas. 503, 11 Eng. Reprint 825.

10. *Johnson v. Daw*, 53 Mo. App. 372. In this case the court said: "The gravamen of the charge in cases of this nature is, and must of necessity be, that defendant, owning the land immediately adjacent to the plaintiff's, dug away and excavated so near the plaintiff's lot as to withdraw the support to the soil in its natural con-

dition, and that in consequence thereof it fell into such pit or excavation to the plaintiff's damage. It is this digging away the soil so near plaintiff's property as to cause it to fall away that makes up the wrong committed, and for which in such cases damages have been awarded. But the facts alleged in this petition make no such case. Defendant is not charged with having dug the pit or excavated on the right of way so as to cause this sliding away of plaintiff's lot. Who may have done this does not appear. The extent of defendant's offending, as alleged in the petition, is that during the five years preceding the institution of the suit it ran its trains and conducted its business on this railroad where such an excavation had been made, and neglected to erect a retaining wall so as to protect plaintiff's lot, etc. For this defendant was not liable."

11. *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312; *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57 (a leading case). And see *Ky.*—*Louisville & N. R. Co. v. Bonhays*, 94 Ky. 67, 21 S. W. 526. *Minn.*—*Schultz v. Bower*, 57 Minn. 493, 59 N. W. 631, 47 Am. St. Rep. 630. *S. D.*—*Ulrick v. Dakota L. & T. Co.*, 2 S. D. 285, 49 N. W. 1054.

12. *Garvy v. Coughlan*, 92 Ill. App. 582, 586.



from land is the diminution of the value of the land so injured.<sup>13</sup> In some cases the surest method of arriving at such measure is to show what it would cost to restore the land to the condition in which it was before the excavation was made.<sup>14</sup>

13. Ind. — *Bohrer v. Dienhart Har-ness Co.*, 19 Ind. App. 489, 49 N. E. 296. Ia. — *Parrott v. Chicago & G. W. R. Co.*, 127 Iowa 419, 103 N. W. 352. Kan. — *Winn v. Abeles*, 35 Kan. 85, 10 Pac. 443, 57 Am. Rep. 138. Ky. — *Probst v. Hinesley*, 117 S. W. 389, 392. Mass. — *Hopkins v. American Pneumatic S. Co.*, 194 Mass. 582, 80 N. E. 624. Minn. — *Schultz v. Bower*, 64 Minn. 123, 66 N. W. 139. Mo. — *Williams v. Missouri Furnace Co.*, 13 Mo. App. 70. N. J. — *McGuire v. Grant*, 25 N. J. L. 356, 67 Am. Dec. 49. S. D. — *Ulrick v. Dakota L. & T. Co.*, 2 S. D. 285, 49 N. W. 1054.

Every landowner has the absolute right to have his land remain in its natural condition, unaffected by any act of his neighbor; and if the neighbor digs upon or improves his own land so as to injure this right, he may maintain an action against him without proof of negligence. But this right of property is only in the land in its natural condition and the damages in such an action are limited to the injury to the land itself, and do not include any injury to buildings or improvements thereon. *Gilmore v. Driscoll*, 122 Mass. 199, 201, 23 Am. Rep. 312.

In *Moellering v. Evans*, 121 Ind. 195, 22 N. E. 989, 6 L. R. A. 449, the court was held to have properly instructed the jury as follows: "There is incident to land in its natural condition, a right to support from the adjoining land; and if land not subject to artificial pressure, sinks or falls away in consequence of the removal of such support, the owner is entitled to damages to the extent of the injury sustained. The measurement of damages in such case is not the cost of restoring the land to its former condition or situation, or, of building a wall to support it, but it is the diminution in value of the plaintiff's land by reason of the acts of the party removing the support."

But in *McGettigan v. Potts*, 149 Pa. 155, 162, 24 Atl. 198, it was held that the measure of damages for withdrawing lateral support by excavations made on

adjoining land, was not the diminution in value of plaintiff's land, but the actual damages done to the land in its natural condition.

In an action for damages for injuries done to plaintiff's house by the careless and negligent manner in which the house of the defendant next adjoining was improved, the court properly instructed the jury that the plaintiff was entitled to recover for all damages naturally or necessarily flowing from the wrongful acts of the defendant; and if plaintiff's house was injured by the careless and negligent manner in which the defendant improved the adjoining house he was entitled to recover such damages as would be sufficient to reinstate the wall and the house in as good condition as they were prior to the injury. *Brown v. Werner*, 40 Md. 15, 21.

Prospective damages cannot be allowed. Kan. — *Kansas City N. W. R. Co. v. Schwake*, 70 Kan. 141, 78 Pac. 431, 68 L. R. A. 673, where the jury improperly included the future cost of building a stone wall. Neb. — *Fremont E. & M. Val. R. Co. v. Harlin*, 50 Neb. 698, 70 N. W. 263, 61 Am. St. Rep. 578, 36 L. R. A. 417. N. Y. — *Williams v. Kenney*, 14 Barb. 629. Wash. — *Smith v. Seattle*, 18 Wash. 484, 51 Pac. 1057. Can. — *Snarr v. Granite Curling & Skating Co.*, 1 Ont. 102.

Loss of spring water occasioned by the fall of the soil has been allowed for in some cases. *Pringle v. Vesta Coal Co.*, 172 Pa. 438, 33 Atl. 690; *Kistler v. Thompson*, 158 Pa. 139, 27 Atl. 874. But see *Williams v. Missouri Furnace Co.*, 13 Mo. App. 70; *McGowan v. Bailey*, 146 Pa. 572, 23 Atl. 387.

14. U. S. — *United States v. Peachy*, 36 Fed. 160. Mass. — *Hopkins v. American P. S. Co.*, 194 Mass. 582, 80 N. E. 624. Minn. — *Nelson v. West Duluth*, 55 Minn. 497, 57 N. W. 149. Pa. — *Jones v. Greenfield*, 25 Pa. Super. 315. Eng. — *Strongan v. Knowles*, 6 H. & N. 454.

And see *Stimmel v. Brown*, 7 Houst. (Del.) 219, 30 Atl. 996.



Injury to the plaintiff's feelings cannot be taken into account.<sup>15</sup> Nor can the plaintiff recover for injuries to his person or to the person of a member of his family resulting from carelessly going too near the excavation.<sup>16</sup>

## II. INJURY TO BUILDINGS.—A. NEGLIGENT EXCAVATION.—

Where a person in the exercise of ordinary care and skill in making an excavation for the improvement of his own lot, digs so near the foundation of a house on the adjacent lot as to cause it to crack and settle he will not be liable for the injury if such excavation would not have injured the adjacent lot in its natural state.<sup>17</sup>

A right of action for damages accrues to a person whose building is injured by an excavation where the same is made in a careless and negligent manner.<sup>18</sup> And if the negligence, want of care, and unskil-

15. *White v. Dresser*, 135 Mass. 150, 46 Am. Rep. 454.

16. This ruling was based on the ground of contributory negligence and on the rule that damages were allowed only for the falling away of land unweighed. *Pullan v. Stahlman*, 70 N. J. L. 10, 56 Atl. 116.

17. *Lasala v. Holbrook*, 4 Paige (N. Y.) 169, 25 Am. Dec. 524.

18. Ala.—*Myer v. Hobbs*, 57 Ala. 175, 29 Am. Rep. 719; *Moody v. McClelland*, 39 Ala. 45, 84 Am. Dec. 770. D. C.—*Frizell v. Murphy*, 19 App. Cas. 440. Ga.—*Bass v. West*, 110 Ga. 698, 36 Atl. 244. Ill.—*Garry v. Coughlan*, 92 Ill. App. 582, 586. Kan.—*Leavenworth Lodge v. Byers*, 54 Kan. 323, 332, 38 Pac. 261. Ky.—*Probst v. Hinesley*, 117 S. W. 389, 392; *Louisville & N. R. Co. v. Bonhago*, 94 Ky. 67, 21 S. W. 526. Md.—*Shafter v. Wilson*, 44 Md. 268, 281; *Brown v. Werner*, 40 Md. 15, 21. Mich.—*Gildersleeve v. Hammond*, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46. Mo.—*Gerst v. St. Louis*, 185 Mo. 191, 84 S. W. 34, 105 Am. St. Rep. 580; *Walters v. Hamilton*, 75 Mo. App. 237; *Victor M. Co. v. Morning Star M. Co.*, 50 Mo. App. 525, 534. N. J.—*McGuire v. Grant*, 25 N. J. L. 356, 362, 67 Am. Dec. 49. N. Y.—*Page v. Dempsey*, 184 N. Y. 245, 77 N. E. 9; *French v. Vix*, 143 N. Y. 90, 37 N. E. 612; *Booth v. Rome, etc. R. Co.*, 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105; *Stevenson v. Pucci*, 32 Misc. 464, 68 N. Y. Supp. 712; *Newell v. Woolfolk*, 91 Hun 211, 36 N. Y. Supp. 327; *Rafter v. Tagliabue*, 21 N. Y. Supp. 107. N. C.—*Davis v. Sumnerfield*, 131 N. C. 352, 42 S. E. 456,

92 Am. St. Rep. 781. Pa.—*Witherow v. Tannehill*, 194 Pa. 21, 44 Atl. 1088. S. C.—*Bailey v. Gray*, 53 S. C. 503, 518, 31 S. E. 354. S. D.—*Hannicker v. Lepper*, 20 S. D. 371, 107 N. W. 202, 129 Am. St. Rep. 938, 6 L. R. A. (N. S.) 243. Eng.—*Dodd v. Holme*, 1 Ad. & El. 493, 28 E. C. L. 128. Can.—*McCann v. Chisholm*, 2 Ont. 506.

In *Larson v. Metropolitan St. R. Co.*, 110 Mo. 234, 19 S. W. 416, 33 Am. Rep. 439, 16 L. R. A. 330, the court said: "It is settled law that the unquestionable right of a landowner to remove earth from his own premises adjacent to another's building, is subject to the qualification that he shall use ordinary care to cause no unnecessary damage to his neighbor's property in so doing."

Approved Form.—In *Hannicker v. Lepper*, 20 S. D. 371, 107 N. W. 202, 129 Am. St. Rep. 938, 6 L. R. A. (N. S.) 243, judgment was sustained on a complaint which described the acts as follows: "That on or about the 1st of July, 1904, the defendants commenced work under said contract, and excavated said lot 1 to the depth of 10 feet, said excavation covering the entire width of said lot 1, and extending from Main street westward, beyond the rear of plaintiff's building on lot 2; and this plaintiff alleges that the said defendants performed their work under said contract in a negligent and unskilful manner, by making said excavation, and allowing the same to stand for a long period of time without constructing the foundation wall therein, or taking any reasonable precaution to sustain the land of the plaintiff's lot, and without putting any

fulness of the defendant are sufficiently alleged it is not necessary to allege that notice of the intention to excavate on the adjoining land was not given to the plaintiff.<sup>10</sup>

props or other supports under said plaintiff's building, but left the natural walls of dirt exposed for an unreasonable length of time to storms and rains and to floods of water shed from the adjoining buildings on to the walls of said excavation, whereby the south wall of said excavation became soft and caved into said excavation, carrying the dirt from said plaintiff's lot and depriving the north sill of the plaintiff's building of the support of its foundation, whereby said sill settled and the entire building became racked out of shape, the timbers displaced and settled so that the said building could not be restored to its former condition, and the plastering and paper on the walls of said building were cracked and destroyed, the doors and windows twisted out of shape and the building otherwise injured and damaged."

19. *Block v. Haseltine*, 3 Ind. App. 491, 29 N. E. 937.

**Form Sustained.**—In *Block v. Haseltine*, *supra*, the complaint alleged in substance "that Scotton & Scotton owned a certain part of a city lot, No. 31, in Kokomo, Ind., upon which they had erected a two-story brick business house, about 110 feet in length and about 22 feet in width, and was properly constructed upon a good and sufficient foundation, which was sufficient and secure for the support of said building; that for more than 10 years immediately prior to the falling of said building by the alleged negligence of the appellants, to-wit, on the 19th day of April, 1888, appellee had used, occupied, and enjoyed said business house upon said premises as a tenant of said Scotton & Scotton, and their immediate grantors, as a jewelry store, which during all of said time was well known to the appellants; that the appellants Block & Thalman were the owners of the north one-third of said lot, and adjoining that part of said lot owned by said Scotton upon which said business house had been erected was so occupied by the appellee. It is claimed by the appellee that the following averments in the complaint, taken in connection with the formal

averments and the facts we have set out, constituted a cause of action against the appellants, to-wit: 'That the appellants dug up, removed and hauled away the dirt and clay the full length of said building, and to the depth of from six to seven feet, and so close to said building as to weaken and destroy the foundation and support thereof, and that they also dug up and removed a portion of the street and sidewalk, which also supported said building occupied by the appellee; and that appellants did not in any way shore up, brace, protect, or support said building, or any part thereof, to make the same safe and secure, although appellants well knew by their wrongful, careless, and negligent acts in making said excavation that they had greatly weakened the support and foundation of said building, and rendered it weak and liable to fall. That said negligent and wrongful acts were done and performed by the appellants, and under their direction, and with their full knowledge and consent; and that said acts were done at divers times from the 1st day of November, 1887, till the 19th day of April, 1889. That by reason of the negligent, careless, and unskillful manner in which said work was done, in this, to-wit, by digging and removing the earth from and against the foundation of said building to the depth of six or seven feet or more along the entire length of said building, and in so digging and removing said earth, the appellants were careless and negligent, and did not use the ordinary precautions, care, and skill, nor did they do and perform said work with the diligence, care and skill that builders and excavators were in this respect accustomed to use and employ under similar and like circumstances, in this, to-wit, that the appellants, instead of removing the dirt, earth, and clay by sections, as they were requested and told to do by practical and experienced excavators and builders, and to build and construct a wall or foundation for their own building, then in contemplation of construction, at and against the earth and foundations of the building of said



**B. BY UNLAWFUL EXCAVATIONS.**—Where an action is brought for damages to property caused by an excavation on adjoining land in violation of law, it is not necessary to allege that the excavation was negligently made.<sup>20</sup>

**C. CONTRIBUTORY NEGLIGENCE.**—A plaintiff cannot recover for injuries to his property caused by an excavation on adjoining land, where it appears that plaintiff's negligence contributed to such injuries.<sup>21</sup>

Scotton & Scotton, and thus continue until the earth along the entire length of said building had been excavated and removed by sections, and the wall or foundation of the appellants was built and constructed by sections, as is usually and invariably done by diligent and careful builders who make excavations with a care and regard for the situation of the adjoining estate; and had appellants thus used ordinary care and skill, and had they used and employed the care, skill, and precaution usual in such cases, and had not been thus negligent in removing their own soil, earth, and clay, the foundation under the building of said Scotton & Scotton would not have weakened and given way, and said building have fallen."

A party who is about to endanger the buildings of his neighbor by a reasonable improvement on his land, is bound to give the owner of the adjacent lot proper notice thereof, and to use ordinary skill in conducting the same, and it is the duty of the latter to shore or prop up his own building so as to render it secure in the meantime. *Shafer v. Wilson*, 44 Md. 268, 281; *Gates v. Fulkerson*, 129 Mo. App. 620, 625, 107 S. W. 1032. And see *Davis v. Summerfield*, 133 N. C. 325, 45 S. E. 654, 63 L. R. A. 492.

In *Bonaparte v. Wiseman*, 89 Md. 12, 42 Atl. 918, 44 L. R. A. 482, the court said: "If one about to excavate his own lot, do it or cause it to be done so carefully as not to injure the adjacent houses, he need not give notice to their owners. If on the other hand he give timely notice to the adjacent owners, the burden will be thrown upon them to protect their own property, and he will not be liable for damages sustained by them, if he makes the excavation with reasonable and ordinary care."

A statute of Massachusetts (Stat. 1892, c. 410, § 32; Stat. 1907, c. 550,

§ 19) relating to the city of Boston, requires one who makes an excavation ten feet or more below the grade of the street, to bear the expense of supporting the wall, if there be one, on the adjoining land. *Regan v. Keyes* (Mass.), 90 N. E. 847.

20. *Post v. Kerwin*, 133 App. Div. 404, 117 N. Y. Supp. 761, was an action to recover damages in consequence of the defendant having excavated on adjoining land. It was charged that the excavation was made in violation of the provisions of § 2 of the building code of the city of New York, and negligently done. The court instructed the jury as follows: "This action is for negligence, plaintiff therefore must establish the facts entitling him to recover by a fair preponderance of proof and from the evidence. He must show that the defendant was negligent, and he must be free from contributory negligence. Failing in either he cannot recover." The court then directed the attention of the jury to the provisions of the building code, and correctly instructed them as to the duties and liabilities of the defendant thereunder, and concluded the charge as follows: "This case as I said at the outset is one of negligence. If you find for the plaintiff, it must be because he has satisfied you by a fair preponderance of proof of the negligence of this defendant, and his own freedom from contributory negligence." This instruction was held erroneous, the court saying: "It is true that the complainant charges the acts and omissions of the defendant as wrongful and negligent, whereas the law is (Building Code) that the liability for breach of the duty imposed by its provisions is absolute, and does not depend on negligence at all."

21. *Smith v. Hardesty*, 31 Mo. 411, was an action for damages caused by defendant excavating his lot adjoining plaintiff's premises. The court in-



D. NATURE OF ACTION AGAINST A CO-TENANT.—An action on the case is the proper remedy to be pursued by one tenant in common of a party wall, against his co-tenant, where an injury to the wall and the house of plaintiff has been caused by the negligent and unskilful manner in which the co-tenant has made an excavation on his own lot.<sup>22</sup>

E. ALLEGATION THAT ACTS WERE UNLAWFUL.—A complaint for injury to buildings caused by excavation on adjoining premises must allege that the acts of excavation were unlawful.<sup>23</sup>

F. EXCAVATION BY CONTRACTOR.—In an action against a landowner for damages on account of an excavation made upon his premises which caused injuries to plaintiff's building on adjoining land, the defendant may plead that such excavation was made by a prudent and skilful contractor and builder, and not by the defendant or his agents.<sup>24</sup>

G. FOR INJURIES CAUSED BY BLASTING.—As a general rule injuries to buildings caused by blasting upon adjacent property, which produces such injuries by the mere shaking of the earth, or the pulsation of the air, will give a right of action for damages, in the absence of negligence in doing the blasting.<sup>25</sup> But it is held in New Jersey and

structed the jury: "That if the jury believes that the defendant managed the excavation of his lot carelessly, and that his carelessness contributed to the injury of plaintiff, then defendant is responsible for the damages; and that the care ought to be commensurate with the danger." This was erroneous, because it is not the law that the defendant is responsible for a carelessness which merely contributed to an injury to plaintiff. And see *Gillies v. Ekerson*, 97 App. Div. 153, 89 N. Y. Supp. 609.

22. *Moody v. McClelland*, 39 Ala. 45, 54, 84 Am. Dec. 770; *Bradbee v. Christ's Hospital*, 4 M. & G. 714, 43 E. C. L. 368; *Cubitt v. Porter*, 8 B. & C. 257, 15 E. C. L. 211.

23. A complaint which states that the defendant negligently and unlawfully excavated on land adjoining plaintiff's premises, causing plaintiff's buildings to fall, does not state a good cause of action without averments that the acts of excavation were unlawful. *Payne v. Moore*, 31 Ind. App. 360, 66 N. E. 483, 67 N. E. 1005.

24. *Myer v. Hobbs*, 57 Ala. 175, 29 Am. Rep. 719, was an action brought by a tenant of rented premises for damages resulting from the fall of a wall upon the house he occupied, which was caused by the negligent and careless manner in which the defendant

made certain excavations on adjoining land belonging to him. "The defendant pleaded, that before and at the time of the fall of the wall he was the owner and in possession of a lot forming the northern boundary of the lot described in the complaint, that 'there had been recently erected on the lot occupied by plaintiff, a brick building which was placed on the northern border of the lot occupied by plaintiff, and close, if not on, the northern boundary line of said lot, and adjacent to and almost touching the southern boundary line of the defendant; that defendant desired to erect a brick store house on his own lot, with a basement story to be made by excavating earth on his own lot;' that he employed for this purpose as contractor and builder, one Shelley, to make said excavation, and erect on defendant's lot said brick storehouse; that Shelley was a prudent and skilful contractor, and obligated himself to perform the work in a workmanlike manner, and that the excavation complained of was done by the employes of Shelley and not by defendant, his agents or servants." This was a good plea.

25. III.—*City of Chicago v. Murdock*, 212 Ill. 9, 72 N. E. 46, 103 Am. St. Rep. 221; *Fitzsimmons & C. Co. v. Braun*, 199 Ill. 390, 65 N. E. 249, 59 L. R. A. 421; *Joliet v. Harwood*, 86

New York that a right of action for such injuries can exist only where it is alleged and proved that the blasting was done in a careless and negligent manner, without the exercise of due and proper care.<sup>26</sup>

H. TENANT'S RIGHT OF ACTION.—Injuries to a tenant's possession by blasting done on adjacent premises gives a right of action to the tenant for damages.<sup>27</sup>

I. ACTION A PERSONAL ONE.—An action for injury to property caused by an excavation on adjoining land is a personal action, and in case of the death of the owner of the property injured, may be brought by personal representatives of the deceased.<sup>28</sup>

J. INJUNCTIVE RELIEF.—Ordinarily a landowner cannot be enjoined from blasting rock on his own premises for the purpose of improving the same, provided he exercise every reasonable care that no injury be done to adjoining property. But the doing of such work without the safeguards which prudent men would adopt in doing like work may be enjoined.<sup>29</sup>

Ill. 110, 29 Am. Rep. 17. Ind.—City of Logansport v. Dick's Admr., 70 Ind. 65, 36 Am. Rep. 166. Ky.—Probst v. Hinesley, 117 S. W. 389, 392; Louisville & N. R. Co. v. Bonhays, 94 Ky. 67, 21 S. W. 526. Md.—Scott v. Bay, 3 Md. 431. Mont.—Longtin v. Persell, 30 Mont. 306, 314, 76 Pac. 699, 104 Am. St. Rep. 723, 65 L. R. A. 655. Ohio.—Tiffin v. McCormack, 34 Ohio St. 638, 32 Am. Rep. 408. R. I.—Hickey v. McCabe, 75 Atl. 404. Tenn.—Gossett v. Southern R. Co., 115 Tenn. 376, 386, 89 S. W. 737, 112 Am. St. Rep. 846, 1 L. R. A. (N. S.) 97. Wash.—Farnandis v. Great Northern R. Co., 41 Wash. 486, 84 Pac. 18, 11 Am. St. Rep. 1027, 5 L. R. A. (N. S.) 1086.

Use of Explosives.—In Colton v. Onderdonk, 69 Cal. 155, 159, 10 Pac. 395, 58 Am. Rep. 556, it was held that the use by defendant of quantities of gunpowder to blast out rocks upon his own lot contiguous to the lot of plaintiff, situate in a large city, was unreasonable, unusual and unnatural, and that no care or skill in so doing would excuse him from being responsible to the plaintiff for actual damages to her dwelling house as the natural and proximate result of his blasting, whether that damage resulted proximately and naturally from the act of blasting by the defendant, from the hurling of rocks against plaintiff's dwelling house, or by the concussion of the air around it.

Instructions which announce the proposition that one who makes use of an explosive in the ground near the

property of another, when the natural and probable, though not the inevitable result of the explosion is injury to such property of the other, is liable for the resulting injury, however high a degree of skill may have been exercised in making use of the explosive, were held to be correct in Fitzsimmons & C. Co. v. Braun, 199 Ill. 390, 397, 65 N. E. 249, 59 L. R. A. 421.

Probable Result of Blasting Question of Fact for the Jury.—In an action for injuries to property caused by blasting upon adjacent land, it is proper to submit to the jury the determination of the question as to whether or not, under the circumstances of the case, the natural and probable result of the blasting was to injure plaintiff's property. Probst v. Hinesley (Ky.), 117 S. W. 389, 392.

26. Simon v. Henry, 62 N. J. L. 486, 41 Atl. 692; Page v. Dempsey, 184 N. Y. 245, 77 N. E. 9; Holland House Co. v. Baird, 169 N. Y. 136, 62 N. E. 149; French v. Vix, 143 N. Y. 90, 37 N. E. 612; Booth v. Rome etc. R. Co., 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105; Benner v. Atlantic Dredg. Co., 134 N. Y. 156, 31 N. E. 328, 30 Am. St. Rep. 649, 17 L. R. A. 220; Newell v. Woolfolk, 91 Hun 211, 36 N. Y. Supp. 327.

27. Hardrop v. Gallagher, 2 E. D. Smith (N. Y.) 523; Gourdiere v. McCormack, 2 E. D. Smith (N. Y.) 200; McCann v. Chisholm, 2 Ont. 506.

28. Garry v. Coughlan, 92 Ill. App. 582, 586.

29. Rafter v. Tagliabue, 21 N. Y. Supp. 107.



**III. OBSTRUCTIONS TO LIGHT AND AIR.—A. PRESCRIPTIVE RIGHT TO LIGHT AND AIR.**—The English doctrine of prescriptive rights to the use of light and air does not prevail in the majority of the states of this country. A grant of the right to the use of light and air will not be implied from the conveyance of a house with windows overlooking the land of the grantor, nor from the nature or use of the structure existing on the land at the time of the conveyance, nor from the necessity of such easement to the convenient enjoyment of the property.<sup>30</sup>

**B. MAY BE ACQUIRED BY GRANT.**—The right to have the light and

In *Stevenson v. Pucci*, 32 Misc. 464, 66 N. Y. Supp. 712, the complaint alleged that the defendant was a contractor engaged in the removal of rock by blasting and carting away the fragments of such rock from certain vacant lots adjacent to plaintiff's premises; that the defendant was conducting his blasting and removing on said vacant lots in a reckless and negligent manner, and that considerable masses of rock were thrown upon plaintiff's premises, and into the apartments in plaintiff's building, causing much damage to the windows and various articles of furniture and ornament in said apartments, and shaking and cracking the walls and partitions of said buildings, and terrifying the tenants of plaintiff. It was held that the complaint was sufficient to support an injunction.

*De Carvajal v. Y. M. C. A.*, 37 Misc. 727, 76 N. Y. Supp. 474, was an application for an injunction to restrain defendants from blasting in the excavation adjoining the plaintiff's property based upon the claim that said blasting was seriously endangering plaintiff's building, and that there was no adequate remedy at law because of the financial irresponsibility of the defendant contractors, and the denial by the defendant owner, the Y. M. C. A., of its liability for any damages that might be caused by such blasting. It was held that an injunction was not warranted under the application, because it did not question the financial responsibility of the Y. M. C. A. owner, and consequently failed to show that plaintiff had no remedy at law.

30. *Cal.*—*Ingwersen v. Barry*, 118 Cal. 342, 50 Pac. 536. *Ill.*—*Keating v. Springer*, 146 Ill. 481, 493, 34 N. E. 805, 37 Am. St. Rep. 175, 22 L. R. A. 544; *Dexter v. Tree*, 117 Ill. 532, 540,

6 N. E. 506; *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570. *Ind.*—*Kerper v. Klein*, 51 Ind. 316. *Iowa.*—*Morrison v. Marquardt*, 24 Iowa 35, 92 Am. Dec. 444. *Kan.*—*Lapere v. Luckey*, 23 Kan. 534, 538, 33 Am. Rep. 196; *Triplett v. Jackson*, 5 Kan. App. 777, 48 Pac. 931. *La.*—*Oldstein v. Firemen's Bldg. Assn.*, 44 La. Ann. 492, 501, 10 So. 928. *Me.*—*Pierre v. Fernald*, 26 Me. 436, 441, 46 Am. Dec. 573. *Mass.*—*Keats v. Hugo*, 115 Mass. 204, 216, 15 Am. Rep. 80; *Randall v. Sanderson*, 111 Mass. 114; *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322; *Brooks v. Reynolds*, 106 Mass. 31; *Carrig v. Dee*, 14 Gray 583; *Collier v. Pierce*, 7 Gray 18, 66 Am. Dec. 453; *Paine v. Boston*, 4 Allen 168; *Atkins v. Bordman*, 20 Pick. 291. *N. J.*—*Harwood v. Tompkins*, 24 N. J. L. 425; *King v. Miller*, 8 N. J. Eq. 559, 55 Am. Dec. 246. *N. Y.*—*Doyle v. Lord*, 64 N. Y. 432, 21 Am. Rep. 629; *Myers v. Gemmel*, 10 Barb. 537; *Palmer v. Wetmore*, 2 Sandf. 316. *Ohio.*—*Letts v. Kessler*, 54 Ohio St. 73, 76, 42 N. E. 765, 40 L. R. A. 177; *Hilliard v. Gas Coal Co.*, 41 Ohio St. 662, 52 Am. Rep. 99; *Mullen v. Stricker*, 19 Ohio St. 135, 2 Am. Rep. 379. *S. C.*—*Bailey v. Gray*, 53 S. C. 503, 515, 31 S. E. 354; *Napier v. Bulwinkle*, 5 Rich. 311, 323. *Vt.*—*Hubbard v. Town*, 33 Vt. 295. *Va.*—*Tunstall Tr. v. Christian Tr.*, 80 Va. 1, 56 Am. Rep. 581.

A landlord is not liable for obstructing his tenant's windows by building on the adjoining land, in the absence of any covenant or agreement in the lease forbidding him to do so. *Keating v. Springer*, 146 Ill. 481, 493, 34 N. E. 805, 37 Am. St. Rep. 175, 22 L. R. A. 544.



air enter the windows of a building over an adjoining lot may exist by express grant, or by virtue of an express covenant or agreement.<sup>31</sup>

**C. COMPLAINT MUST SHOW AN EASEMENT.**—A declaration for damages against the owner of land adjoining plaintiff's premises for obstructing light and air by the erection of a structure on his own land by the defendant, must show that plaintiff has acquired an easement in defendant's land for the passage of light and air to plaintiff's premises.<sup>32</sup> But it has been held that the erection of a useless structure for the sole purpose of obstructing light and air affords a right of action to the party injured.<sup>33</sup>

31. *Ill.*—*Keating v. Springer*, 146 *Ill.* 481, 493, 34 *N. E.* 805, 37 *Am. St. Rep.* 175, 22 *L. R. A.* 544. *Ia.*—*Morrison v. Marquardt*, 24 *Iowa* 35, 92 *Am. Dec.* 444. *Mass.*—*Keats v. Hugo*, 115 *Mass.* 204, 15 *Am. Rep.* 80; *Brooks v. Reynolds*, 106 *Mass.* 31. *Ohio.*—*Hilliard v. Gas Coal Co.*, 41 *Ohio St.* 662, 52 *Am. Rep.* 99.

32. *Guest v. Reynolds*, 68 *Ill.* 478, 18 *Am. Rep.* 570; *Lapere v. Luckey*, 23 *Kan.* 534, 538, 33 *Am. Rep.* 196; *Triplett v. Jackson*, 5 *Kan. App.* 777, 48 *Pac.* 931.

A declaration for damages against the proprietor of land adjoining plaintiff's premises for obstructing light and air by the erection of a structure on his own land, which fails to show that the plaintiff has by any of the methods known to the law acquired an easement in defendant's premises whereby the same has been made servient to his for light and air, and fails to state that the structure in and of itself is in any other manner a nuisance to the plaintiff or his property, is insufficient to sustain an action. *Honsel v. Conant*, 12 *Ill. App.* 259.

33. *Barger v. Barringer*, 151 *N. C.* 433, 66 *S. E.* 439, was an action brought to recover damages for the malicious, useless and unlawful erection of a high board fence on defendant's lot immediately adjoining plaintiff, for the sole purpose of cutting off light and air from plaintiff's windows. At the close of the evidence the court being of the opinion that the plaintiff could not recover, granted defendant's motion for a non-suit. This was held error, on the ground "that while it is true that when one pursues a strictly legal right, his motives are immaterial, yet no man has a right to

build and maintain an entirely useless structure for the sole purpose of injuring his neighbor."

**Form of Complaint for Obstructing Light.**—Title of Cause and Court.

The plaintiff claims of the defendant one thousand dollars damages for that whereas the said plaintiff before and at the time of the committing of the grievances hereinafter mentioned was, and from thence hitherto has been and still is, lawfully possessed of a certain dwelling house with the appurtenances, situate and being in the town of Huntsville in said county, described as follows, viz. — in which said dwelling house during all the time aforesaid, there were, and still of right ought to be divers (to-wit, four) ancient windows through which the light and air, during all the time aforesaid ought to have entered, and still of right ought to enter into said dwelling house, for the convenient use, occupation and enjoyment thereof: yet the said defendant well knowing the premises, but contriving, and wrongfully and unjustly intending to injure plaintiff, and to deprive him of the use, benefit and enjoyment of the said windows, and to annoy and incommode him in the use, possession and enjoyment of the said dwelling house with the appurtenances, heretofore, to-wit, on the — day of — A. D. — wrongfully and injuriously erected and raised, and caused and procured to be erected and raised a certain (describing the structure) near to said windows, and wrongfully and injuriously kept and continued the said — so erected and raised for a long space of time, to wit, from the day and year aforesaid hitherto; by means of which premises, the said dwelling house with the appurtenances, during all the time

**D. HIGH FENCES.**—As a general rule in the absence of statutes to the contrary, a landowner cannot restrain his neighbor from building a fence upon his own land, as high as he pleases, even though it obstructs the former's rights.<sup>54</sup> In some jurisdictions, however, it is held that a high fence or other structure maliciously built by a landowner on his own land, and near the land of another, with the intent to annoy and injure him in the use or disposition of his property, is a nuisance, and may be removed by mandatory injunction.<sup>55</sup>

**Spite Fence Contrary to Statutes.**—Under statutes prohibiting the erection of fences or other structures intended to spite and annoy adjoining proprietors, a mandatory injunction may be issued for the abatement and removal of a fence or other structure so erected, if it actually causes annoyance or injury.<sup>56</sup>

aforesaid was, and still is greatly disturbed, and the light and air hindered and prevented from coming and entering into and through the said windows, into the said dwelling house, and the same hath thereby been rendered, and is close and uncomfortable, and greatly impaired in value; and the plaintiff hath thereby been, and still is greatly annoyed and incommoded in the use, possession and enjoyment of his said dwelling house, to plaintiff's damage one thousand dollars.

The court held this complaint broad enough to let in evidence of a right founded either upon adverse enjoyment for the period prescribed as a bar to actions for land, or upon grant, covenant, or agreement, saying: "In all other respects except the use of the word 'ancient,' this court follows the most approved form of declaration so framed as to authorize proof of any legal right of the plaintiff to the unobstructed enjoyment of the lights." *Ward v. Neal*, 35 Ala. 602, 605.

34. **U. S.**—*Camfield v. United States*, 167 U. S. 518, 523, 17 Sup. Ct. 765, 42 L. ed. 260. **Cal.**—*Ingwersen v. Barry*, 118 Cal. 342, 50 Pac. 536. **Mass.**—*Walker v. Cronin*, 107 Mass. 555, 564. **N. Y.**—*Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93; *Clinton v. Myers*, 46 N. Y. 511; 7 Am. Rep. 373; *Pickard v. Collins*, 23 Barb. 444; *Mahan v. Brown*, 13 Wend. 261, 28 Am. Dec. 461. **Ohio.**—*Frazier v. Brown*, 12 Ohio St. 294. **Vt.**—*Catfield v. Wilson*, 28 Vt. 49. **W. Va.**—*Koble-gard v. Hale*, 60 W. Va. 37, 42, 53 S. E. 793, 116 Am. St. Rep. 868.

35. **Conn.**—*Scott v. Wilson*, 73 Atl.

781. **Me.**—*Healey v. Spaulding*, 104 Me. 122, 71 Atl. 472; *Lord v. Langdon*, 91 Me. 221, 39 Atl. 552. **Mich.**—*Peek v. Roe*, 110 Mich. 52, 67 N. W. 1080; *Flaherty v. Moran*, 81 Mich. 52, 45 N. W. 381, 21 Am. St. Rep. 510, 8 L. R. A. 183; *Burke v. Smith*, 69 Mich. 380, 37 N. W. 838.

36. **Conn.**—*Whitlock v. Uhle*, 75 Conn. 423, 53 Atl. 891; *Harbison v. White*, 46 Conn. 106. **Mass.**—*Rice v. Moorehouse*, 150 Mass. 482, 23 N. E. 229. **Wash.**—*Jones v. Williams*, 106 Pac. 166; *Karasek v. Peier*, 22 Wash. 419, 61 Pac. 33, 37, 50 L. R. A. 345.

**Spite Fence. — Injunction.**—Under a statute which provides that an injunction may be granted against the malicious erection by or with the consent of an owner or lessee or person entitled to the possession of land, of any structure upon it, intended to annoy and injure any owner or lessee of adjacent land in respect to his use or disposition of the same, an injunction may be granted against the continuance of a high unsightly board fence, maliciously erected on a division line by one owner with intent to injure and annoy the other owner, and which actually causes such injury and annoyance. *Scott v. Wilson* (Conn.), 73 Atl. 781.

Under a statute declaring fences or like structures unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property, to be private nuisances, and giving a right of action to any such owner or occupant injured either in his comfort or the enjoyment



**IV. ENCROACHMENT OF BUILDINGS.—A. LEGAL AND EQUITABLE RELIEF.**—Where a building or other structure of one owner encroaches upon the land of another, the latter is entitled to both legal and equitable relief.<sup>37</sup>

of his estate by such nuisance, a landowner may maintain an action although not in actual occupation of his property. *Smith v. Morse*, 148 Mass. 407, 19 N. E. 393.

37. Del.—*Pierce v. Lemon*, 2 Houst. 519. D. C.—*Frizzell v. Murphy*, 19 App. Cas. 440. Mass.—*Harrington v. McCarthy*, 169 Mass. 492, 48 N. E. 278; *Hodgkins v. Farrington*, 150 Mass. 19, 22 N. E. 73, 15 Am. St. Rep. 168, 5 L. R. A. 209; *Tucker v. Howard*, 128 Mass. 361; *Cadigan v. Brown*, 120 Mass. 493; *Creeley v. Bay State Brick Co.*, 103 Mass. 514. Mich.—*Harrington v. Port Huron*, 86 Mich. 46, 48 N. W. 641, 13 L. R. A. 664. N. Y.—*Blake v. McCarthy*, 115 N. Y. Supp. 1014; *Aiken v. Benedict*, 39 Barb. 400; *Vrooman v. Jackson*, 6 Hun 326; *Sherry v. Frecking*, 4 Duer 452. Pa.—*Pile v. Pedrick*, 167 Pa. 296, 31 Atl. 646, 46 Am. St. Rep. 677. Vt.—*Murphy v. Bolger*, 60 Vt. 723, 728, 15 Atl. 365, 1 L. R. A. 309. Wis.—*Rasch v. Noth*, 99 Wis. 285, 288, 74 N. W. 820, 67 Am. St. Rep. 858, 40 L. R. A. 577.

Where the encroachment of a building on another's land has been wilfully and intentionally made, a mandatory injunction will issue for its removal therefrom. But where such encroachment has not been intentionally made, and the defendant submits to the equitable jurisdiction of the court, a mandatory injunction will not be granted where its enforcement would work great hardship upon the defendant, with little or no corresponding benefit to the plaintiff, and where the injury to the plaintiff may be fully satisfied by the award of damages. In such case the relief granted is alternative giving the defendant the opportunity to make the plaintiff whole. *Goldbacker v. Eggers*, 38 Misc. 36, 76 N. Y. Supp. 881, 884.

In *Norwalk H. & L. Co. v. Vernam*, 75 Conn. 662, 55 Atl. 168, 96 Am. St. Rep. 246, the complaint alleged substantially the following: That plaintiff owns certain land which is substantially covered by the waters of

the Norwalk river, and defendants own adjoining land on the river bank, having a brick building upon it extending to the boundary line, and to this building the defendants have attached a wooden structure supported by beams resting on its foundation walls, which is ten feet wide and nineteen feet deep, and projects over the plaintiff's land without touching it; that plaintiff's title rests on a conveyance made after this structure was completed. That plaintiff has requested the defendants, who are occupying it by tenants as part of a store, to remove it, and they have refused. That plaintiff desires to build on its premises, and this structure prevents it from doing so, and interferes with its use of its land. The facts so stated were found to be true and were held to warrant the issuance of a mandatory injunction to prevent the wrongful continuance of the structure.

In *Caleo v. Goldstein*, 134 App. Div. 228, 118 N. Y. Supp. 859, the complaint alleged ownership of a parcel of land 50 feet wide by 100 feet deep, and that defendant Fleisher owned a parcel adjoining on the north 25 by 100 feet on which was erected a four-story building, and that defendant Goldstein owned a parcel 25 by 100 feet adjoining plaintiff's land on the south, on which was erected a three-story frame building and shed, and that all parties derived their title from the same grantor. That the space in width of plaintiff's land between the buildings of the defendants was less than 50 feet, and that such buildings,—one or both encroached on the land of plaintiffs to the extent of about 15 inches, and that they were deprived thereby of the possession and use of their land to that extent. That plaintiffs were unable to determine as to which of defendant's buildings so encroached on their land. That owing to such complications and entanglements the rights of the parties were in doubt, it being difficult to determine who was liable and who was not except upon a full hearing with all parties before the



court. Wherefore plaintiffs prayed judgment fixing the boundary lines of said properties, and that said defendants or such of them as should be found to encroach upon plaintiff's land be enjoined and restrained therefrom and for a mandatory injunction for the removal of the encroachment and for damages, etc. This was held to state a good cause of action in equity, the court saying: "The complaint is not to be condemned because it does not point out the actual trespasser. That is made impossible because of the conflict of boundaries created by the defendants themselves, each of whom adopted a line as the proper division line between their land and that of the plaintiffs, and built accordingly. One or both are in error, the buildings of one or both are alleged to encroach upon the land of plaintiffs, and the plaintiffs are entitled to relief against one or both of the defendants who are interested and may possibly be affected by the determination."

Where the foundation of a building is intentionally projected onto adjoining land of another, although the superstructure does not encroach thereon, it constitutes a continuing trespass for which successive actions at law can be brought, and also warrants the issuing of a mandatory injunction for the removal of the same. *Curtis Mfg. Co. v. Spencer Wire Co.*, 203 Mass. 448, 89 N. E. 534.

A mandatory injunction for the removal of an encroachment of a building on plaintiff's land will not be granted where its enforcement would produce great injury to the defendant without corresponding benefit to the plaintiff. *Crocker v. Manhattan Life Ins. Co.*, 66 N. Y. Supp. 84.

In *Davis v. Smith*, 141 N. C. 108, 53 S. E. 745, the complaint alleged that the roof of defendant's building, a large three-story livery stable, not being provided with gutters, the water collected thereon was thrown against the wall of plaintiff's building adjacent thereto, which kept the plaintiff's wall moist and wet all the time, and this water leaked through the plaintiff's wall and injured her building, and collected at the foot of her wall, and this put her to the expense in draining of her building under orders of the health officer, to which she would not other-

wise have been subjected. That plaintiff complained to the defendant at various times of this condition and requested him to remedy it; that it could be remedied by the defendant at little cost by putting upon his building proper gutters and drains from the gutters under the sidewalk of Main street as the plaintiff has done, but the defendant has persistently refused to do so. Held that the complaint was good on demurrer. The same case came up again in 144 N. C. 297, 56 S. E. 940, on review of a judgment for plaintiff which contained, besides the adjudication for the recovery of the damages assessed, a mandate that the defendant shall "provide sufficient gutters or pipes or drains for his large building on his said lot adjoining the plaintiff's, to prevent the water falling from the roof thereof from flowing against the plaintiff's building and lot." It was held that this was a proper order upon the allegations and issues found, and was prayed for in the complaint,—and if it had not been specially prayed for, the judgment should contain any appropriate relief justified by the allegations of the complaint, and the verdict.

In *Rankin v. Charless*, 19 Mo. 490, 61 Am. Dec. 574, the plaintiff's petition alleged that he was the owner of a lot on the west side of Main street in the city of St. Louis, upon which there was a four-story building, the south wall of which was on the south line of said lot; that the defendant was the owner of an adjoining lot on the south, upon which he erected a building, the joists of which he inserted in plaintiff's south wall, without his consent, whereby plaintiff's building was greatly weakened and exposed to greater risk of injury and destruction by fire, praying for an injunction and damages. The petition was held to state a good cause of action for damages, but not to warrant an injunction.

It is no justification or defense to an action by a landowner for damages caused by the erection of a bay window extending over his land, to plead that a public highway extends over plaintiff's land at such place, and that the erection of the bay window does not interfere with the way. *Codman v. Evans*, 5 Allen (Mass.) 308, 81 Am. Dec. 748.

B. **COLLAPSE OF DEFECTIVE BUILDING.**—Where a building or other structure by reason of its defective construction or condition falls upon adjoining property and injures it, the owner thereof may maintain an action for damages against the owner of the building.<sup>38</sup>

C. **NEGLECT TO REPAIR.**—Where adjoining proprietors own a building standing upon the lands of both, there is no implied obligation on the part of either to keep his part of the building in repair, and the neglect or refusal to do so gives no right of action to the other party.<sup>39</sup> But in such case a proprietor may be restrained by injunction from pulling down his part of the building to the injury of the other party.<sup>40</sup>

D. **INJURIOUS EMBANKMENT.**—A right of action accrues to a land owner whose property is injured by the wrongful or negligent construction of an embankment upon adjoining land.<sup>41</sup>

38. *Brent v. Baldwin* (Ala.), 49 So. 343, was an action for damages for the collapse of a poorly constructed building falling upon the premises of the plaintiff. An amended count in the complaint charged negligence as follows: "Plaintiff avers that the damages sustained by him as aforesaid, were proximately caused by the negligence of the defendant in this: the defendant or her duly authorized agent who had control of said building, had knowledge that said building was weak and poorly constructed, and incapable of standing up under a heavy load, and negligently rented said building for warehouse purposes, knowing that the same was unfitted for such purposes, and that as a proximate result of the use of the building for such purposes, it was liable to fall, and plaintiff avers that as a proximate result of the use of said building by the tenants of the defendant to whom it was rented as aforesaid for such warehouse purposes, said building fell and damaged the plaintiff as aforesaid." This was demurred to because the complaint did not negative negligence on the part of defendant's tenants as the proximate cause of the injury, but was held to be defensive matter available to the defendant under proper plea, and not necessary to the sufficiency of the complaint.

In an action for damages for the collapse of a badly constructed building falling upon plaintiff's premises, a plea averring "that the plaintiff failed to take such precautionary measures to protect himself against injury as a reasonably prudent man might

have taken under the like or similar circumstances" is bad for indefiniteness and uncertainty, being but the statement of a conclusion of the pleader. *Brent v. Baldwin* (Ala.), 49 So. 343.

39. In *Pierce v. Dyer*, 109 Mass. 374, 378, 12 Am. Rep. 716, the plaintiff's action was founded on the alleged right of the owner of one part of a dwelling house to recover damages at law for the wilful neglect of the other owner in permitting his part to become ruinous and fall into decay, whereby the plaintiff's house was damaged. There was held to be no cause of action stated, the court saying, "The plaintiff's declaration in this case does not allege as a fact, in direct terms, that they were entitled to have their part of the house supported or protected by the defendant's part, or that any easement of that description existed in their favor. But giving it the most favorable construction, and assuming that title to such support can be inferred as matter of law, from the allegations contained in it, yet the obligation to repair cannot be so inferred, and without such obligation an action cannot be maintained for mere refusal and neglect."

40. *Wray v. Morrison*, 9 Ont. 180, 184.

41. *Abrey v. Detroit*, 127 Mich. 374, 86 N. W. 785; *Brine v. Great Western R. Co.*, 2 B. & S. 402, 110 E. C. L. 402.

In *Brine v. Great Western R. Co.*, 2 B. & S. 402, 110 E. C. L. 402, the declaration stated that the defendants wrongfully raised an embankment near the plaintiff's house and wrongfully



**V. TREES AND FENCES.—A. TREES ON DIVISION LINE.**—A tree standing directly upon the line between adjoining owners so that the line passes through it, is the common property of both parties, and an action of trespass will lie, if one owner destroys or injures it without the consent of the other.<sup>42</sup> And an owner may be restrained by injunction from destroying or injuring such trees.<sup>43</sup>

**B. ENCROACHING TREES.**—A person whose property is injured by the overhanging branches or the encroaching roots of trees growing on another's land adjoining, has a right of action for damages against the owner of the trees.<sup>44</sup>

**C. BRANCHES AND FRUIT.**—Where branches or roots of a tree growing upon the land of one owner extend over or into the land of an adjoining owner to his injury, he may cut them off along the line of his

continued the same, by reason whereof large quantities of water flowed against and into the house; averring special damages. Plea that the embankment was raised and continued by the defendants under certain acts of Parliament. Replication that although the embankment was raised and continued under the acts of Parliament, the flowing of the water against and into the plaintiff's house was occasioned by the wrongful construction, and negligent and improper raising of the embankment, and the want of proper and sufficient drains to the same, and the continuing the embankment so wrongfully constructed and insufficiently drained. The replication was consistent with the declaration and stated the same cause of action and was therefore not a departure.

42. Conn.—Robinson v. Clapp, 67 Conn. 538, 35 Atl. 504, 52 Am. St. Rep. 298; Robinson v. Clapp, 65 Conn. 365, 377, 32 Atl. 939, 29 L. R. A. 582. Del.—Quillen v. Betts, 1 Penne. 53, 59, 39 Atl. 595. N. H.—Griffin v. Bixby, 12 N. H. 454, 458, 37 Am. Dec. 225. N. Y.—Dubois v. Beaver, 25 N. Y. 123, 82 Am. Rep. 326. Eng.—Waterman v. Soper, 1 Ld. Raym. 737, 91 Eng. Reprint 1393.

43. Scarborough v. Woodill, 7 Cal. App. 39, 93 Pac. 383; Musch v. Burkhart, 83 Iowa 301, 48 N. W. 1025, 32 Am. St. Rep. 305, 12 L. R. A. 484.

So an injunction will not be granted to compel an adjoining landowner to dig out and destroy a division hedge on the ground that it has become a nuisance, as such hedge is common

property which neither owner can destroy without the consent of the other. Harndon v. Stultz, 124 Iowa 440, 100 N. W. 329.

44. Buckingham v. Elliott, 62 Miss. 296, 301, 52 Am. Rep. 188.

In Grandona v. Lovdal, 70 Cal. 161, 11 Pac. 623, the action was brought to compel the defendant to remove a certain line of trees on or near the boundary line of his land, and the land of plaintiff, and to recover damages alleged to have been caused by reason of the existence of the trees during the preceding four years. The complaint alleged in effect that the trees had been allowed to grow to such a size that they caused damage to the land of the plaintiff by lessening its value, and by reason of their dense shade, falling leaves and protruding roots, and had broken down the division fence between his land and that of the defendant, so that stock belonging to the latter were enabled to trespass upon his land. This complaint was held not to be subject to a general demurrer, nor to a demurrer for misjoinder of actions, but, as it was ambiguous and uncertain, judgment for defendant was affirmed.

**Damage From Shade of Trees Not Actionable.**—As against adjoining properties, the owner of a lot may plant shade trees upon it, or cover it with a thick forest, and the injury done to them by the mere shade of the trees, is *damnum absque injuria*, and an action cannot be maintained therefor. Bliss v. Ball, 99 Mass. 297.



land without liability, but he will be liable for damages if he appropriates the branches or fruit thereon to his own use.<sup>45</sup>

**VI. ABATEMENT OF NUISANCES.**—A landowner whose property is injured by the establishment of a nuisance on adjoining premises, may maintain an action for the abatement of such nuisance.<sup>46</sup> But in such a case, it must be alleged that the thing complained of was in fact a nuisance, and that it was placed upon the adjoining property without legal right or authority.<sup>47</sup>

45. *Conn.*—*Lyman v. Hale*, 11 Conn. 177, 27 Am. Dec. 728. *N. Y.*—*Hoffman v. Armstrong*, 48 N. Y. 201, 204, 5 Am. Rep. 537. *Vt.*—*Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645.

46. *Givens v. Van Studdiford*, 4 Mo. App. 498, was an action for damages against the defendant for permitting a nuisance to be established and maintained on the premises of the defendant adjoining those of plaintiff, by which the value of plaintiff's property, consisting of a valuable residence, was permanently injured, and the rents lost. The particular nuisance complained of was that the house of defendant was, with his knowledge and consent, rented to prostitutes who conducted themselves in an indecent manner in the house, in full view of the neighborhood. This constituted a good cause of action.

47. In *Jenkins v. Louisville H. Tel. Co.* (Ky.), 120 S. W. 276, the complaint

alleged that the defendant erected a telephone pole on premises adjoining plaintiff's residence, so near to one of plaintiff's windows that it afforded a way for burglars or other evil minded persons to enter plaintiff's premises, and that defendant was warned that if such entry was made, she would hold defendant responsible for consequences; and that on a certain day, a burglar did enter by means of said pole, and injured plaintiff, and stole her property, which injuries and loss were brought about by the gross negligence and carelessness of defendant in erecting said pole too close to plaintiff's premises. It was not alleged that the pole was in or of itself a nuisance, nor was it alleged that the defendant did not own the lot or have the legal right to erect the pole at the point where it was placed. The complaint was insufficient to sustain the action.

# ADMIRALTY

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**I. ADMIRALTY COURTS AND THEIR JURISDICTION. — A. ORIGIN AND DEVELOPMENT OF MARITIME LAW. — 1. General Nature of Admiralty Law. — Definition. —** Admiralty is that system of law and procedure which is concerned exclusively with the rights and obligations arising out of maritime commerce and navigation. It administers the law maritime, as distinguished from the municipal or common law, by means of its own methods and process. There is an instance, or civil, jurisdiction, which is permanent, and a prize jurisdiction, which is in abeyance except during times of war. There is also a criminal jurisdiction for the cognizance of offenses and crimes committed upon the high seas.<sup>1</sup>

**Origin and Necessity. —** As a branch of historical jurisprudence, it appears as the result of the necessities of commerce by sea. Such commerce always involved international relations as well as the peculiar customs and methods of the merchants and mariners by whom it was carried on. It could not be confined to a single country or adapt itself to the purely local laws of the various places to which it came. Its legal problems were essentially the same everywhere because they arose out of the same commercial transactions. Their solution required courts of similar jurisdiction, not bound by local conditions and familiar with the nature and traditions of the business itself. It was a commerce that needed its own commercial courts to dispose of its legal complications, and out of this necessity, as a matter of history, the admiralty law appeared.<sup>2</sup> Such a system of law originates in the customs of the business itself and, if the necessities of the business are substantially the same everywhere, the law will develop and grow with substantial uniformity. Local differences will be inconspicuous and tend to disappear in proportion to the degree with which local courts recognize the international character of the subject-matter with which they are dealing. Procedure will also tend to be the same in various countries in response to the essential need of the business

1. The word "admiralty" seems to have had its origin in the judicial authority exercised by the English admirals or naval commanders in the thirteenth and succeeding centuries. As their functions increased, a court was held, in person or by deputy, which became known as the court of admiralty. Roscoe, *Admiralty Jurisdiction*, 1; *Century Dict.* "Admiralty."

2. In the case of *The Magnolia*, 20 How. (U. S.), 296, 15 L. ed. 909, Mr. Justice McLean said: "By the civil law, the maritime system extends over all navigable waters. The admiralty and maritime jurisdiction, like the common law or chancery jurisdiction, embraces a system of procedure known and established for ages. It may be called a system of regulations embodied and matured by the most enlightened and commercial nations of

the world. Its origin may be traced to the regulations of Wisbuy, of the Hanse Towns, the laws of Oleron, the ordinances of France, and the usages of other commercial countries, including the English admiralty.

"It is, in fact, a regulation of commerce, as it comprehends the duties and powers of masters of vessels, the maritime liens of seamen, of those who furnish supplies to vessels, make advances, etc., and, in short, the knowledge and conduct required of pilots, seamen, masters, and everything pertaining to the sailing and management of a ship. As the terms import, these regulations apply to the water, and not to the land, and are commensurate with the jurisdiction conferred."

See also Amos, *The Science of Law*, 315-316.

for simplicity and dispatch. All this is illustrated in the general history of admiralty law.<sup>3</sup>

Courts of Admiralty are those which administer the maritime law by the procedure and remedies peculiar to this system. Their forms and practice, as well as the general principles upon which they proceed, are similar all over the world. In a broad sense, they are courts of equity and the jurisdiction which they exercise has been characterized as the chancery of the sea.<sup>4</sup>

The General Maritime Law. — By the common consent of all commercial nations there has long existed a distinct body of international law known as the general maritime law, or the common law of the sea. It is, of course, operative within particular countries only so far as they may adopt its doctrines by their own usages and laws, but such adoption has long since taken place as to its characteristic features. It is the foundation or ground-work of all the maritime regulations of the world, a result which has been as much due to its broad principles of equity and efficiency of procedure as to the practical necessity for uniformity of laws among nations maintaining commercial relations by sea.<sup>5</sup>

3. Bouvier, *Law Dict.* (1897) "Admiralty;" 1 Parsons, *Shipping & Admiralty* (1869), 3-24; 2 Browne, *Civil & Admiralty Law* (1840), 21; Betts, *Admiralty* (1838), Introduction; Benedict, *Admiralty* (1910), c. 1; Kent, *Commentaries*, Lecture XVII.

Lord Mansfield, in *Luke v. Lyde*, 2 Burr. 882, 97 Eng. Reprint 614, said: "The maritime law is not the law of a particular country, but the general law of nations."

4. See Hall, *Admiralty*, Introduction, x1; Lowndes, *Collisions*, 12.

In the *Recovery*, 6 C. Rob. 348, Lord Stowell said: "It is to be recollected that this is a court of the law of nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own; and what foreigners have a right to demand from it, is the administration of the Law of Nations simply, and exclusively of the introduction of principles borrowed from our own municipal jurisprudence."

5. The clear demonstration of Mr. Justice Bradley, in *The Lottawanna*, 21 Wall. (U. S.) 558, 572, 22 L. ed. 654, should be observed. He says: "But it is hardly necessary to observe that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like in-

ternational law or the laws of war, which have the effect of law in no country any further than they are accepted and received as such; or, like the case of the civil law, which forms the basis of most European laws, but which has the force of law in each state only so far as it is adopted therein, and with such modifications as are deemed expedient. The adoption of the common law by the several States of this Union also presents an analogous case. It is the basis of all State laws; but it is modified as each sees fit. Perhaps the maritime law is more uniformly followed by commercial nations than the civil and common laws are by those who use them. But, like those laws, however fixed, definite, and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have. But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country, peculiarities exist either as to some of the rules, or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with, or shades off into, the local or municipal



law of the particular country and affects only its own merchants or people in their relations to each other. Whereas, in matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed—as, in justice, it should be. No one doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third; still, the convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice. Hence the adoption by all commercial nations (our own included) of the general maritime law as the basis and groundwork of all their maritime regulations. But no nation regards itself as precluded from making occasional modifications suited to its locality and the genius of its own people and institutions, especially in matters that are of a merely local and municipal consequence and do not affect other nations. It will be found, therefore, that the maritime codes of France, England, Sweden, and other countries, are not one and the same in every particular; but that whilst there is a general correspondence between them arising from the fact that each adopts the essential principles, and the great mass of the general maritime law, as the basis of its system, there are varying shades of difference corresponding to the respective territories, climate, and genius of the people of each country respectively. Each state adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law. And thus it happens, that, from the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common, comes to be the common maritime law of the world."

"The Admiralty courts were originally established for the protection of commerce and the administration of that venerable law of the sea which reaches back to sources long anterior even to those of the civil law itself; which Lord Mansfield says is not the law of any particular country, but the general law of nations; and which is founded on the broadest principles of equity and justice, deriving, however, much of its completeness and symmetry, as well as its modes of proceeding, from the civil law, and embracing, altogether, a system of regulations embodied and matured by the combined efforts of the most enlightened commercial nations of the world. Its system of procedure has been established for ages." *Insurance Co. v. Dunham*, 11 Wall. (U. S.) 1, 23, 20 L. ed. 90.

"Undoubtedly no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which when generally accepted became of universal obligation. The Rhodian law is supposed to have been the earliest system of marine rules. It was a code for the Rhodians only, but it soon became of general authority because accepted and assented to as a wise and desirable system by other maritime nations. The same may be said of the Amalphitan table, of the ordinances of the Hanseatic League, and of parts of the marine ordinances of Louis XIV. They all became the law of the sea, not on account of their origin, but by reason of their acceptance as such. And it is evident that unless general assent is efficacious to give sanction to international law, there never can be that

**2. Historical Résumé.** — The history of this general maritime law is very ancient. To use the language of Chief Justice Marshall,<sup>6</sup> "These (admiralty) cases are as old as navigation itself; and the law, admiralty and maritime as it has existed for ages, is applied by our courts to the cases as they arise." There is an apparent thread of continuity from all the systems of maritime law of modern times to the sea laws and the consular courts of the Middle Ages, and again back from them, through the Roman law, to the codes of the Rhodians and other earlier peoples of the Mediterranean.<sup>7</sup>

growth and development of maritime rules which the constant changes in the instruments and necessities of navigation require. Changes in nautical rules have taken place. How have they been accomplished, if not by the concurrent assent, express or understood, of maritime nations?" The *Scotia*, 14 Wall. (U. S.) 170, 187, 20 L. ed. 822.

The general maritime law, like the law of nations, and unlike foreign municipal law, is judicially noticed, and it is not necessary to prove it as a fact. The *New York*, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. ed. 126; The *Scotia*, 14 Wall. (U. S.) 170, 20 L. ed. 822; *Talbot v. Seeman*, 1 Cr. (U. S.) 1, 2 L. ed. 15; *Marsden on Collisions* (1904), 320; *Wharton on Conflict of Laws*, § 771; *Whart. on Ev.*, §§ 285, 331.

In *The Elfrida*, 172 U. S. 186, 19 Sup. Ct. 146, 43 L. ed. 413, it was again said that the admiralty and maritime laws and usages of foreign countries were not binding upon the courts of the United States and would be recognized only so far as they accorded with well-settled principles of English and American jurisprudence.

6. *American Ins. Co. v. Canter*, 1 Pet. (U. S.) 511, 545, 7 L. ed. 688.

7. See *Park, Marine Insurance*, Introduction, where it is said: "The time at which these laws were compiled is not precisely ascertained, but we may reasonably suppose it was about the period when the Rhodians first obtained the sovereignty of the sea, which was about 916 years before the era of Christianity."

"Usages, called sea laws, having the effect of obligatory regulations to prevent collisions between ships engaged in navigation, existed long before there was any legislation on the subject." *The City of Washington*, 92 U. S. 31, 23 L. ed. 600.

Doubtless, the origin of the essen-

tial features of this law was coeval with maritime commerce. The records of Babylon show contracts of affreightment, some of which are published in the appendix of Révillout's "*Les Obligations en Droit Egyptien*," Paris, 1886. Herodotus and other Greek historians have noted various maritime laws of ancient Egypt, as those in regulation of the seashore, for the protection of strangers and their goods in case of shipwreck, for consular courts for settling disputes among foreigners, and in respect of the transmission of merchandise from one port to another when it was not intended for use within the country. Herodotus I, 11, §§ 115, 178, 179; *Diodorus Siculus*, I, 1, § 67; *Maspero, Histoire Ancienne*, Ch. XII.

The Indian Ocean apparently had its own code dating from about the thirteenth century before our era, according to the compilation of Manou, translated by Eugene Burnouf and published in *Pardessus' Collection des Lois Maritimes*, volume VI. The Hebrews had their own traffic with the maritime merchants of Babylon and the Talmud contains considerable discussion on the subject of freight, jettison and contribution in general average. One text is believed to show the earliest record of marine insurance, and if correctly interpreted, would indicate that it was practiced on the Persian Gulf at the time of the Roman Republic.

Copious references in support of this will be found in the first chapter of the "*Historical Introduction to the Study of Maritime Commercial Law*" of Arthur Desjardins (*Droit Commercial Maritime*, par Arthur Desjardins — Paris, 1890), an elaborate work in nine volumes, covering all the systems of the world.

The active maritime enterprise of the Greeks created their own system of



In the Roman republic there appears evidence of the necessity for a recognition of maritime law and the law merchant as something distinct from the local or municipal law.<sup>8</sup>

Upon the dissolution of the Roman empire, commercial intercourse was reduced to a minimum. It became perilous to venture abroad. If a merchant ventured a voyage, the degenerate customs or laws of the land exposed him and his goods to more serious perils than storm or stranding; in the event of shipwreck the local laws of the Dark Ages made the property forfeit to the lord of the manor and devoted the merchants and mariners either to servitude or to sacrifice to the gods of the soil.<sup>9</sup> With the renaissance of commerce, about the era of the Crusades, it is evident that the exigencies of the situation recalled the old laws under which the commerce of the Mediterranean had anciently flourished. Doubtless they had persisted in the vague forms of custom and tradition even when courts were not sitting and records had been lost. At any rate, with the revival of trade, local courts commenced to appear, at ports along the Mediterranean and up the Atlantic shore, which were distinct from the territorial courts and administered a maritime law for the benefit of sailors and those trading by sea. These courts, although sitting in different nations, were all formed on a common model. Their jurisdiction was very similar. Their procedure was that of the old Roman system and their jurisprudence was full of reminiscences of the civil law. They administered a sort of private international law, and were quite untrammelled by the territorial law of the place in which they sat. For the most part, they confined themselves to controversies between merchants and foreigners growing out of maritime transactions, and from them, much as the modern law merchant was developed in its sphere, came the revival of the general admiralty law which exists in modern times. They are generally referred to as the consular courts of the Mediterranean.<sup>10</sup>

maritime law of which the modern system of consuls is a distinct survival. Foreign merchants, in commercial cases, might sue in their own names. Sea commerce was the most extensive form of their trade and they adopted and improved the commercial laws of the Babylonians. Bottomry bonds, marine interest, maritime liens, and special regulations for the title and dispositions of ships, the protection of sailors, and punishing negligence of the master, all appear. No published code is known to be extant, but the evidences of the law appear throughout Greek history. Numerous allusions also appear in the orations of Demosthenes, who seems to have had a large admiralty practice. Lee, *Historical Jurisprudence*, 184. Desjardins; *Droit Commercial Maritime*, c. I, pp. 8, 9.

8. Mommsen has shown how large the foreign trade of Italy was from

early times (*History of Rome*, c. 13) and as far back as 242 B. C. the *praetor peregrinus* was appointed to have jurisdiction over all cases to which foreigners were parties, and to administer commercial law or the *jus gentium* instead of local Roman law. Under this system much of the older maritime law was absorbed into Roman jurisprudence and prepared the way for the final legislation of the Empire. Duer on Marine Insurance, Introduction; Friedlander's *Roman Life and Manners*, VI, VII; Lee, *Historical Jurisprudence*, pp. 229-235; Huet, *Histoire du Commerce et de la Navigation des Anciens*.

9. An interesting observation on this practice by Judge Brown will be found in *The Albany*, 44 Fed. 431. And see, in general, Hallam's *Middle Ages*, Vol. 3, Book IX, part 2.

10. The jurisdiction of these consu-



lar courts included all questions concerning freight, damage to cargo laden on board ship, mariners' wages, partnerships in shipbuilding, sales of ships, jettisons, commissions, entrusted to masters of ships or mariners, debts contracted by the master who borrowed money for the wants or necessities of his vessel, promises made by a merchant to a master or by a master to a merchant, goods found on the open sea or on the strand, the fitting out of ships, galleys, or other vessels, and generally all other contracts set forth in the customs of the sea. See *Black Book of the Admiralty*, Rolls Series; app. Vol. IV, p. 473.

The "Sea Laws of the Middle Ages" is the class name which designates the principal compilations of maritime laws and usages which were administered by the Consular Courts. Below will be found an outline of the more important compilations of the Middle Ages which constituted a substantially consistent code of maritime law around the entire littoral of Europe.

The most ancient of these codes is the "Ordinances and Customs of the Sea Promulgated by the Consuls of the City of Trani," which dates from 1063.

Dating from the tenth century, the code of Amalfi, on the western shores of Italy, became recognized throughout the Mediterranean for its equity and sound sense. There would seem to have been a maritime court here from about the year 900, A. D., whose decisions and enactments created this body of laws. It became forgotten with the decline of the city until a copy in manuscript was discovered in Vienna in 1843.

On the Atlantic Coast the most noted compilation was the "Rooles or Judgments of Oleron," dating from the twelfth century, and purporting to be the laws and statutes, "which were by the Lord Richard, formerly King of England, on his return from the Holy Land, corrected, interpreted, and declared and published in the Island of Oleron." They were of great authority in England and are even now frequently referred to in admiralty cases. A transcript may be found in Peter's Admiralty Reports, and in the Appendix to the Federal Cases.

The Consulate of the Sea, or Consolato del Mare, is a compilation of the

twelfth or thirteenth centuries, and preserves the maritime laws and usages which prevailed in the Mediterranean at that time. It is prefaced by the statement that "these be the venerable and good customs of the sea, the which our ancestors, wise men journeying through the world, collected and transmitted down to us." It purports to be a collection of maritime regulations and laws of former times whose authenticity had been investigated and approved during the eleventh century by all the centers of existing commerce. Students believe that it reproduced to a large extent the maritime jurisprudence of antiquity and there is very patent connection between it and many passages in the great compilation of Justinian. Beyond question it evidences the contemporaneous law of the Mediterranean and has been always regarded as a work of the highest authority. It has been well said that what Coke did for the common law and Papinian for the Roman, the author of the Consulate has done for the law maritime. This work is the great source for the common law of the sea.

The "Laws of Oleron" constituted the maritime code of Western Europe along the Atlantic coast. The "Jus Hanseaticum Maritimum" was a similar compilation for the Baltic Sea and the famous league of the Hanse towns, Wisbuy, Lubeck and Hamburg. In addition to these, there were numerous local codes and later compilations, all of which seem to bear evidence of a common source of origin.

The "Black Book of the Admiralty" is the most valuable English compilation of ancient maritime rules and customs. It was compiled under the directions of Edward III for the guidance of his judges in admiralty matters. Like all the other compilations it shows a derivation from the Civil Law; it contains instructions for the admiral's administrative duties, among which are the appointment of deputies "wise in the maritime law;" also a transcript of the Laws of Oleron, a treatise on Procedure in the Admiralty, and definitions of its jurisdiction.

These were all merged in the great French compilation of Louis XIV, "The Ordonnance de la Marine" which became the digest of the maritime law of civilized Europe from the time of its publication in 1681, and has

**3. Admiralty Courts of England.**—The origin of English admiralty jurisdiction is lost in obscurity. Lord Coke believed that the court of admiralty existed in Saxon times.<sup>11</sup>

The law merchant of the Middle Ages included both maritime and commercial law, as they are now distinguished, and was of an international character, administered by peculiar courts, quite distinct in methods and procedure from the courts of the common law. Most of the English seaports, as far back as the records can be traced, had these local courts, supervised by the crown, and dealing with controversies of mariners and merchants according to the usages of the sea. Such were the courts of the Cinque Ports, of Ipswich, Newcastle, Bristol and London. They proceeded, in general, according to the rules laid down in local compilations of customary maritime law, of which the common source would appear to have been the Judgments of Oleron, and, less distinctly, the Consulate of the Sea.<sup>12</sup>

Of somewhat later origin, but probably commencing about the year 1300, an officer of the crown, known as the admiral, began to exercise authority over maritime affairs, at first, only in respect of the ships under his command, then as a court for military matters, and, finally, taking over an increasing amount of civil jurisdiction in courts held by himself or his deputies. In the time of Edward III this official held an independent court and was able to administer complete justice "in piracy and other maritime cases." The earliest distinct ref-

been commended by high authority as "a model of a perfect code of maritime jurisprudence." 3 Kent Com. 16.

11. The English Court of Admiralty, as a distinct institution from earner courts which administered maritime law, would seem to date from the reign of Edward III. Marsden's Select Pleas, Vol. 1, XIV. Spellman's Glossary, 13. Beawes' Lex Mercatoria (6th ed.) 400. 11 Social England, 103, 182-194. Roscoe's Admiralty Jurisdiction, 1-61. The battle of Sluys, in 1340, gave that sovereign the supremacy of the sea, and it was his policy to maintain and extend it by providing a court to keep the peace on the ocean in the same way that his courts of the common law did on the land. There is a memorandum of his requiring that his Justiciaries should investigate and report as to the proper method to secure the ancient supremacy of the crown, and the authority of the admiral's office, over the seas of England, in order "to maintain peace and justice amongst the people of every nation there passing." From this enquiry came the establishment of the High Court of Admiralty under the Lord High Admiral of England.

By the time of Richard II, this court

had received distinct and statutory authority to exercise its jurisdiction over all causes and matters of a maritime nature and had absorbed the more ancient jurisdiction of the Chancellor and most of the local courts in these respects. The Cinque Courts, however, retained their ancient powers over their own admiralty causes. This jurisdiction still exists in the Lord Warden of the Cinque Ports and is exercised by him through his admiralty judge.

An old manuscript found at Middleburg bears the strange title, "Costume de la Mer Faicte Entre L'Empereur de Romme et le Roy Richart, Observes a Bordeaux, Angle-terre, Bretagne, Normandie, Ecosse et en Pruyche." If published it may be expected to make plain some of the doubtful periods in the history of the admiralty along the Atlantic and Baltic coasts.

12. Holdsworth's History of English Law, Vol. 1, p. 300.

In *Mogadara v. Holt*, 1 Shower K. B. 318, 89 Eng. Reprint 597, it is said: "The law of merchants is *jus gentium*, and the judges are bound to take notice of it."



erence to a court of admiralty is in 1357, in connection with a claim made by the King of Portugal on behalf of a subject, for goods taken by an Englishman from a French vessel. This was in a court held by the admiral as distinguished from any of the local courts. From this time on, the jurisdiction of the admiral increased in civil and criminal causes and was exercised in an independent court, by judges appointed under commissions from the crown.<sup>13</sup>

The procedure in this court of the admiral was modeled on that of the civil law, and it administered the maritime, as distinguished from the common, law. Its jurisdiction gradually encroached upon that of the local courts in the seaport towns. In the era of the Tudors it had cognizance of nearly all mercantile as well as maritime cases. It was regarded as the proper tribunal of the law merchant and had extended its scope far beyond the legitimate boundaries of maritime jurisdiction.<sup>14</sup>

There followed, then, in the time of Queen Elizabeth, the famous controversy with the courts of the common law under the championship of Lord Coke.<sup>15</sup> The result was that the admiralty was not only forced back to its proper bounds, but finally shorn of a large part of its natural and legitimate jurisdiction. A large part of its subject-matter was entirely removed and it even ceased to be a court of record. It was not until the reign of Victoria that this jurisdiction was substantially restored and it became once more entitled to the dignity of a court of record and equal to similar courts in the commercial nations of the world.<sup>16</sup> In 1873-5 the High Court of Admiralty ceased to be an independent tribunal and its jurisdiction was transferred to the judges of the Supreme Court of Judicature.

The present admiralty jurisdiction in England is vested in the Admiralty Division of the High Court of Justice, certain county courts, the City of London Court, the Court of Admiralty of the Cinque Ports, the Liverpool Court of Passage. Certain quasi-judicial bodies also exercise an admiralty jurisdiction in particular cases.<sup>17</sup>

13. When the admiral's court was established, various towns obtained by charter an exemption from its jurisdiction and the right to continue to administer their own maritime jurisdiction. Such were Dartmouth, Harwich and Dearborough.

14. See Holdsworth's *A History of English Law*, Volume 1, c. VII; Seldon Society, *Select Pleas of the Admiralty*, I, LXV-LXXI, Malynes, *Lex Mercatoria*, 303 304.

In the sixteenth century even contracts of marriage and testamentary dispositions, made abroad, are to be found as the subject of suits in the admiralty; and it also devised a process of contempt for the arrest and punishment of those who, having maritime causes of action, brought them in any other court. 1 *Select Pleas of the Admiralty*, LX; LXVIII.

15. For a full account of this controversy see *selected Essays in Anglo-American Legal History*, Volume 1, pp. 313-323; Volume 2, pp. 353-364; Benedict's *Admiralty* (fourth ed.), 38-54.

16. "It is no court of record, any more than the spiritual courts." 3 *Black. Com.* 68.

Pepys in his *Diary* for March 17th, 1662, notes: "To St. Margaret's Hill in Southwark where the Judges of the Admiralty come and the rest of the Doctors of the Civil Law. I perceive that this court is yet but in its infancy as to its rising again; and their design and consultation was, I could overhear them, how to proceed with the most solemnity, and spend time, there being only two businesses to do, which, of themselves, would not spend much time."

17. 1 *Laws of England*, "Admir-



The jurisdiction of the English admiralty is now partly statutory and partly the inherent and traditional jurisdiction of the older courts of admiralty as they existed there from ancient times. It administers the maritime law of England as distinguished from the ordinary municipal law.<sup>18</sup> This jurisdiction is at present generally similar to that exercised in the United States, but it also includes some matters of which our courts decline to take cognizance. In matters of tort, its authority extends to all cases of damage done by a ship, without the qualification that the damage must be consummated on the water, although this does not include every tort which may be committed on the sea.<sup>19</sup>

**4. Admiralty Courts in the United States.—a. Colonial Period.**—A comprehensive admiralty jurisdiction existed in the American colonies before the revolution, and it was, in several respects, broader than that subsequently exercised under the constitution. The colonists were active in maritime affairs from the beginning and always maintained a vigorous commerce by sea. As early as 1647 it was resolved by the popular government of the colony of Rhode Island that the laws of Oleron should be in force for the benefit of seamen. Under the first charter of the colony of Massachusetts bay, admiralty jurisdiction was vested in the Court of Assistants, over all cases of maritime contracts and matters of maritime equity. A code or compilation of rules for the regulation of matters of freight, wages, and other subjects of admiralty jurisdiction, similar to the older sea laws, was also enacted, consisting of some thirty sections. It was also provided that all admiralty cases should be heard and determined by the Court of Assistants without a jury unless the court should find cause to the contrary, and there was also a reservation of concurrent remedies in other courts similar to the reservation of a common-law remedy in the present Judiciary Act of 1789. This court existed from 1673 to

alty;" Williams & Bruce, Admiralty Practice.

18. Brett, L. J., in *The Gaetano and Marie*, L. R. (1882) p. 137, 143, said: "Every Court of Admiralty is a court of the country in which it sits and to which it belongs. The law which is administered in the Admiralty Court of England is the English maritime law. It is not the ordinary municipal law of the Country, but it is the law which the English Court of Admiralty either by act of Parliament or by reiterated decisions and traditions and principles has adopted as the English maritime law." See also *The Gas Float Whitton*, L. R. (1895) 42, 47; *The Zeta*, L. R. (1893), App. Cas. 468; *The Patria*, L. R. 3 A. & E. 436; *The Neptune*, 3 Hag. Adm. 129, 135.

19. Lord Esher in *The Queen v. Judge*, L. R. (1892) 1, Q. B. 273, 294, said: "It is useless, therefore, to cite an American decision with regard to

the jurisdiction of the Admiralty Court; it is not binding on us, and it has been disregarded in this country. I come, then, to enquire what the English law is. On what does the jurisdiction of the Admiralty Court depend? It does not depend merely on the fact that something has taken place on the high seas. That it happened there is, no doubt, irrespective of statute, a necessary condition for the jurisdiction of the Admiralty Court; but there is the further question, what is the subject-matter of that which happened on the high seas? It is not everything which takes place on the high seas which is within the jurisdiction of the admiralty court. A third consideration is, with regard to whom is the jurisdiction asserted? You have to consider three things—the locality, the subject-matter of complaint, and the person with regard to whom the complaint is made."

about 1684, or the time when the first charter was annulled and the charter of the province of Massachusetts bay went into effect. The new charter, like most, if not all, subsequent charters to the several colonies, reserved to the crown the right to establish courts of admiralty jurisdiction, and this was generally done in each of the several colonies. The commissions thereafter issued, and the records of the courts themselves, indicate the grant and exercise of a most ample jurisdiction over all maritime subjects and causes of action.<sup>20</sup>

b. *The Confederation.* — During the revolution, and under the confederacy, each state acted largely for itself in regard to its admiralty courts. In some, such courts were simply continued, as in Massachusetts, and exercised the same powers as before. In some, the court was abolished; and in others, new courts were created with appropriate powers.<sup>21</sup>

20. There has not been any publication of the original records of the colonial admiralty, nor is there any account of its jurisdiction which covers the subject with sufficiency of detail. Apart from the actual records of the colonial courts, the following references may suggest sources of information: "Opinions to the Board of Trade in England in respect of the Admiralty Jurisdiction exercised in the American Colonies," 1702 (reprinted in 2 Chalmers' *Opinions of Eminent Lawyers*, 187-193); Reeves' *History Navigation & Shipping*, 79, 90; *A View of the Constitution of the British Colonies of North America and the West Indies*: by Anthony Stokes: London, 1783; *Admiralty Jurisdiction in America*: Etting: Philadelphia, 1879; Hopkinson's "Judgments in the Admiralty of Pennsylvania," Philadelphia, 1789; *Miscellaneous Essays and Occasional Writings of Francis Hopkinson*, Vol. 3, Philadelphia, 1792; Woodcock on *British Colonies*, 272; Auchmuty's *Vice-Admiralty Decisions*, Mass. 1740; Crowell's *Ordinance of 1648*; Bee's *Admiralty Reports*, 78, 168, 435, appendix; Dana's *Defense of New England Charters*; Com. v. Gaines, 2 Virginia Cas. 179-185; 6 *American Archives*, 226, 234.

21. In Virginia, for example, a statute of 1779 created a court of admiralty to "have jurisdiction of all maritime causes, except those wherein any parties may be accused of capital offenses," and to be governed in its proceedings by "the regulations of the United States of America, by the acts of the General Assembly, by the Laws of Oleron and the Rhodian and Im-

perial laws, so far as they have been heretofore observed in the English courts of admiralty, and by the laws of nature and of nations."

New Hampshire created a "court maritime" by a statute of July 3, 1776, to have jurisdiction in matters of capture or prize, which may be found in the case of *Penhallow v. Doane's Admr.*, 3 Dall. 54, 1 L. ed. 507. Massachusetts had already adopted a similar act, on November 11, 1775. This divided the state into three districts, in each of which an admiralty court was established. Connecticut created County Maritime courts in its territory along Long Island sound and Maryland continued the existing colonial court. North and South Carolina, Delaware, New Jersey, and Rhode Island also either continued or created like tribunals. Most, if not all, of the states provided for appeals to congress from their maritime courts and the records show upwards of an hundred such appeals to have been presented and disposed of.

Washington recommended, before the close of 1775, that congress establish a court to exercise jurisdiction in all matters of prize, but this was not accomplished until 1780, appeals, in the meantime, being heard by congress or its committees. A resolution of January 15, 1780, created a court of appeals, to try all appeals from the courts of admiralty, in cases of capture. It consisted of three judges appointed by congress and was to sit in Philadelphia, and also, if necessary, at other places between Hartford and Williamsburg. Its last sessions seem to have been in 1787. A list of the

c. *The Constitutional Period.*—The story of the development of the jurisdiction of the admiralty in the United States under the constitution is, in some respects, a repetition of the earlier controversy with the courts of the common law which transpired in England. The contest, however, in this country, was not so much between different tribunals, as it was between the systems of law and procedure, since the struggle was almost altogether in the supreme court itself. This was necessarily so, by reason of that court being the ultimate arbiter in all matters of constitutional law. The final result of the struggle was the same here as in England. The jurisdiction was established on substantially the lines of its original and natural dominion. Different methods accomplished this in the two nations. In the United States it was worked out through the supreme court, but in England it came through acts of parliament.<sup>22</sup>

admiralty appeals heard by this court, as well as by congress, is published in 131 U. S. App.

Some portion of the admiralty jurisdiction originally possessed by the colonies and the states during the confederation has evidently remained within their cognizance by reason of the boundaries of the jurisdiction of the United States as they now stand defined. This would include all those matters growing out of the building of the ship of which the federal courts decline to take jurisdiction, as well as certain classes of liens on watercraft which, although maritime in fact, are not so considered in the admiralty law. So as to matters of tort occurring on purely intrastate waters. Most of the states have statutes covering the subject and providing remedies against the craft involved along the lines of admiralty procedure *in rem*. These are permitted in so far as they do not trespass on the exclusive jurisdiction of the courts of the United States and, practically, seem to present a survival of the earlier jurisdiction which was, for the most part, relinquished to the national government. An instance of state legislation in this direction may be seen in Michigan, where the "Water-craft Law" (Comp. Laws 10,789) provides a procedure which has all the characteristics of a suit *in rem*, and Act 113 of 1909 is a code for the regulation and navigation of steam vessels on waters within the jurisdiction of the State, similar to the statutes of the United States on the same subjects.

22. Benedict's Admiralty (1910), c. XII-XVI, Jurisdiction of the Ad-

miralty in Cases of Tort (by Mr. Justice Brown), IX Columbia Law Review, 1; 2 Parsons Shipping & Admiralty, 159-190; History of Admiralty Jurisdiction, 5 Am. Law. Rev.

The more liberal views of admiralty jurisdiction did not prevail in the earlier history of the Supreme Court. Questions along the border line of the common law were comparatively rare during the first half-century of its organization, and the tendency of the justices was to follow the narrower English precedents without much consideration of the altered conditions here. There are maritime cases in every volume of Dallas, Cranch and Wheaton, but these are principally concerned with questions growing out of the naval operations of the Revolution and War of 1812, or salvage and the like, where the matter of jurisdiction could not be in dispute. In such cases, the contemporary English decisions were in harmony with the general maritime law and afforded a satisfactory rule. In other cases, where the authority of the common law had prevailed in England, such precedents became a source of confusion and trouble and finally had to be abandoned. The decisions on questions which did not relate to the domestic waters of the United States, but pertained to the open sea, like the question of jurisdiction in cases of prize (*Glass v. The Sloop Betsey*, 3 Dall. [U. S.] 6, 1 L. ed. 485), recaptures (*The Adeline*, 9 Cr. [U. S.] 244, 3 L. ed. 719), rights of neutrals (*The L'Invincible*, 1 Wheat. [U. S.] 238, 4 L. ed. 80), piracy (*The Marianna Flora*, 11 Wheat. [U. S.] 1, 6 L. ed. 405), salvage



The effect of this tendency to follow English precedents too closely is illustrated in the series of decisions in regard to the extent of admiralty jurisdiction where it depends upon the locality of the act done, as it does in matters of tort. In England this locality had come to be defined by the ebb and flow of the tide, among other things, but the definition there, from natural causes, was synonymous with practical navigability. The supreme court, however, interpreted the expression very literally and according to the exact import of the words employed and the rule limiting the American admiralty to the line of the tide stood in force until after 1850.<sup>23</sup>

The incongruous nature of this rule, which excluded the growing commerce of the great lakes and American rivers from the benefits of admiralty jurisdiction, began to be appreciated in the decade of 1840, and congress attempted to relieve the situation by the well-known act of 1845, "extending the jurisdiction of the district courts to certain

(*Houseman v. The North Carolina*, 15 Pet. [U. S.] 40, 10 L. ed. 653; *M'Donough v. Dannery*, 3 Dall. [U. S.] 188, 1 L. ed. 563); seizures (*United States v. Betsy & Charlotte*, 4 Cranch [U. S.] 443, 2 L. ed. 673), torts in general (*Manro v. Almeida*, 10 Wheat. [U. S.] 473, 6 L. ed. 369), the powers of the courts exercising admiralty jurisdiction (*Penhallow v. Doane's Admr.*, 3 Dall. 54, 1 L. ed. 507), and the like, have always been regarded as of high authority and satisfactory in results. But in defining the boundaries of the jurisdiction within American waters the court committed itself to the doctrine that the jurisdiction in matters involving locality was bounded by the tide (*The Thomas Jefferson*, 10 Wheat. [U. S.] 428, 6 L. ed. 358; *Peyroux v. Howard*, 7 Pet. [U. S.] 324, 8 L. ed. 700; *United States v. Coombs*, 12 Pet. [U. S.] 72, 9 L. ed. 1004). It held that there was no lien for supplies furnished at the home port of the vessel (*The General Smith*, 4 Wheat. [U. S.] 438, 4 L. ed. 609); that there was no jurisdiction of accounts between part-owners (*The Orleans v. Phoebus*, 11 Pet. [U. S.] 175, 9 L. ed. 677); nor of a contract for the building of a ship (*Roach v. Chapman*, 22 How. [U. S.] 129, 16 L. ed. 294); nor of mortgages on vessels (*Bogart v. The John Jay*, 11 How. [U. S.] 399 L. ed.; nor of personal suits for contribution in general average (*Cutler v. Rae*, 7 How. [U. S.] 729, 12 L. ed. 890). Many of these restrictions have been since modified or removed by subsequent decisions of the supreme court in response to a clearer appreciation

of the real necessities of the case which came with the growth of the commerce involved.

23. In the *Thomas Jefferson*, 10 Wheat. (U. S.) 428, 6 L. ed. 358, where the voyage involved was on the Missouri river, it was held that there was no jurisdiction in the admiralty of a libel for seamen's wages earned on waters outside of the ebb and flow of the tide.

*Peyroux v. Howard*, 7 Pet. (U. S.) 324, 8 L. ed. 700, was a libel against the steamboat "Planter," for repairs done at New Orleans. The court said that the jurisdiction of the admiralty depended on whether the tide of the Mississippi ebbed and flowed as high up the river as New Orleans. This was a question of fact of which it might take judicial notice.

*The Orleans v. Phoebus*, 11 Pet. (U. S.) 175, 9 L. ed. 677, was a libel in the nature of a possessory suit by one part owner against the others, praying for a sale of the ship, an accounting between the owners, and a distribution of the proceeds of the sale. The court below had given a decree accordingly. In the supreme court, when it appeared that the substantial employment of the boat was between New Orleans and ports on the Ohio river, outside of the ebb and flow of the tide, the libel was dismissed for want of jurisdiction. An intervening libel for wages was dismissed on the same ground.

The rule was reiterated in *United States v. Coombs*, 12 Pet. (U. S.) 72, 9 L. ed. 1004.

cases upon the lakes and navigable waters connecting the same.<sup>24</sup> The conspicuous features of this statute were that while deferring to the decisions of the supreme court as to the limits of admiralty jurisdiction, it gave to the district courts a similar jurisdiction of like cases, occurring on the waters mentioned, where the vessels were above a specified tonnage and engaged in interstate commerce. Apparently as a concession to the adherents of the common law, a right of trial by jury was provided if desired by the parties, but on the whole, the obvious intention was to extend admiralty jurisdiction to the lakes, in effect, but not in terms.<sup>25</sup>

24. In the *Genesee Chief*, 12 How. (U. S.) 443, 13 L. ed. 1058, constitutionality of this act was attacked. The court decided that it did not attempt to regulate commerce but only the jurisdiction of the federal courts over such commerce, which was outside of their jurisdiction, whether regulated or not. Jurisdiction of the case at bar was sustained under the constitutional grant by repudiating the tide-water rule, but the act itself was left in a condition of doubtful validity.

25. In the case of *The Eagle*, 8 Wall. (U. S.) 15, 19 L. ed. 365, the supreme court held that the act was superfluous as a grant of jurisdiction, because the true interpretation of the constitution carried admiralty jurisdiction to the Lakes of its own force and legislation was unnecessary to accomplish this. The right to a trial by jury might stand in the cases specified, but the rest of the statute was inoperative and void.

At nearly the same time with this statute, the important case of *The De Soto* (Waring v. Clarke), 5 How. (U. S.) 441, 12 L. ed. 226, came before the supreme court, and marked the beginning of its departure from the English restrictions on admiralty jurisdiction. This was a case of collision which occurred on the Mississippi river, nearly a hundred miles above New Orleans and within the body of a county. The court held squarely that the grant in the constitution was neither limited to, nor to be interpreted by, the jurisdictional tests in England, but that, in matters of tort, it depended upon locality alone. In defining locality the court was not yet prepared to abandon the test of tide-water and so, on the theory of judicial notice, found that this collision had happened in a place where there was some current subject to the influence of the tide.

In the subsequent case of *The Mag-nolia*, 20 How. (U. S.) 296, 15 L. ed. 909, the court recognized the rather metaphysical nature of this test and alluded to it as "an occult tide, without ebb or flow." The tide-water theory had then been discarded since the *Genesee Chief*, in 1851.

The natural result of the "*De Soto*" case was the abandonment of the tide-water test altogether, and this soon followed in the case of *The Genesee Chief*, decided in 1851 (12 How. [U. S.] 443, 13 L. ed. 1058). This was a collision on Lake Ontario, for which suit was brought under the Act of 1845. The court held that the statute was within the powers of congress, not resting upon the authority to regulate commerce, but upon the ground that the lakes were within the scope of admiralty jurisdiction as known and understood in the United States when the constitution was adopted; and that the grant of the constitution was not limited to tide-waters, but extended to all public navigable lakes and rivers, where commerce is carried on between different states, or with a foreign nation.

The case of *Fretz v. Bull*, 12 How. (U. S.) 466, 13 L. ed. 1068, involved a collision on the Mississippi river above any tidal influence, and was contemporaneous with *The Genesee Chief*, and followed the rule of that case.

On like reasoning the exercise of admiralty jurisdiction was excluded altogether from waters within the body of a county, irrespective of whether or not the locality was affected by the influence of the tide. This position prevailed for more than fifty years, and until the case of *The De Soto* (Waring v. Clarke), 5 How. (U. S.) 441, 12 L. ed. 226.



So, also, during the period referred to, the English admiralty had no authority to take cognizance of any cause of which the courts of common law had jurisdiction and could give the parties a trial by jury. Taken in connection with the clause in the judiciary act which saved to suitors the benefit of a common law remedy, this gave countenance to a similar doctrine in this country which was not corrected by the supreme court until 1847.<sup>26</sup>

Again, it was held for a time that the admiralty jurisdiction of the district courts was controlled by the commerce clause of the constitution and could not be exercised unless the craft were engaged in interstate commerce, or the transaction involved business of this character. This doctrine prevailed until 1861.<sup>27</sup>

Several cases were decided between 1846 and 1859, in which it was held that the extent of the admiralty grant in the constitution was limited to foreign or interstate commerce, and although there had been an express declaration to the contrary in the "Genesee Chief," in 1851.<sup>28</sup> In 1851, however, when a case of collision on the Hudson river came before the court, it was held that the power of congress to regulate commerce was not the measure of the admiralty jurisdiction.<sup>29</sup> In 1870 the court declared that the question was one of fact

26. *Waring v. Clarke*, 5 How. (U. S.) 441, 12 L. ed. 226.

While never affirmed by the supreme court as a test of admiralty jurisdiction, the right to a trial by jury was a valuable weapon for the advocates of a restricted jurisdiction in view of the reservation of a common law remedy in the Judiciary Act. It was finally made plain that this related only to suits *in personam* and qualified only the concurrent jurisdiction of the district courts. *Insurance Co. v. Dunham*, 11 Wall. (U. S.) 1, 20 L. ed. 90; *The Belfast*, 7 Wall. (U. S.) 624, 19 L. ed. 266; *The Hine*, 4 Wall. (U. S.) 555, 18 L. ed. 451; *The Moses Taylor*, 4 Wall. (U. S.) 411, 18 L. ed. 397.

27. In *Waring v. Clarke*, 5 How. 441, 12 L. ed. 226, although the case did not call for the expression because the ship was engaged in interstate commerce, the opinion of the court contained this statement: "It is a maritime court instituted for the purpose of administering the law of the seas. There seems to be ground, therefore, for restraining its jurisdiction, in some measure, within the limit of the grant of the commercial power which would confine it, in cases of contract, to those concerning the navigation and trade of the country upon the high seas and tide-waters with foreign countries and among the several states. Contracts growing out of the purely internal

commerce of the state, as well as commerce beyond tide-waters, are generally domestic in their origin and operation and could scarcely have been intended to be drawn within the cognizance of the federal courts."

28. *Allen v. Newberry*, 21 How. (U. S.) 244, 16 L. ed. 110; *Maguire v. Card*, 21 How. (U. S.) 248, 16 L. ed. 118; *Nelson v. Leland*, 22 How. (U. S.) 48, 16 L. ed. 269.

29. *The Commerce*, 1 Black (U. S.) 574, 17 L. ed. 107. See also, *The Belfast*, 7 Wall. (U. S.) 624, 19 L. ed. 266. *In re Garnett*, 141 U. S. 1, 14, 15, 11 Sup. Ct. 840, 35 L. ed. 631, Mr. Justice Bradley said: "It being established, therefore, that the law of limited liability is part of the maritime law of the United States, it only remains to determine whether that law may be applied to navigable rivers above tide-water, such as the Savannah River, and to vessels engaged in commerce on such a river, like the steamboat *Katie*, in this case. Of this there can be no doubt whatever. The question has been settled by a long course of decisions, some of which are here referred to. *Genesee Chief v. Fitzhugh*, 12 How. 443; *Fretz v. Bull*, 12 How. 466; *Jackson v. The Magnolia*, 20 How. 296; *Nelson v. Leland*, 22 How. 48; *The Propeller Commerce*, 1 Black 574; *The Hine v. Trevor*



and that those waters were navigable in law which were navigable in fact, that is, used or capable of being used, in their ordinary condition, as highways of commerce. Such waters are navigable waters of the United States, within the meaning of the acts of congress, when they form, in whole or in part, a highway for commerce between the states and with foreign nations.<sup>30</sup>

Certain other doctrines, like the lack of jurisdiction over mortgages and matters of account, ship-building contracts, and the rights of material-men in a vessel's home port, became established during the earlier period of the court, and it has as yet been indisposed to modify them in conformity with the general law.<sup>31</sup>

The liberal tendency appears most clearly in the series of decisions under the "Limited Liability Act" of 1851 and the rules of court adopted for giving it efficiency and force.<sup>32</sup>

The development of the law of limited liability of shipowners came with the great increase in the business of navigation which the application of steam produced and was in response to the necessity of affording owners a more restricted liability than the common law allowed. This rule is really a very old doctrine of the general maritime law which either through its personification of the ship, or an application of the law of demand, allowed an owner to free himself of responsibility for the obligations of the vessel, by abandoning her to the creditors.<sup>33</sup>

4 Wall. 555; *The Belfast*, 7 Wall. 624; *The Eagle*, 8 Wall. 15; *The Daniel Ball*, 10 Wall. 557; *The Montello*, 20 Wall. 430; *Ex parte Boyer*, 109 U. S. 629. In all of these cases it was held that the admiralty and maritime jurisdiction granted to the Federal government by the Constitution of the United States is not limited to tide-waters, but extends to all public navigable lakes and rivers. In some of the cases it was held distinctly that this jurisdiction does not depend on the question of foreign or interstate commerce, but also exists where the voyage or contract, if maritime in character, is made and to be performed wholly within a single State."

30. *The Daniel Ball*, 10 Wall. (U. S.) 557, 19 L. ed. 999; *The Montello*, 11 Wall. (U. S.) 411, 20 L. ed. 191.

31. With the reports of Black and Wallace, and the era which knew the Civil War, the element of dissent disappears and the tendency is to administer admiralty jurisdiction on broad and liberal lines. The exclusive side of its authority is asserted with great positiveness as against the State laws for the enforcement of liens on watercraft (*The Belfast*, 7 Wall. [U. S.]

624, 19 L. ed. 266; *The Moses Taylor*, 4 Wall. [U. S.] 411, 18 L. ed. 397; *The Hine*, 4 Wall. [U. S.] 555, 18 L. ed. 451) and in overthrowing the theory of restrictions on the jurisdiction by reason of the vessel being engaged in business wholly within the state, *The Belfast*, 7 Wall. (U. S.) 624, 19 L. ed. 266; *The Commerce*, 1 Black. (U. S.) 574, 17 L. ed. 107.

32. *Norwich Co. v. Wright*, 13 Wall. (U. S.) 104, 20 L. ed. 585.

33. *The Rebecca*, 1 Ware 187, 20 Fed. Cas. No. 11,619; *The Phebe*, 1 Ware 263, 19 Fed. Cas. No. 11,064; *Wheeler's Modern Law of Carriers*, c. 1.

The loss of the steamer *Lexington*, in 1840, and the consequent liability of her owners (*New Jersey S. N. Co. v. Merchants' Bank*, 6 How. [U. S.] 344, 12 L. ed. 465), caused congress to adopt the Act of 1851 (R. S. 4282-4289), which, in effect, incorporated into the maritime law of the United States the rule of the general maritime law (*Norwich Co. v. Wright*, 13 Wall. [U. S.] 104, 20 L. ed. 585). This legislation was upheld by the supreme court as a proper exercise of the powers of congress, both under the commerce clause of the constitution (*Lord v. Goodall*, etc. S. S. Co., 102

The first statute limited liability for torts. In 1884 Congress passed a further statute on this subject, the avowed intention of which was to include all liabilities, contract as well as tort, and to make a ship like a corporation so far as her debts and liabilities were concerned, irrespective of the owner's part in incurring them.<sup>34</sup>

In 1891 Congress created the courts of appeals and transferred to them the greater part of the appellate jurisdiction in admiralty cases which the supreme court had exercised for more than a century. While still retaining the right of final review of all maritime cases through writs of certiorari, according to its discretion, and the right of direct appeal on questions of jurisdiction alone, for most purposes the activity of the supreme court in admiralty causes was terminated by this legislation.

**B. AMERICAN ADMIRALTY JURISDICTION. — 1. Source. — a. Constitutional Grant. — (I.) Generally. —** The primary source of all the admiralty jurisdiction of the United States is in the constitution.<sup>35</sup>

**(II.) Commerce Clause Not Involved. —** The jurisdiction is not limited by, or dependent upon, the clause in the federal constitution vesting in Congress the power to regulate foreign and interstate commerce,<sup>36</sup>

U. S. 541, 26 L. ed. 224; *affirming* 4 Saw. 292; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819), as well as on the broader ground that the rule was a part of the general maritime law which congress might adopt into our jurisprudence and which the courts of admiralty jurisdiction might enforce under the admiralty clause alone (*Butler v. Boston & S. S. Co.*, 130 U. S. 527, 9 Sup. Ct. 612, 32 L. ed. 1017; *The City of Norwich*, 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. ed. 134).

34. This is section 18, Act of June 26, 1884, which provides "that the individual liability of a shipowner shall be limited to the proportion of any and all debts and liabilities that his individual share of the vessels bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending." In the debates in congress which accompanied its enactment, the words "privity or knowledge," as limiting the character of the liabilities incurred, were stricken out and the advocates for the bill stated that it was the purpose "to make ownership in all seagoing vessels a limited liability company, in which every individual was liable for only his share." Cases touching the construction of this law and the admiralty jurisdiction under it are: *Great Lake Tow. Co. v. Trans. Co.*, 155 Fed. 11, 83 C. C. A. 607 (cer-

tiorari denied, 207 U. S. 596); *Rudolk v. Brown*, 137 Fed. 106; *Gilchrist v. Chicago Ins. Co.*, 104 Fed. 566; *Warner v. Boyer*, 74 Fed. 873; *The Faxon*, 66 Fed. 575, 75 Fed. 364; *Whitcomb v. Emerson*, 50 Fed. 128; *The Giles Loring*, 48 Fed. 474; *Gokey v. Fort*, 44 Fed. 364; *McPhail v. Williams*, 41 Fed. 61; *Force v. Providence W. Ins. Co.*, 35 Fed. 767. For debates in Congress, see Congressional Record, May-June, 1884, 3958-3973-5452.

35. Article III, Sec. 2, declares that "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction."

For the interpretation of this constitutional grant of authority, see *Insurance Company v. Dunham*, 11 Wall. 1, 20 L. ed. 90; *De Lovio v. Boit*, 2 Gall. 398.

36. *The Mary Washington*, 1 Abb. Adm. 1, 16 Fed. Cas. No. 9,229. See *The Volunteer*, 15 Fed. Cas. No. 8,260. Compare *The Lottawanna*, 21 Wall. (U. S.) 558, 22 L. ed. 654.

In *The Robert W. Parsons*, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. ed. 73, the court said: "Suggestion is also made that the admiralty jurisdiction of the Federal courts does not extend to contracts for the repair of vessels engaged wholly in commerce within a state. It is true that as late as 1858, in *The Fashion* (*Allen v. Newberry*) 21 How. 244, it was held, that under the act of congress of 1845, extending jurisdiction of

though it seems that only those waters which form a link in a maritime highway between states are the subjects of admiralty jurisdiction.<sup>37</sup>

(III.) **Rule of Interpretation.**—The same rule of interpretation is applied to this grant as to other portions of the constitution. Each word must be given its plain meaning and none deprived of its appropriate force. Together, they are to be understood in their natural and obvious sense, in connection with the whole instrument and the purposes for which the grant was made to the federal judiciary.<sup>38</sup>

(IV.) **Test of Nature and Extent.**—What are “cases of admiralty and maritime jurisdiction,” within the meaning of these words of the constitution, is to be determined by a test which is, in the main, an historical one, namely, the practice and usages which prevailed in this country among the courts of admiralty at the time the constitution was adopted, the subsequent legislation of congress, and, principally, the decisions of the supreme court.<sup>39</sup>

the Federal courts to vessels employed in navigation upon the Great Lakes, between ports and places in different states, it did not extend to the case of a shipment of goods from a port in one state to another port in the same state, and that in the case of *The Goliah* (*McGuire v. Card*), 21 How. 248, the same doctrine was extended to a contract for supplies furnished to a vessel engaged in trade between different ports in the State of California. These cases, however, were practically overruled by that of *The Belfast*, 7 Wall. 624, in which a state statute, similar to the statute of New York involved in this case, for a breach of contract of affreightment between ports in the same state (Alabama), was held to be unconstitutional and void, although the shipments were between ports of the same state. The contention was distinctly made (p. 635) that the state court had jurisdiction because the contract of affreightment was between ports and places in the same state, but it was as distinctly disclaimed by the court, and the prior cases practically overruled. So also in *Ex parte Boyer*, 109 U. S. 629, the doctrine of *The Belfast* was reiterated and applied to a collision between canalboats, Mr. Justice Blatchford saying: “That it makes no difference as to the jurisdiction of the District Court, that one or the other of the vessels was at the time of the collision on a voyage from one place in the State of Illinois to another place in the same State.” To the same effect are *The Daniel Ball*, 10 Wall. 557; *The Montello*, 20 Wall. 411;

*The Commerce*, 1 Black. 574, and *Lord v. Steamship Co.*, 102 U. S. 541.”

*In re Garnett*, 141 U. S. 1, 11 Sup. Ct. 840, 35 L. ed. 631, was a suit in which it was sought to restrain the scope of the law of the limited liability of shipowners to the domain of interstate commerce. The court held that as this law was as broad as the admiralty jurisdiction, it could not be limited in its operation by the powers of Congress over interstate commerce, there being no necessary connection between the two subjects.

37. See *infra*, I, B, 7, a, (VI).

38. In *The St. Lawrence*, 1 Black. (U. S.) 522, 527, 17 L. ed. 180, the Supreme Court said that the boundary of the constitutional grant of admiralty and maritime jurisdiction “is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal Government.”

39. *The Lottawanna*, 21 Wall. (U. S.) 558, 22 L. ed. 654; *Insurance Co. v. Dunham*, 11 Wall. (U. S.) 1, 20 L. ed. 90; *Waring v. Clarke*, 5 How. (U. S.) 441, 12 L. ed. 226; *New Jersey Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344, 12 L. ed. 465.

In *Ex parte Easton*, 95 U. S. 68, 24 L. ed. 373, the court says: “Judicial power under the Federal Constitution extends to all cases of admiralty and maritime jurisdiction, and it was doubtless the intention of Congress, by the ninth section of the Judiciary Act, to



confer upon the District Court the exclusive original cognizance of all admiralty and maritime causes, the words of the act being in terms exactly co-extensive with the power conferred by the Constitution. In order, therefore, to determine the limits of the admiralty jurisdiction, it becomes necessary to ascertain the true interpretation of the constitutional grant. On that subject three propositions may be assumed as settled by authority, and to those it will be sufficient to refer on the present occasion, without much discussion of the principles on which the adjudications rest: 1.—That the jurisdiction of the district courts is not limited to the particular subjects over which the admiralty courts of the parent country exercised jurisdiction when our Constitution was adopted. 2.—That the jurisdiction of those courts does not extend to all cases which would fall within such jurisdiction, according to the civil law and the practice and usages of continental Europe. 3.—That the nature and extent of the admiralty jurisdiction conferred by the Constitution must be determined by the laws of Congress and the decisions of this court, and by the usages prevailing in the courts of the States at the time the Federal Constitution was adopted. No other rules are known which it is reasonable to suppose could have been in the minds of the framers of the Constitution than those which the opinion of Justice Story in *DeLovio v. Boit*, 2 Gall. 398, 7 Fed. Cas. No. 3,776 remains as one of the most learned ever written and the foundation, in one sense, of American admiralty jurisdiction. As to the construction of the words of the Constitution, he said: "What is the true interpretation of the clause, 'all cases of admiralty and maritime jurisdiction'? If we examine the etymology, or received use, of the words 'admiralty' and 'maritime jurisdiction,' we shall find that they include jurisdiction of all things done, upon and relating to the sea, or, in other words, all transactions and proceedings relative to commerce and navigation, and to damages or injuries upon the sea. . . . The clause however of the constitution not only confers admiralty jurisdiction, but the word 'maritime' is superadded, seemingly *ex industria* to remove every latent doubt. 'Cases of maritime jurisdiction' must include all maritime contracts, torts and

injuries, which are in the understanding of the common law, as well as of the admiralty, '*causae civiles et maritimae*.' In this view there is a peculiar propriety in the incorporation of the term 'maritime' into the constitution. The disputes and discussions, respecting what the admiralty jurisdiction was, could not but be well known to the framers of that instrument. One party sought to limit it by locality; another by subject matter. It was wise, therefore, to dissipate all question by giving cognizance of all 'cases of maritime jurisdiction,' or, what is precisely equivalent, of all maritime cases. Upon any other construction, the word 'maritime' would be mere tautology; but in this sense it has a peculiar and appropriate force. . . . The language of the constitution will therefore warrant the most liberal interpretation; and it may not be unfit to hold, that it had reference to that maritime jurisdiction, which commercial convenience, public policy, and national rights, have contributed to establish, with slight local differences, over all Europe; that jurisdiction, which, under the name of consular courts, first established itself upon the shores of the Mediterranean, and from the general equity and simplicity of its proceedings, soon commended itself to all the maritime states; that jurisdiction, in short, which, collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, produced the venerable *Consolato del Mare*, and still continues in its decisions to regulate the commerce, the intercourse, and the welfare of mankind. . . . On the whole, I am, without the slightest hesitation, ready to pronounce, that the delegation of cognizance of 'all civil cases of admiralty and maritime jurisdiction' to the Courts of the United States comprehends all maritime contracts, torts, and injuries." *Butler v. Boston & S. S. Co.*, 130 U. S. 527, 9 Sup. Ct. 612, 32 L. ed. 1017. See *infra*, I. B. 1 b.

Other cases on the approved interpretation of the admiralty clause of the Constitution are: *Workman v. New York*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. ed. 314; *Oregon R. & Nav. Co. v. Balfour*, 179 U. S. 55, 21 Sup. Ct. 28, 45 L. ed. 82; *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. ed. 981; *Ex parte Easton*, 95 U. S. 68, 24 L. ed. 373; *The Moses Taylor*, 4 Wall. (U.

(V.) *Historical Test Not Restrictive.* — But the fact that the criterion of this jurisdiction is an historical one does not imply that the law has been cast into any rigid limitations, as of any particular time or era, or that it may not adapt itself to varying conditions or altered circumstances as they may arise.<sup>40</sup>

(VI.) *Not Limited by Extremes.* — It is settled that the nature and extent of this jurisdiction must be determined by the practice and usages prevailing in the courts of the states at the time of the adoption of the constitution and, accordingly, that the admiralty jurisdiction of the district courts is neither limited to the restricted field of the English admiralty of that period, nor, on the other hand, does it extend to all the cases which would fall within such jurisdiction according to the civil law and the modern law of continental Europe.<sup>41</sup>

b. *Legislative and Judicial Action.* — Since admiralty jurisdiction is a constitutional grant the determination of its limits is largely a

S.) 411, 18 L. ed. 397; *The St. Lawrence*, 1 Black (U. S.) 522, 17 L. ed. 180; *Cope v. Dry-Dock*, 10 Fed. 142; *The Great Western*, 29 Fed. Cas. No. 17,443; *The Sandwich*, 1 Pet. Adm. 233, 23 Fed. Cas. No. 13,409; *Steele v. Thacher*, 1 Ware 85, 22 Fed. Cas. No. 13,348; *The Seneca*, 3 Wall. Jr. 395, 21 Fed. Cas. No. 12,670; *The Young American*, Newb. 101, 21 Fed. Cas. No. 12,549; *Rev. Cutter No. 1*, Brown's Adm. 76, 20 Fed. Cas. No. 11,713; *The Mears*, Newb. 197, 18 Fed. Cas. No. 10,766; *The Huntsville*, 8 Blatchf. 228, 12 Fed. Cas. No. 6,916; *The Continental*, 10 Fed. Cas. No. 5,425; *The Backus*, Newb. 1, 9 Fed. Cas. No. 5,048; *Cunningham v. Hall*, 1 Cliff. 43, 6 Fed. Cas. No. 3,481; *Chisholm v. Northern Trans. Co.*, 61 Barb. (N. Y.) 363.

40. In *The Lottawanna*, 21 Wall. (U. S.) 558, 22 L. ed. 654, Mr. Justice Bradley said: "But we must always remember that the court cannot make the law, it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department. It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed. The scope of the maritime law and that of commercial regulation are not coterminous, it is true, but the latter embraces much the largest portion of ground covered by the

former. Under it Congress has regulated the registry, enrolment license, and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews; and many other things of a character truly maritime. And with regard to the question now under consideration, namely, the rights of material-men in reference to supplies and repairs furnished to a vessel in her home port, there does not seem to be any great reason to doubt that Congress might adopt a uniform rule for the whole country, though, of course, this will be a matter for consideration should the question ever be directly presented for adjudication."

41. *Ex parte Easton*, 95 U. S. 68, 24 L. ed. 373. In "*Bags of Linseed*," 1 Black (U. S.) 108, 113, 17 L. ed. 35, the chief justice, speaking for the court, said: "But it may be proper to say, that while this court has never regarded its admiralty authority as restricted to the subjects over which the English courts of admiralty exercised jurisdiction at the time our Constitution was adopted, yet it has never claimed the full extent of admiralty power which belongs to the courts organized under, and governed altogether by, the principles of the civil law." *Revenue Cutter No. 1*, Brown's Adm. 76, 20 Fed. Cas. No. 11,713; *The Gold Hunter*, Blatch. & H. 300, 10 Fed. Cas. No. 5,513; *The Seneca*, Gilp. 10, 7 Fed. Cas. No. 3,650.



judicial question,<sup>42</sup> and the boundaries cannot in general be enlarged or restricted by acts of Congress,<sup>43</sup> by statutes of the states,<sup>44</sup> or by local laws, whether created by legislation or by decisions of state courts,<sup>45</sup> or by rules of the courts.<sup>46</sup> The grant of jurisdiction, however, necessarily carries with it the power to legislate,<sup>47</sup> and congress, therefore, as the legislative arm of the federal government, may regulate not only the procedure in admiralty,<sup>48</sup> but within certain limits, maritime rights and jurisdiction as well.<sup>49</sup> While it cannot make maritime those controversies and things which are essentially non-maritime by nature, it may recognize and enforce rights and remedies which are in their nature maritime, although not previously recog-

42. *The Lottawanna*, 21 Wall. (U. S.) 558, 576, 22 L. ed. 654; *The Genesee Chief*, 12 How. (U. S.) 443, 13 L. ed. 1058; *Black's Constitutional Law*, c. IV.

43. *The Blackheath*, 195 U. S. 361, 365, 25 Sup. Ct. 46, 49 L. ed. 236; *The Lottawanna*, 21 Wall. (U. S.) 558, 576, 22 L. ed. 654; *The St. Lawrence*, 1 Black (U. S.) 522, 526, 17 L. ed. 180. See *The Chusan*, 2 Story 455, 5 Fed. Cas. No. 2,717.

44. *Workman v. New York*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. ed. 314; *The J. E. Rumbell*, 148 U. S. 1, 12, 13 Sup. Ct. 498, 37 L. ed. 345; *The Mary F. Chisholm*, 129 Fed. 814.

In *Mack S. S. Company v. Thompson* (C. C. A.), 176 Fed. 499, 504, the court of appeals for the sixth circuit said: "We think the maritime law subsists as an entirety as the subject of federal jurisprudence, and is to be administered by the federal courts without impairment by state legislation. If changes are to be made in it, it must be done by federal authority." Here the point was whether the question of credit is as material under state statutes giving maritime liens as it is under the general maritime law. The rule being that where a contract is maritime, the admiralty will enforce liens given for its security, even where created by the local, or State, law (*The Lottawanna*, 21 Wall. 558, 22 L. ed. 654), and the state statutes generally omitting reference to credit as an element of their liens, their literal construction, in this respect, would effect a change in the general maritime law by other than federal authority.

45. In *Watts v. Camors*, 115 U. S. 353, 6 Sup. Ct. 91, 29 L. ed. 406, a libel on a charter-party, the question was as to the amount of damages to be awarded, whether the sum stipulated

in the contract, which was the measure according to the law of the place, or the actual damages, which would be more in harmony with the practice of courts of admiralty. The court said: "The provisions of the Civil Code of Louisiana, and the decisions of her Supreme Court, tend to show that in the courts of that state, in case of a total breach of the contract by one party, the other might have judgment for the full amount of the penalty stipulated by the parties. . . . But the law of Louisiana does not govern this question, whether it is treated as a question of construction of the contract of the parties or as a question of judicial remedy. . . . If it is considered as a question of the remedy and relief to be judicially administered, the equity and admiralty jurisdiction of the courts of the United States, under the national Constitution and laws, is uniform throughout the Union, and cannot be limited in its extent, or controlled in its exercise, by the laws of the several states."

46. *The Lottawanna*, 21 Wall. (U. S.) 558, 22 L. ed. 654; *The St. Lawrence*, 1 Black (U. S.) 522, 17 L. ed. 180. See also *United States v. Steamboat Co.*, 202 U. S. 184, 26 Sup. Ct. 648, 50 L. ed. 897; *Hudson v. Steamboat Co.*, 77 Fed. 846; *The Independence*, 2 Curt. 350, 356, 13 Fed. Cas. No. 7,014; *Gates v. Johnson*, 10 Fed. Cas. No. 5,268.

47. See *Ex Parte Garrett*, 141 U. S. 1, 11 Sup. Ct. 840, 35 L. ed. 631; *The Chusan*, 2 Story 455, 5 Fed. Cas. No. 2,717.

48. See *infra*, II, B.

49. *Butler v. Steamship Co.*, 130 U. S. 527, 9 Sup. Ct. 612, 32 L. ed. 1017; *The Scotland*, 105 U. S. 24, 26 L. ed. 1001; *The Lottawanna*, 21 Wall. (U. S.) 558, 22 L. ed. 654.



nized as such by the American courts.<sup>50</sup> So, also, while state statutes cannot regulate or abridge the admiralty jurisdiction, they may create maritime remedies which the admiralty courts will recognize and enforce.<sup>51</sup>

2. Divisions of. — a. *Generally.* — This jurisdiction is classified as original and appellate; and again, as exclusive or concurrent, in respect of courts of the common law; and again, as civil, criminal, and prize. The original jurisdiction of the supreme court, being limited by the constitution to cases affecting ambassadors and consuls, and those in which a state shall be a party, does not extend to admiralty cases in general, and, as to these, its jurisdiction, which is appellate only, is wholly within the control of congress.<sup>52</sup>

b. *Classes of Original Jurisdiction.* — (I.) *Criminal.* — The original jurisdiction of admiralty courts includes a criminal as well as a civil and a prize jurisdiction, but, in criminal matters the court proceeds according to the common law and with a jury. The right to prosecute at all for offenses committed on the high seas depends on the constitutional grant of admiralty jurisdiction and the courts have un-

50. See *The Blackheath*, 195 U. S. 361, 364, 25 Sup. Ct. 46, 49 L. ed. 236 (particularly the opinions of Justices Holmes and Brown); *Ex Parte Phoenix Ins. Co.*, 118 U. S. 610, 7 Sup. Ct. 25, 30 L. ed. 274.

An example of this may be seen in the fact that the legislation of congress in regard to the rule of the limited liability of shipowners (R. S. 4282 to 4289, inclusive) brought into American admiralty jurisprudence from the general maritime law a very wide field which it had left unoccupied up to that time. *Great Lake Tow. Co. v. Transp. Co.*, 155 Fed. 11, 16, 83 C. C. A. 607; *The Rebecca*, 1 Ware 187, 20 Fed. Cas. No. 11,619.

In *Butler v. Steamship Co.*, 130 U. S. 527, 9 Sup. Ct. 612, 32 L. ed. 1017, the court said: "Whilst the general maritime law, with slight modifications, is accepted as law in this country, it is subject to such amendments as Congress may see fit to adopt. One of the modifications of the maritime law, as received here, was a rejection of the law of limited liability. We have received that. Congress has restored that article to our maritime code. We cannot doubt its power to do this. As the Constitution extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction, and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature,

and not in the state legislatures. It is true, we have held that the boundaries and limits of the admiralty and maritime jurisdiction are matters of judicial cognizance, and cannot be affected or controlled by legislation, whether state or national. Chief Justice Taney, in *The St. Lawrence*, 1 Black 522, 526, 527; *The Lottawanna*, 21 Wall. 558, 575, 576. But within these boundaries and limits the law itself is that which has always been received as maritime law in this country, with such amendments and modifications as Congress may from time to time have adopted."

51. See I, B, 5.

52. No appellate jurisdiction may be exercised by the supreme court except in pursuance of a grant of it by congress. The provisions of the constitution concerning appellate jurisdiction are not self-executing but quite subject to the action and discretion of congress. *Ex parte McCardle*, 7 Wall. (U. S.) 506, 19 L. ed. 264; *The Alicia*, 7 Wall. (U. S.) 571, 19 L. ed. 84; *Barry v. Mercein*, 5 How. (U. S.) 103, 12 L. ed. 70. In this last case an act of congress permitted the transfer of certain admiralty cases directly to the supreme court on the application of all parties in interest; the court, however, held that this was incompetent as an attempt to give an original jurisdiction withheld by the constitution. *Ex parte Yerger*, 8 Wall. (U. S.) 85, 98, 19 L. ed. 332; *Ex parte Vallandigham*, 1 Wall. (U. S.) 243, 17 L. ed. 589.

doubtedly the power to proceed as courts of admiralty in the disposition of such cases. Nevertheless, they have been reluctant about exercising any criminal jurisdiction not specially covered by acts of congress, and, as criminal cases are tried according to the course of the common law, the criminal jurisdiction of the admiralty, as such, has become a practically negligible quantity.<sup>53</sup>

(II.) *Prize*. — The prize jurisdiction of the district courts, as courts of admiralty, is inherent and exclusive. It is not active except in time of war and is then administered in accordance with the provisions of Title LIV of the revised statutes.<sup>54</sup>

(III.) *Civil*. — The civil jurisdiction of the admiralty is by far its most important field, historically as well as at the present time. While none of the courts of the United States, at the present time, sit as courts of admiralty exclusively, in the exercise of their admiralty jurisdiction they are as exclusively courts of admiralty as if they were separate tribunals. Their various jurisdictions do not blend, but remain as distinct as if they were administered by different courts.<sup>55</sup>

3. *Distribution of*. — a. *Power of Congress*. — The distribution of the judicial power of the United States, except as to the supreme court, is entirely committed to congress, and its discretion is final as to the system, number, or character of the courts to which this power may be assigned.<sup>56</sup>

b. *District Court*. — Pursuant to this power, congress has vested exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, with a few unimportant exceptions,<sup>57</sup> in the federal district courts,<sup>58</sup> saving to suitors, however, their common-law remedy.<sup>59</sup>

53. As to the criminal jurisdiction of the admiralty in the United States, see I Kent's Commentaries, 360, 365; *United States v. Wiltberger*, 5 Wheat. (U. S.) 76, 5 L. ed. 37; *United States v. Bevans*, 3 Wheat. (U. S.) 336, 4 L. ed. 404; *Henry Miller's Case*, Brown's Adm. 156 Fed. Cas. No. 7; *United States v. Coolidge*, 1 Gall. 488, 25 Fed. Cas. No. 14,857.

54. *Glass v. The Sloop Betsey*, 3 Dall. (U. S.) 6, 1 L. ed. 485. As to prize jurisdiction in general, see *The Habana*, 189 U. S. 453, 23 Sup. Ct. 593, 47 L. ed. 900; *The Buena Ventura*, 175 U. S. 384, 20 Sup. Ct. 148, 44 L. ed. 206; *Oakes v. United States*, 174 U. S. 778, 19 Sup. Ct. 864, 43 L. ed. 1169; *Cushing v. Laird*, 107 U. S. 69, 2 Sup. Ct. 196, 27 L. ed. 391; *The Siren*, 13 Wall. 389, 20 L. ed. 505; *Bingham v. Cabbot*, 3 Dall. (U. S.) 19, 1 L. ed. 491; *The Nassau*, 4 Wall. (U. S.) 635, 18 L. ed. 413; *The Admiral*, 3 Wall. (U. S.) 603, 18 L. ed. 58; *The Prize Cases*, 2 Black (U. S.) 635, 17 L. ed. 459; *Jecker v. Montgomery*, 13 How. (U. S.) 498, 14

L. ed. 240; *The Santissima Trinidad*, 7 Wheat. (U. S.) 283, 5 L. ed. 454; *The L'Invincible*, 1 Wheat. (U. S.) 238, 4 L. ed. 80; *The Siren*, 1 Low. 280, 22 Fed. Cas. No. 12,911; *The Hiawatha*, Blatchf. Pr. 1, 12 Fed. Cas. No. 6,451; *The Amy Warwick*, 2 Spr. 123, 1 Fed. Cas. No. 341.

55. *The Sarah*, 8 Wheat. (U. S.) 391, 5 L. ed. 644.

56. *United States v. Union Pacific R. Co.*, 98 U. S. 569, 25 L. ed. 143.

For a review of the legislation with respect to the federal courts and their admiralty jurisdiction, see *The Munson S. S. Line v. Miramar S. S. Co.*, 167 Fed. 960.

57. See *infra*, I, B, 3.

58. *Insurance Co. v. Dunham*, 11 Wall. (U. S.) 1, 23, 20 L. ed. 90.

This was done by the ninth section of the Judiciary Act of 1789; (Act of September 24, 1789; 2 Stat. at L., 59; Rev. Stat. § 563; 1 U. S. Comp. Stat. 457).

59. See *infra*, I, B, 5.

The effect of this grant of admiralty powers was to place in the district courts all the original jurisdiction in matters of admiralty and maritime cognizance which the constitution had granted to the nation.<sup>60</sup> It carried with it full jurisdiction of all matters of prize,<sup>61</sup> as well as of crimes within the admiralty and maritime jurisdiction.<sup>62</sup>

c. *Court of Claims*. — The court of claims has jurisdiction, concurrent with the district and circuit courts, of non-tortious maritime claims against the federal government.<sup>63</sup>

d. *Circuit Court*. — By virtue of the act of 1891 the circuit courts have been shorn of their appellate jurisdiction<sup>64</sup> and now their admiralty powers are confined to taking original cognizance of cases of seizure and condemnation arising under acts relating to insurrection<sup>65</sup> and the slave trade,<sup>66</sup> of certain classes of maritime claims against the federal government,<sup>67</sup> and of other cases when the district judge is unable through disability to perform his duties.<sup>68</sup>

e. *Circuit Court of Appeals*. — Except in certain cases which may be appealed directly to the supreme court,<sup>69</sup> the exclusive appellate jurisdiction from the district courts is in the circuit courts of appeals.<sup>70</sup>

f. *Supreme Court*. — The supreme court is the ultimate tribunal in all matters of admiralty and maritime cognizance, although a large part of its former appellate jurisdiction is now vested in the circuit courts of appeals, which may, however, certify any questions to the supreme court for its decision. The right of direct appeal to the supreme court from the district courts on questions of jurisdiction alone, and its power to issue writs of certiorari to any of the courts below, preserve its control over the whole field of admiralty jurisprudence.<sup>71</sup>

60. *Insurance Company v. Dunham*, 11 Wall. (U. S.) 1, 20 L. ed. 90; *Waring v. Clarke*, 5 How. (U. S.) 441, 12 L. ed. 226; *Martin v. Hunter's Lessee*, 1 Wheat. (U. S.) 304, 4 L. ed. 97; *The Young America*, Newb. 101, 21 Fed. Cas. No. 12,549; *The Isabella*, Brown's Adm. 96, 13 Fed. Cas. No. 7,100.

61. It was settled at an early day that the courts of the United States received under the Judiciary Act, by the delegation of all civil causes of admiralty and maritime jurisdiction, at least as full jurisdiction of all cases of prize as the High Court of Admiralty in England, and the prize jurisdiction of this court was always ample and exclusive. *The Sloop Betsey*, 3 Dall. (U. S.) 6, 1 L. ed. 485; *The Emulous*, 1 Gall. 563, 8 Fed. Cas. No. 4,479; 2 *Parsons, Shipping & Admiralty*, 173; 1 *Kent's Com.* 357; *The Two Friends*, 1 C. Rob. (Eng.) 48.

62. Judiciary Act of September 24, 1789; *Du Ponceau on Jurisdiction*, 59-61.

63. See *United States v. Cornell S.* S. Co., 202 U. S. 184, 26 Sup. Ct. 648,

50 L. ed. 987; *United States v. Morgan*, 99 Fed. 570, 39 C. C. A. 653.

64. Act of Mar. 3, 1891, c. 517, § 4; 26 Stat. at L., P. 826.

65. U. S. Rev. Stat., § 629, cl. 6; § 5309.

66. U. S. Rev. Stat., § 629, cl. 7.

67. *United States v. Morgan*, 99 Fed. 570, 39 C. C. A. 653.

68. U. S. Rev. Stat., §§ 587, 588, 601.

69. See *infra*, I, B, 3, f.

70. The act establishing the Courts of Appeals (26 Stat. 826) provides in section six (1 U. S. Comp. Stat. 549), that appeals or writs of error may be taken from the district courts direct to the Supreme Court in cases of jurisdiction; prize causes, capital crimes, cases involving the construction or application of the Constitution; cases involving the constitutionality of laws of the United States and cases in which state constitutions or laws are claimed to be in contravention of the federal Constitution.

71. Revised Statutes, sections 637, 690; Act of March 3, 1891, 26 Statutes at Large, 826; 1 U. S. Comp. Stat.,



It is possible that where suits in admiralty come within the category of "cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party," the supreme court would have original jurisdiction.<sup>72</sup>

*g. Courts of Territories and District of Columbia.*—Congress has also invested territorial courts with jurisdiction in admiralty cases, not under the doctrine that it was conferring upon them any portion of the judicial power conferred by the constitution, but by virtue of the supreme powers of sovereignty which it has over the territories themselves.<sup>73</sup>

The courts of the District of Columbia also have admiralty jurisdiction.<sup>74</sup>

**4. Remedies of the Jurisdiction.**—*a. In Rem and In Personam.*—As hereinafter shown, the jurisdiction of admiralty is administered by remedies both *in personam* and *in rem*.<sup>75</sup> As to the first their jurisdiction is concurrent with the common-law courts, but as to the second it is exclusive.<sup>76</sup>

*b. Equitable Remedies.*—Admiralty courts, as such, have no jurisdiction to enforce equitable remedies except as hereinafter shown.<sup>77</sup>

**5. When Concurrent and When Exclusive.**—*a. Generally.*—While the admiralty jurisdiction is exclusively vested in the federal courts,<sup>78</sup> the judiciary act of 1789 expressly saves to suitors in all cases "the right of a common-law remedy where the common-law is competent to give it."<sup>79</sup> By this saving clause it was designed to give to litigants the option of resorting to any non-maritime court, whether of law or of equity or of a state or the United States, for the enforcement of any remedy therein afforded them not peculiarly maritime in its nature, notwithstanding that the admiralty law might provide them a remedy or remedies upon the same state of facts.<sup>80</sup>

chapters 8a, 9, 10, 11. These cover the present organization and jurisdiction of the Supreme Court and the Circuit Courts of Appeals. The statute creating the Courts of Appeals is published with annotations in 90 Federal Reporter, v-xlviii and in volume 150 of the same, pages v-xxii.

72. Constitution, Art. III, § 2.

73. 1 Kent's Com. 384; Black's Constitutional Law, 115; American Ins. Co. v. Canter, 1 Pet. 511, 7 L. ed. 242; The City of Panama, 101 U. S. 453, 25 L. ed. 1061; *In re Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. ed. 232. For typical statutes, see Alaska, 23 Statutes at Large, 24; Hawaii, 31 Statutes at Large, 158; Porto Rico, same volume, 84.

74. *Smith v. Burnett*, 173 U. S. 430, 19 Sup. Ct. 442, 43 L. ed. 756.

75. See fully *infra*, II, C, 3.

It was at one time questioned whether the admiralty could proceed

at all *in personam* (Hall's Admiralty, ix), but all doubts on this point have long since been determined in favor of the jurisdiction. *Manro v. Almeida*, 10 Wheat. (U. S.) 473, 6 L. ed. 369; *Atkins v. Disintegrating Co.*, 18 Wall. (U. S.) 272, 21 L. ed. 841; *Cushing v. Laird*, 107 U. S. 69, 2 Sup. Ct. 196, 27 L. ed. 391; *In re Louisville Underwriters*, 134 U. S. 488, 490, 10 Sup. Ct. 587, 33 L. ed. 991. And historically considered it seems that admiralty proceedings *in personam* antedate those *in rem*. See *infra*, II, C, 3, a.

76. See *infra*, I, B, 5.

77. See *infra*, I, B, 5, e.

78. *The Hine v. Trevor*, 4 Wall. (U. S.) 555, 18 L. ed. 451.

79. U. S. Rev. Stat., § 563, ¶ 8.

80. See *Knapp v. McCaffrey*, 177 U. S. 638, 20 Sup. Ct. 824, 44 L. ed. 921; *Chappell v. Bradshaw*, 128 U. S. 132, 9 Sup. Ct. 40, 32 L. ed. 369; *American Steamboat Co. v. Chace*, 16 Wall. 522,

b. *Effect of Limited Liability Act.*—The act providing for limitation of liability does not deprive suitors of their right to avail themselves of a remedy furnished by a non-maritime court.<sup>81</sup>

c. *Proceedings in Rem.*—The admiralty jurisdiction is exclusive in all cases where the proceeding is purely *in rem* and the cause of action is one of admiralty cognizance. These conditions must both exist.<sup>82</sup>

*Proceedings Under Statutes.*—The mere fact that in a proceeding *in personam* in a non-maritime court the plaintiff avails himself of the statutory right to attach does not convert the suit into one *in rem* and thereby destroy the concurrent jurisdiction of the non-maritime court.<sup>83</sup> And when the cause of action is non-maritime, the nature of the proceeding authorized by the statute, whether *in personam* or purely *in rem*, is immaterial, since the admiralty courts have no jurisdiction in any event.<sup>84</sup> But where the cause of action is maritime and the remedy given is one *in rem* against the property itself the jurisdiction of the admiralty courts is exclusive<sup>85</sup> and the statute in

21 L. ed. 369; *The Moses Taylor*, 4 Wall. 411, 18 L. ed. 397, and following sections.

In *Leon v. Galceran*, 11 Wall. (U. S.) 185, 20 L. ed. 74, the court says: "Where the suit is *in rem* against the ship or ship and freight, the original jurisdiction of the controversy is exclusive in the District Courts, as provided by the ninth section of the Judiciary Act, but when the suit is *in personam* against the owner or master of the vessel, the mariner may proceed by libel in the District Court, or he may at his election, proceed in an action at law either in the Circuit Court, if he and his debtor are citizens of different States, or in a State court as in other causes of action cognizable in the State and Federal courts exercising jurisdiction in common law cases, as provided in the eleventh section of the Judiciary Act. He may have an action at law in the case supposed either in the Circuit Court or in the State court, because the common law, in such a case, is competent to give a remedy, and wherever the common law is competent to give a party a remedy in such a case, the right to such a remedy is reserved and secured to suitors by the saving clause contained in the ninth section of the Judiciary Act."

81. *Baird v. Daly*, 57 N. Y. 236, 15 Am. Rep. 488. See title "Shipping."

82. *The Glide*, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. ed. 296. The enforcement of a maritime lien created by a

state statute, by a proceeding *in rem*, in a state court, is an infringement on the exclusive admiralty jurisdiction granted to the federal courts by the Constitution and is void for want of jurisdiction.

83. U. S. — *Knapp v. McCaffrey*, 177 U. S. 638, 20 Sup. Ct. 824, 44 L. ed. 921; *The Hine v. Trevor*, 4 Wall. 555, 18 L. ed. 451. Cal. — *Olsen v. Birch*, 133 Cal. 479, 65 Pac. 1032, 85 Am. St. Rep. 215. Pa. — *Albany City Ins. Co. v. Whitney*, 70 Pa. 248.

84. *The Winnebago*, 205 U. S. 354, 27 Sup. Ct. 509, 51 L. ed. 836. This was a proceeding against a vessel, under the "Water Craft Law" of the state of Michigan (Comp. Laws Mich. 10,789), to enforce liens thereby given for work and materials furnished in the building of the steamer. Such contracts and services not being maritime the proceeding did not trespass on the exclusive jurisdiction of the admiralty. The opinion of the supreme court of Michigan which was affirmed in this case is reported under the title of *Delaney Forge & Iron Co. v. The Winnebago*, 142 Mich. 84, 105 N. W. 527, 113 Am. St. Rep. 566. See also *Johnson v. Chicago etc. Elev. Co.*, 119 U. S. 388, 7 Sup. Ct. 254, 30 L. ed. 447; *The Winnebago*, 141 Fed. 945, 73 C. C. A. 295.

85. *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. ed. 345; *The Moses Taylor*, 4 Wall. (U. S.) 411, 18 L. ed. 397.



so far as it attempts to authorize such proceedings in a non-maritime court is inoperative.<sup>86</sup>

d. *Proceedings in Personam*.—The admiralty and the common law have concurrent jurisdiction where the cause of action is maritime in its nature, but the proceeding is *in personam*, or in other words, where the plaintiff seeks only a personal judgment against the defendant, with or without a preliminary attachment of his goods.<sup>87</sup> This rule applies in actions both *ex contractu*<sup>88</sup> and *ex delicto*.<sup>89</sup> But even in a proceeding *in personam* the non-maritime court cannot enforce a right or remedy which is peculiarly maritime in its nature.<sup>90</sup>

e. *Equitable Remedies*.—A suit in equity, though involving maritime rights, is within the clause saving the common-law remedy.<sup>91</sup>

86. *The Moses Taylor*, 4 Wall. (U. S.) 411, 18 L. ed. 397.

87. *Knapp v. McCaffrey*, 177 U. S. 638, 20 Sup. Ct. 824, 44 L. ed. 921. On page 648 the court said: "The true distinction between such proceedings as are and such as are no invasions of the exclusive admiralty jurisdiction is this: If the cause of action be one cognizable in admiralty, and the suit be *in rem* against the thing itself, though a monition be also issued to the owner, the proceeding is essentially one in admiralty. If, upon the other hand, the cause of action be not one of which a court of admiralty has jurisdiction, or if the suit be *in personam* against an individual defendant, with an auxiliary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the statute (sec. 563) of a common law remedy. The suit in this case being one in equity to enforce a common law remedy, the state courts were correct in assuming jurisdiction."

88. *Ransberry v. No. Am. Transp. & Tr. Co.*, 22 Wash. 476, 61 Pac. 154.

For *Seaman's Wages*.—*Leon v. Galceran*, 11 Wall. (U. S.) 185, 20 L. ed. 74.

On *Contract of Affreightment or Charter Party*.—*Miss. — Parisot v. Helm*, 52 Miss. 617. *Pa. — Albany City Ins. Co. v. Whitney*, 70 Pa. 248. *Wash. — Gill v. No. Am. Transp. & Tr. Co.*, 37 Wash. 694, 79 Pac. 778.

For *supplies furnished for use of a vessel*. *Crawford v. Roberts*, 50 Cal. 235.

On *Average Bond*.—*Dike v. The St. Joseph*, 6 McLean 573, 7 Fed. Cas. No. 3,908; *Conrad v. De Montcourt*, 138 Mo. 311, 39 S. W. 805.

On *Contract of Marine Insurance*.—*De Lovio v. Boit*, 2 Gall. 398, 7 Fed. Cas. No. 3,776; *Albany City Ins. Co. v. Whitney*, 70 Pa. 248.

For *Pilotage*.—*The Wave v. Hyer*, 2 Paine 131, 29 Fed. Cas. No. 17,300.

89. *U. S. — Belden v. Chase*, 150 U. S. 674, 14 Sup. Ct. 264, 37 L. ed. 1218; *Chappell v. Bradshaw*, 128 U. S. 132, 9 Sup. Ct. 40, 32 L. ed. 369 (injury caused by fire from burning scow); *Schoonmaker v. Gilmore*, 102 U. S. 118, 26 L. ed. 95 (collision); *Brown v. Gilmore*, 92 Pa. 40.

Death by *Wrongful Act*.—*American Steamboat Co. v. Chace*, 16 Wall. (U. S.) 522, 21 L. ed. 369; *McDonald v. Mallory*, 77 N. Y. 546, 33 Am. Rep. 664.

For *Possession of Property*.—*Dailey v. Doe*, 3 Fed. 903; *Warehouse etc. Sup. Co. v. Galvin*, 96 Wis. 523, 71 N. W. 804, 65 Am. St. Rep. 67.

90. See *Belden v. Chase*, 150 U. S. 674, 14 Sup. Ct. 264, 37 L. ed. 1218 (division of damages); *Norwich Co. v. Wright*, 13 Wall. (U. S.) 104, 123, 20 L. ed. 585 (limitation of liability).

Salvage.—While a state court may entertain a suit *in personam* to recover salvage in so far as the right is based upon express or implied contract (*Albany City Ins. Co. v. Whitney*, 70 Pa. 248), it cannot enforce the purely maritime right to salvage or the maritime lien therefor, even in a proceeding *in personam*. *Merritt etc. Co. v. Tice*, 77 App. Div. 326, 79 N. Y. Supp. 120, 97 App. Div. 457, 89 N. Y. Supp. 1057, 118 App. Div. 123, 103 N. Y. Supp. 333; *Frith v. Crowell*, 5 Barb. (N. Y.) 209. *Contra*, *Hunter v. St. Louis & M. Transp. Co.*, 25 Mo. App. 660 (enforcing a state statute governing salvage).

91. *Knapp v. McCaffrey*, 177 U. S. 638, 20 Sup. Ct. 824, 44 L. ed. 921.



On the other hand admiralty courts have a concurrent jurisdiction with courts of equity only where as an incident to the exercise of admiralty jurisdiction it is necessary to recognize and enforce equitable rights.<sup>92</sup>

**f. Conflicting Jurisdiction.**—Notwithstanding the exclusive jurisdiction of admiralty courts in the enforcement of purely maritime rights and remedies, they will not exercise that jurisdiction over property in the lawful possession of a non-maritime court.<sup>93</sup> Thus property in the rightful<sup>94</sup> custody of a court officer,<sup>95</sup> such as sheriff<sup>96</sup> or receiver,<sup>97</sup> will not be interfered with until such possession terminates. But where such court, or its receiver, continues to use the property in maritime business and permits it to become subject to maritime liens, such liens are enforceable in admiralty notwithstanding the previous custody.<sup>98</sup> So, also, the rule has no application until the property in question has been reduced to the actual possession of the non-maritime court or its officers.<sup>99</sup>

**6. Who May Invoke.**—The exercise of this jurisdiction may be invoked as a matter of right by every citizen of the country.<sup>1</sup> And

*M'Rae v. Bowers Dredg. Co.*, 86 Fed. 344. Here the court sitting in equity and having possession of the property through a receiver held that it would not surrender it for disposition by other courts but would enforce maritime liens against the proceeds.

92. See *infra*, I, B, 11, C. (XVI).

93. *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. ed. 981; *Taylor v. Carryl*, 20 How. 583, 15 L. ed. 1028; *The Red Wing*, 5 McCrary 122, 14 Fed. 869. See *infra*, II, C, 3, c. (II).

**Effect of Proceeding To Limit Liability.**—See title "Shipping."

94. *The J. W. French*, 13 Fed. 916; *The Ferryboats Roslyn and Midland*, 9 Ben. 119, 20 Fed. Cas. No. 12,068; *The Joseph Gorham*, 13 Fed. Cas. No. 7,537.

95. Where the possession of an assignee in insolvency is by force of the statute the possession of the court it will be respected by admiralty courts (*The J. G. Chapman*, 62 Fed. 939), otherwise it will not. *The city of Frankfort*, 62 Fed. 1006; *The James Roy*, 59 Fed. 784.

96. *Taylor v. Carryl*, 20 How. (U. S.) 583, 15 L. ed. 1028.

97. *The E. L. Cain*, 45 Fed. 367. See *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. ed. 981.

98. *The Willamette Valley*, 66 Fed. 565, 13 C. C. A. 635; *Paxson v. Cunningham*, 63 Fed. 132, 11 C. C. A. 111.

99. *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. ed. 981. Here a state court had appointed a receiver

for a corporation owning a number of vessels and various creditors had filed libels against them under which the marshal had taken them into his custody before the receiver obtained actual possession. The state court then enjoined the libelants from prosecuting their suits. On writ of error the supreme court held that the state court had no jurisdiction *in personam* over the libelants as holders of maritime liens when the suits were filed; that the question of jurisdiction as the case then stood was one for the admiralty court to decide in the first instance; and that, as the district court had full jurisdiction, the proceedings in the state court to restrain prosecution of the libels was an unlawful interference with the proceedings in admiralty. The opinion is a very careful review of all the questions involved in the controversy.

1. *The Falls of Keltie*, 114 Fed. 357. This was a libel by four sailors, one of whom alleged that he was an American citizen, and involved the construction of the shipping-articles which they had signed before a British consul, that being the nationality of the ship. It was held that notwithstanding a previous decision by a British vice-consul, the court had jurisdiction of the controversy.

In *The Neck*, 138 Fed. 144, a similar case in some respects, it is said: "Exclusive jurisdiction of all admiralty and maritime causes cognizable

being international in its scope, it may, with few exceptions, be as freely resorted to by foreigners as by citizens.<sup>2</sup>

**7. Extent of Jurisdiction — Waters.**—*a. In General.*—The waters covered by the admiralty jurisdiction of the United States include the high seas and all the public navigable waters of the nation.<sup>3</sup>

*b. The High Seas.*—The expression “high seas,” in respect of which the jurisdiction of the admiralty has never been questioned, in its true sense means the open, unenclosed water, whose use is common and public, and is not limited to the ocean or those waters which are salt or influenced by the tide. The term includes the waters of the great lakes.<sup>4</sup>

*c. Navigable Waters.*—The question of what waters are navigable, within the meaning of admiralty jurisdiction, is one of fact. Waters navigable in fact are deemed navigable in law, with the possible exception of waters wholly within the limits of particular states and having no connection whatever with commerce and navigation on the high seas.<sup>5</sup>

within the United States is by the constitution vested in the national courts, and a citizen of the United States who is a party to a suit of admiralty and maritime jurisdiction cannot be deprived of the right to have such a suit adjudicated by a court upon which admiralty jurisdiction has been conferred pursuant to the constitution. It would be just as competent and just as reasonable to require merchants to refer their controversies arising out of maritime transactions to local magistrates for determination, as to require American seamen to submit their differences respecting wages to consular representatives of foreign countries.”

2. *Panama R. Co. v. Shipping Co.*, 166 U. S. 280, 17 Sup. Ct. 572, 41 L. ed. 1004; *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. ed. 152; *Ex parte Newman*, 14 Wall. 152, 20 L. ed. 877; *The Blaireau*, 2 Cranch 240, 2 L. ed. 266; *The Maggie Hammond*, 9 Wall. 435, 19 L. ed. 772; *Chubb v. Hamburg-A. Packet Co.*, 39 Fed. 431; *Thommasen v. Whitwill*, 12 Fed. 891; *The St. Oloff*, 2 Pet. Adm. 428, 29 Fed. Cas. No. 17,357; *The Invincible*, 2 Gall. 29, 13 Fed. Cas. No. 7,054; *The Jerusalem*, 2 Gall. 191, 13 Fed. Cas. No. 7,293; *The Havana*, 1 Spr. 402, 11 Fed. Cas. No. 6,226; *Davis v. Leslie*, 1 Abb. Adm. 123, 7 Fed. Cas. No. 3,639; *The Bee*, 1 Ware 322, 3 Fed. Cas. No. 1,219; *The Anne Johanne Stuart*’s 2 Vice Adm. 43; *The Courier*, *Lushington* (Eng.) 541; *The Charkieh*,

L. R. 4 A. & E. 120. See *infra*, I, B, 9.

3. The important case of the *Genesee Chief*, 12 How. (U. S.) 443, 13 L. ed. 1058, held that the great lakes, and their connecting waters, were included in the constitutional grant of admiralty and maritime jurisdiction, and the plenary effect of the language used in the Constitution was further illustrated in the case of *The Eagle*, 8 Wall. (U. S.) 15, 19 L. ed. 365, the former being a case of collision on Lake Ontario, and the latter a similar casualty on the Canadian side of the St. Clair river.

4. *United States v. Rodgers*, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. ed. 1071; *Illinois v. Illinois Cent. R. Co.*, 146 U. S. 387, 435, 13 Sup. Ct. 110; *Bigelow v. Nickerson*, 70 Fed. 113, 17 C. C. A. 1.

5. *The Montello*, 11 Wall. (U. S.) 411, 20 L. ed. 191. See *Leovy v. United States*, 177 U. S. 621, 20 Sup. Ct. 797, 44 L. ed. 914.

*The Daniel Ball*, 10 Wall. (U. S.) 557, 19 L. ed. 999. “Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, in their ordinary condition, as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”

*The Montello*, 20 Wall. (U. S.) 430, 441, 22 L. ed. 391. “It would be a narrow rule to hold that in this coun-



d. *Artificial Waterways*.—The admiralty jurisdiction extends over transactions upon artificial waterways, whether domestic or foreign.\*

e. *Foreign waters*, equally with domestic, are within American admiralty jurisdiction in respect of matters transpiring upon them.†

f. *Waters wholly within a state* and having no connection with the public waters of the nation may not be within the admiralty jurisdiction, but this question cannot be said to be finally determined.\*

try, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of its use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway."

In *Ex parte Boyer*, 109 U. S. 629, 3 Sup. Ct. 434, 27 L. ed. 1056, the supreme court approved the expressions of these cases, in a suit more directly involving the extent of admiralty jurisdiction as apart from the power of congress to regulate vessels under its authority over interstate commerce.

6. *The Avon*, Brown's Adm., 170, 2 Fed. Cas. No. 680; the opinion of Judge Emmons in this case is probably the most thorough exposition of the principles involved and holds that the waters of the Welland Canal, in Canada, are within the American admiralty jurisdiction. This was a cause of collision in that water. *Ex parte Boyer*, 109 U. S. 629, 3 Sup. Ct. 434, 27 L. ed. 1056, affirmed the jurisdiction over a canal within the State of Illinois; *The Robert W. Parsons*, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. ed. 73, over the Erie Canal; the City of Milwaukee, 1 Fed. 611, reached the same result in regard to a collision in the same channel; in *The Diana*, Lush. (Eng.), 539, the English admiralty took cognizance of a collision in a canal of Holland.

7. *The Avon*, Brown's Adm., 170, 2 Fed. Cas. No. 680; *Smith v. Condry*, 1 How. (U. S.) 28, 11 L. ed. 35.

In *Panama R. Co. v. Napier Ship Co.*, 166 U. S. 280, 17 Sup. Ct. 572, 41 L. ed. 1004, the court in its opinion said: "The fact that the cause of action arose in the waters of a foreign port is immaterial. While in some cases it is said that a court of admiralty has

jurisdiction of all torts arising upon the high seas, or upon navigable waters of the United States (*The Commerce*, 1 Black, 574; *Holmes v. O. & C. R.*, 5 Fed. 75; *The Clatsop Chief*, 8 Fed. Rep. 167), the connection in which those words are found indicates that they were not used restrictively; and the law is entirely well settled both in England and in this country, that torts originating within the waters of a foreign power may be the subject of a suit in a domestic court. The authorities upon this subject are fully reviewed in an exhaustive opinion by the late Judge Emmons in the case of *The Avon*, Brown's Adm. 170, wherein jurisdiction was taken of a collision occurring upon the Welland Canal in Canada. To the same effect are *Smith v. Condry*, 1 How. 28; *The Ticonderoga*, Swabey, 215; *The Griefswald*, Swabey, 430; *The Diana*, Lushington, 539; *The Courier*, Lushington, 541; *The Halley*, L. R. 2 Ad. & Ec. 3; S. C. L. R. 2 P. C. 193; *The Mali Ivo*, L. R. 2 Ad. & Ec. 356; *The M. Moxham*, 1 P. D. 43, 107. Indeed, large numbers of collisions arise upon the Canadian side of the St. Clair, Detroit and St. Lawrence Rivers, which would not be cognizable in our courts, if the general proposition claimed by the appellant were true, since by the treaty between this country and Great Britain the boundary line is located in or near the centre of the river."

In the *Kaiser Wilhelm Der Grosse*, 175 Fed. 215, it was held, on full authority, that the admiralty had jurisdiction of a case of collision which occurred within a marine league of the coast of France, between a German steamship and a British vessel, the libellant being a subject of the emperor of Austria, although a resident of the United States at the time the libel was filed.

8. In *Ex parte Boyer*, 109 U. S. 629, 632, 3 Sup. Ct. 434, 27 L. ed. 1056, this point was expressly reserved and not decided. See also, *United States v. Ferry Co.*, 21 Fed. 331. But there are



**8. Property Subject to Jurisdiction.** — a. *Generally.* — The property subject to admiralty jurisdiction is, in general, the ship and her cargo.<sup>9</sup> Whether a particular craft or structure is a ship or vessel within admiralty cognizance is not ordinarily dependent upon its size, form, capacity, or means of propulsion.<sup>10</sup> If it is a boating structure capable of navigation it is, in general, a vessel, and the subject of admiralty jurisdiction, although it is not self-propelled and is not used as an instrument of commerce.<sup>11</sup>

dicta in other cases to the effect that such waters are not within the admiralty jurisdiction (*The Montello*, 11 Wall. [U. S.] 411, 20 L. ed. 191; *The Robert W. Parsons*, 191 U. S. 17, 51, 24 Sup. Ct. 8, 48 L. ed. 73, dissenting opinion of Brewer, J.; *United States v. Burlington, etc. Ferry Co.*, 21 Fed. 331); and it has been expressly so held in a state court. *Stapp v. Steamboat Clyde*, 43 Minn. 192, 45 N. W. 430.

9. *Cope v. Vollette Dry Dock Co.*, 119 U. S. 625, 7 Sup. Ct. 180, 30 L. ed. 501.

10. *The Robert W. Parsons*, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. ed. 73. This was a libel for repairs to a canal-boat used on the Erie Canal. The question of what size a craft must be to come within the cognizance of the admiralty is discussed, but no precise rule is stated, the actual dimensions of a craft being unimportant, in comparison with other jurisdictional tests. The opinion says: "The modern law of England and America rules out of the admiralty jurisdiction all vessels propelled by oars, simply because they are the smallest class and beneath the dignity of a court of admiralty; but long within the historic period, and for at least seven hundred years, the triremes and quadriremes of the Greek and Roman navies were the largest and most powerful vessels afloat." See *The Pioneer*, 21 Fed. 426.

*The Ella B.*, 24 Fed. 508. This was a tug of less than five tons burden. "It is contended by the respondent that, because of her diminutive size and the restricted theatre of her operations, she is not within the admiralty jurisdiction of the court. This proposition cannot be maintained. She was engaged in aiding commerce upon navigable waters of the United States. This fact, irrespective of questions relating to the size and tonnage of the vessel, the absence of enrollment and license, and the circumscribed nature

of her employment, is sufficient to give the court jurisdiction."

In *Charles Barnes Co. v. One Dredge Boat*, 169 Fed. 895, it was held that admiralty has jurisdiction over a pumpboat or floating structure equipped with an engine, boiler, pumps and capstans, and used for pumping out canal barges, and will consider it as a navigable structure intended for transportation of a permanent cargo, the equipment with which its work is accomplished. The opinion in this case contains a very complete reference to other decisions on this question.

**Registry or Enrollment Immaterial.** — The fact that the craft is or is not enrolled or registered or licensed under the Acts of Congress is not material on the question of jurisdiction (*The General Cass*, Brown's Adm., 334, 10 Fed. Cas. No. 5,307); so also is the means of propulsion (*The Robert W. Parsons*, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. ed. 73; *The Salisbury*, OLC. 71, 7 Fed. Cas. No. 3,694).

11. *Charles Barnes Co. v. One Dredge Boat*, 169 Fed. 895. See *supra*, "Commerce Clause Not Involved."

As soon as she is launched a vessel becomes the subject of maritime jurisdiction. *Tucker v. Alexandroff*, 183 U. S. 424, 22 Sup. Ct. 195, 46 L. ed. 264.

The employment of the vessel is seldom a material enquiry in matters of jurisdiction, so long as it appertains to travel or trade upon navigable waters (*The General Cass*, Brown's Adm., 334, 10 Fed. Cas. No. 5,307); and it has been held that it was not necessary that she should be engaged in business at all (*The Canton*, 1 Spr. 437, 5 Fed. Cas. No. 2,388); this may be true for some purposes (*The Hendrick Hudson*, 3 Ben. 419, 11 Fed. Cas. No. 6,355), but for others it would apparently exclude her as the subject-matter of some classes of maritime claims (*The Murphy Tugs*, 28 Fed. 429).

**b. Property Not Subject to Seizure.**—(I.) Generally. The admiralty will not ordinarily exercise its jurisdiction *in rem* against property which public policy or considerations of comity treat as exempt from seizure by judicial process.<sup>12</sup> The property of the government and its municipal agencies is therefore ordinarily not subject to maritime jurisdiction.<sup>13</sup> But public ownership does not prevent a maritime lien from attaching<sup>14</sup> and a proceeding *in rem* is therefore available to enforce such a lien, even against public property, whenever it is not necessary to invade the actual possession of the government by the process of the court.<sup>15</sup>

(II.) **Public Vessels.**—Public vessels may be subject to admiralty jurisdiction by the consent of their owners.<sup>16</sup> In the absence of such consent, it will decline jurisdiction.<sup>17</sup> The reason is based on comity as well as the public policy which exempts property of a sovereignty from attachment or sequestration by the courts.<sup>18</sup> Within this rule are the vessels not only of the United States,<sup>19</sup> of the several states,<sup>20</sup>

**Particular Instances.**—Among the craft which have been held to be within admiralty jurisdiction are, a floating bath-house (The Public Bath No. 13, 61 Fed. 692); a house-boat (Rogers v. A Scow Without a Name, 80 Fed. 736); a dredge (Dredge No. One, 87 Fed. 760); lighters (The General Cass, Brown's Adm. 334, 10 Fed. Cas. No. 5,307); and canal-boats (The Robert W. Parsons, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. ed. 73); a barge (Wood v. Two Barges, 46 Fed. 204; The City of Pittsburgh, 45 Fed. 699; The New York, 93 Fed. 495); floating pile-driver (Southern Log Co. v. Lawrence, 84 Fed. 200, *affirmed*, 86 Fed. 907, 30 C. C. A. 480); floating elevator (The Hezekiah Baldwin, 8 Ben. 556, 12 Fed. Cas. No. 6,449).

**Rafts.**—The status of a raft for purposes of admiralty jurisdiction has not been definitely and finally determined by the supreme court, and the cases in the lower courts are not harmonious. See Knapp v. McCaffrey, 177 U. S. 638, 20 Sup. Ct. 824, 44 L. ed. 921. For some purposes a raft has been held subject to the jurisdiction of maritime courts. Bywater v. A Raft of Piles, 42 Fed. 917 (salvage); and see Seabrook v. Raft of R. Cross Ties, 40 Fed. 596 (exhaustively reviewing the authorities and upholding a suit *in rem* against a raft for collision). See also The Rock Island Bridge, 6 Wall. (U. S.) 213, 18 L. ed. (*dictum*); The Mary, 123 Fed. 609; Wells v. The Gas-Float Whitton No. 2, 76 L. T. N. S. (Eng.) 663. For other purposes a contrary rule has been

enforced. See Tome v. Four Cribs of Lumber, Taney 533, 24 Fed. Cas. No. 14,083; Gastrel v. A Cypress Raft, 2 Woods 213, 10 Fed. Cas. No. 5,266; The Gas-Float Whitton No. 2, [1896] Prob. Div. (Eng.) 42; Raft of Timber, 2 W. Rob. (Eng.) 251.

12. 1 Parsons, Shipping & Admiralty, 460; volume 2, 151, 200, 203; Briggs v. Light-boats, 11 Allen 157 (opinion by Justice Gray, subsequently of the supreme court); The Davis, 10 Wall. (U. S.) 15, 19 L. ed. 875.

13. See *infra*, I, B, 8, (II). II, H, 5, b.

14. The Davis, 10 Wall. (U. S.) 15, 19 L. ed. 875.

15. The Davis, 10 Wall. 15, 19 L. ed. 875. See also Two Hundred & Fifty Tons of Salt, 5 Fed. 216, and *infra*, II, H, 6, a.

16. The Prinz Frederick, 2 Dods. (Eng.) 451.

17. The Siren, 7 Wall. (U. S.) 152, 19 L. ed. 129; Young v. Steamship Scotia, 89 L. T. N. S. (Eng.) 374.

18. The Siren, 7 Wall. (U. S.) 152, 19 L. ed. 129; The Santissima Trinidad, 7 Wheat. (U. S.) 283, 5 L. ed. 454.

19. U. S. v. Morgan, 99 U. S. 570, 25 L. ed. 519; The Davis, 10 Wall. (U. S.) 15, 19 L. ed. 875; Briggs v. Light Boats, 11 Allen (Mass.) 157 (opinion by Justice Gray, subsequently of the supreme court).

20. Oyster Police Steamers of Maryland, 31 Fed. 763, a case holding that such vessels belonging to the state were subject to the penalties prescribed for violation of the navigation laws of



and their municipal agencies,<sup>21</sup> but also of foreign governments.<sup>22</sup> The rule covers both war vessels<sup>23</sup> and other vessels engaged in the service of the government,<sup>24</sup> even though privately owned;<sup>25</sup> not, however, when they are engaged in private trade.<sup>26</sup>

(III.) *Property in Custodia Legis.*—Courts of admiralty cannot exercise their jurisdiction over property in the lawful custody of other courts.<sup>27</sup>

9. *Persons Subject to Jurisdiction.*—*a. Generally.*—There are no restrictions upon the admiralty jurisdiction as to persons, either in the capacity of actors or of defendants. Any one having a cause of action of the requisite subject-matter may bring his suit in any court, and jurisdiction over a defendant may be obtained wherever he can be served with process or wherever his property can be attached. In particular instances, this general rule may be subject to the discretion of the court, but such cases are comparatively infrequent. It may also be qualified by treaties.<sup>28</sup>

*b. Controversies between foreigners* are within the jurisdiction of the admiralty, whether the suit is *in rem* or *in personam*. Such controversies are heard as a matter of grace or comity, and not as of right, and the court may, in its discretion, decline to entertain them.<sup>29</sup>

congress, but recognizing the general rule of exemption from seizure under process.

21. *Workman v. New York*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. ed. 314; *The John McCracken*, 145 Fed. 705; *Thompson Nav. Co. v. Chicago*, 79 Fed. 984; *the Protector*, 20 Fed. 207; *The Fidelity*, 9 Ben. 333, 8 Fed. Cas. No. 4,757; 16 Blatchf. 569, 8 Fed. Cas. No. 4,758.

22. *L'Invincible*, 1 Wheat. (U. S.) 238, 4 L. ed. 80; *The Schooner Exchange*, 7 Cranch. (U. S.) 116, 3 L. ed. 287; *The Constitution*, L. R. 4 P. D. (Eng.) 39; *The Parlement Belge*, L. R. 4 P. D. (Eng.) 129; *The Athol*, 1 W. Rob. (Eng.) 374; *The Comus*, 2 Dods. (Eng.) 464; *Marsden on Collisions* (5th ed.) 93, 208.

23. See cases in preceding notes.

24. *Long v. The Tampico*, 16 Fed. 491; *The Jassy*, 95 L. T. N. S. (Eng.) 363; *The Parlement Belge*, L. R. 5 Prob. Div. (Eng.) 197. But see *The Ticonderoga*, Swabey (Eng.) 215.

25. *The Athol*, 1 W. Rob. (Eng.) 374. See also *The Thomas A. Scott*, 10 L. T. N. S. 726.

26. See *The Charkieh*, L. R. 4 Adm. & Ecc. (Eng.) 59, 96.

27. See *supra*, I, B, 5, f.

28. A primary reason for the origin and development of admiralty jurisprudence was the necessity of courts to which persons engaged in maritime

commerce, particularly foreigners and non-residents, could resort at any time and any place. Hence there has always been in its procedure the greatest freedom from all restraints or qualifications on the general right of any party to bring his suit, without reference to his own residence, wherever he might be able to find his adversary, or his property, or the ship or thing against which he desired to proceed. This doctrine has been constantly observed by the federal courts. *In re Louisville Underwriters*, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. ed. 991; *In re Devol Mfg. Co.*, 108 U. S. 401, 2 Sup. Ct. 894, 27 L. ed. 764; *Cushing v. Laird*, 107 U. S. 69, 2 Sup. Ct. 196, 27 L. ed. 391; *New England Ins. Co. v. Navigation Co.*, 18 Wall. (U. S.) 307, 21 L. ed. 846; *Atkins v. Disintegrating Co.*, 18 Wall. (U. S.) 272, 21 L. ed. 841; *Manro v. Almeida*, 10 Wheat. (U. S.) 473, 6 L. ed. 369; *Panama R. Co. v. Napier Ship Co.*, 166 U. S. 280, 17 Sup. Ct. 572, 41 L. ed. 1004. See *The August Belmont*, 153 Fed. 639.

29. *The Arabian (Fairgrieve v. Ins. Co.)*, 94 Fed. 686, 37 C. C. A. 190.

*In Panama R. Co. v. Napier Ship Co.*, 166 U. S. 280, 17 Sup. Ct. 572, 41 L. ed. 1004, the court said: "Had both parties to the libel been foreigners, it might have been within the discretion of the court to decline jurisdiction of the case, though the better



**c. Effect of Treaties.**—The original jurisdiction of the district courts in admiralty may be limited by treaty in respect of controversies between foreigners or in which foreign property is involved.<sup>80</sup> Where one of the parties is a citizen of this country, such treaty stipulations do not govern the case.<sup>81</sup>

**10. The Amount involved in no way affects the jurisdiction of the admiralty,**<sup>82</sup> either original or appellate.<sup>83</sup>

opinion is that, even under those circumstances, the court will take cognizance of torts to which both parties are foreigners; at least in the absence of a protest from a foreign consul. *The Maggie Hammond*, 9 Wall. 435; *The Belgenland*, 114 U. S. 355; *The Courier*, Lushington 541; *The Havana*, 1 Sprague 402; *The Invincible*, 2 Gall. 29; *The Johann Friedrich*, 1 W. Rob. 35; *The Charkieh*, L. R. 4 Ad. & Ec. 120; *The Vivar*, 2 P. D. 29; *The Anne Johanne*, Stuart, Vice Adm. 43; *Thomassen v. Whitwell*, 9 Ben. 113; *Chubb v. Hamburg-American Packet Co.*, 39 Fed. Rep. 431."

In entertaining libels for wages against a foreign vessel, the court of admiralty will, through comity, enforce the law of the ship's flag. *The Belvidere*, 90 Fed. 106.

30. *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. ed. 152; *The Baker*, 157 Fed. 485.

Other cases on this subject are: *Ex parte Newman*, 14 Wall. (U. S.) 152, 20 L. ed. 135; *The Falls of Keltie*, 114 Fed. 357; *The Elwine Kreplin*, 9 Blatchf. 438, 8 Fed. Cas. No. 4,426; *The St. Oloff*, 2 Pet. Adm. 428, 29 Fed. Cas. No. 17,357; *The Forsoket*, 1 Pet. Adm. 197, 29 Fed. Cas. No. 17,682; *The Catherina*, 1 Pet. Adm. 104, 23 Fed. Cas. No. 13,949; *The Becherdass*, 1 Low. 569, 3 Fed. Cas. No. 1,203; *The Havana*, 1 Spr. (U. S.) 402, 11 Fed. Cas. No. 226; *The Leon XIII*, L. R. 8 Prob. Div. 121; *The Agincourt*, L. R. 2 Prob. Div. 239; *The Nina*, L. R. 2 A. & E. 44.

31. *The Neck*, 138 Fed. 144. This was a suit against a foreign vessel by a sailor who proved himself to be a citizen of the United States. The court declined to allow its jurisdiction to be controlled by the treaty, and held that a citizen could not so be deprived of his constitutional right to invoke the admiralty jurisdiction of the United States in a cause to which he was a party and whose nature made it cognizable in the admiralty.

But see *The Bound Brook*, 146 Fed. 160. This was a libel for wages against a German vessel, but the fact that the sailors were American citizens was not alleged in the libel. The German consul protested against the court entertaining the suit, because of the treaty between the German Empire and the United States, and the libel was dismissed.

32. *The Robert W. Parsons*, 191 U. S. 17, 33, 34 Sup. Ct. 8, 48 L. ed. 73.

33. *The Joseph B. Thomas*, 148 Fed. 762, 18 C. C. A. 428.

In *The Paquete Habana*, 175 U. S. 677, 681, 20 Sup. Ct. 290, 44 L. ed. 320, the court said, after referring to the history of appellate jurisdiction previous to 1891: "But all this has been changed by the act of March 3, 1891, c. 517, establishing the Circuit Courts of Appeals, and creating a new and complete scheme of appellate jurisdiction depending upon the nature of the different cases, rather than upon the pecuniary amount involved. 26 Stat. 826. By that act, as this court has declared, the entire appellate jurisdiction from the Circuit and District Courts of the United States was distributed, 'according to the scheme of the act,' between this court and the Circuit Court of Appeals thereby established, 'by designating the classes of cases' of which each of these courts was to have final jurisdiction. *McLish v. Roff*, 141 U. S. 661, 666; *American Construction Co. v. Jacksonville Railway*, 148 U. S. 372, 382; *Carey v. Houston & Texas Railway Co.*, 150 U. S. 170, 179. The intention of Congress, by the act of 1891, to make the nature of the case, and not the amount in dispute, the test of the appellate jurisdiction of this court from the District and Circuit Courts clearly appears upon examination of the leading provisions of the act. \* \* \* The act of 1891 nowhere imposes a pecuniary limit upon the appellate jurisdiction, either of this court or of the Circuit Court of Appeals, from a District

**11. Subject-Matter. — a. Generally.** — The general test of admiralty jurisdiction is the subject-matter of the suit. That must be maritime in its nature, according to the meaning of the word as defined in the decisions of the federal courts.<sup>34</sup>

The principal subjects of the civil jurisdiction on the admiralty are classified into *matters of contract and torts*.<sup>35</sup>

**b. Contracts. — (I.) Generally.** — In matters of contract the test of jurisdiction is to be found in the subject-matter of the agreement; if that is maritime in its nature, the admiralty has jurisdiction; if it is not maritime, the jurisdiction does not exist.<sup>36</sup>

**(II.) Maritime Contracts Defined.** — No precise definition of maritime contracts can be given, but, in general, it must relate to the navigation, business, or commerce of the sea; it must have reference to maritime services or maritime transactions, not incidentally merely, but as an essential part of its subject-matter; the place where it is made or performed is not material. The citizenship of the parties and the amount involved have nothing to do with the question of admiralty jurisdiction. The sole test is the maritime or non-maritime character of the agreement. This test cannot be accurately defined. The line between

or Circuit Court of the United States. The only pecuniary limit imposed is one of \$1000 upon the appeal to this court of a case which has been once decided on appeal in the Circuit Court of Appeals, and in which the judgment of that court is not made final by section 6 of the act. \* \* \* We are of the opinion that the act of 1891, upon its face, read in the light of settled rules of statutory construction, and of the decisions of this court, clearly manifests the intention of Congress to cover the whole subject of the appellate jurisdiction from the District and Circuit Courts of the United States, so far as regards in what cases, as well as to what courts, appeals may be taken, and to supersede and repeal, to this extent, all the provisions of earlier acts of Congress, including those that imposed pecuniary limits upon such jurisdiction; and, as part of the new scheme, to confer upon this court jurisdiction of appeals from all final sentences and decrees in prize causes, without regard to the amount in dispute, and without any certificate of the District Judge as to the importance of the particular case."

34. 1 Kent's Com. 369 (note; 13 edition); "And it seems that the nature of the subject-matter alone may be sufficient to give jurisdiction, though

there be neither a maritime tort or contract. *Grigg v. The Clarisso Ann*, 2 Hughes 89."

35. In *Ex parte Easton*, 95 U. S. 68, 24 L. ed. 373, the court says: "Wide differences of opinion have existed as to the extent of the admiralty jurisdiction, that it extends to all contracts, claims, and services essentially maritime, among which are bottomry bonds, contracts of affreightment and contracts for the conveyance of passengers, pilotage on the high seas, wharfage, agreements of consortship, surveys of vessels damaged by the perils of the seas, the claims of material-men and others for the repair and outfit of ships belonging to foreign nations or to other states, and the wages of mariners; and also to civil marine torts, and injuries, among which are assaults or other personal injuries, collisions, spoliation, and damage, illegal seizures or other depredations on property, illegal dispossession or withholding of possession from the owners of ships, controversies between part owners as to the employment of ships, municipal seizures of ships, and cases of salvage and marine insurance."

36. *The Resolute*, 168 U. S. 437, 18 Sup. Ct. 112, 42 L. ed. 533; *The San Fernando*, 12 Fed. 341.



cases in either category is still somewhat vague and fluctuating, where the borderland of admiralty jurisdiction is approached, and there is a considerable group of contracts to which the term amphibious must be applied until their proper classification is agreed on by the courts or settled by ultimate authority.<sup>37</sup>

(III.) Classes of Maritime Contracts. — (A.) SEAMEN'S WAGES. — Contracts for seamen's wages are maritime and the subject of admiralty jurisdiction.<sup>38</sup> The term seamen, mariners or sailors is used in its

37. See the sections following.

The contract of marine insurance is undoubtedly maritime (Insurance Co. v. Dunham, 11 Wall. 1, 20 L. ed. 690), but a contract to procure insurance for a vessel is not maritime (Marquardt v. French, 53 Fed. 603), although an agreement to insure against perils of the sea, when one of the elements of a contract of affreightment, may be proved in the admiralty and damages awarded for its breach (Nash v. Bohlen, 167 Fed. 427).

Contracts for building ships are not maritime (Roach v. Chapman, 22 How. [U. S.] 129, 16 L. ed. 294), but a charter of a ship to be built is, and a libel *in rem* and *in personam* may be maintained in the admiralty for the damages sustained by its non-fulfillment (The Barocoa, 44 Fed. 102).

A contract for the use of a dry-dock is maritime (The Vidal Sala, 12 Fed. 207), but a lease of a wharf is not (The James T. Furber, 157 Fed. 126), although wharfage is a maritime obligation and imports a maritime lien upon the ship (*Ex parte* Easton, 95 U. S. 68, 24 L. ed. 373).

Contracts for the transportation on the water of passengers and their baggage are clearly maritime and within admiralty jurisdiction (The Moses Taylor, 4 Wall. [U. S.] 411, 18 L. ed. 397), and this jurisdiction includes a suit for damages sustained by reason of false representations in respect of the voyage contemplated (The Normannia, 62 Fed. 469); but a contract to take boys on a nine months' cruise to foreign countries, as members of a school on shipboard, is not of such maritime quality as to bring it within the jurisdiction of the admiralty (The Pennsylvania, 154 Fed. 9, 83 C. C. A. 139).

The contracts of those who go upon a fishing voyage to take fish are maritime, although the parties have nothing to do with the navigation of the ship (The Minna, 11 Fed. 759), and this

is not affected by the fact that they do their work on shore (Domenico v. Alaska Packers' Assn., 112 Fed. 554); but musicians cannot sue in the admiralty for their services, for the reason that their work does not tend to the preservation of the ship or to aid in her navigation (The Superior, Gilp. 514, 24 Fed. Cas. No. 14,136).

In Reed v. Weule (C. C. A.), 176 Fed. 660, it was held that a contract of sale of a chronometer for a ship was a maritime contract, though at the time of sale it was on shore.

38. Sheppard v. Taylor, 5 Pet. 675, 8 L. ed. 269.

The Federal statutes provide (Rev. Stat. 4536) that no wages due or accruing to any seaman shall be subject to attachment or arrestment from any court. The effect of this statute is to eliminate the jurisdiction of all other courts to garnish the wages of sailors at the instance of their creditors, and a plea of payment under such a garnishment or attachment will be no defense to a libel for such wages by a seaman in a court of admiralty. Wilder v. Navigation Co., 211 U. S. 239, 29 Sup. Ct. 58, 53 L. ed. 164; The City of New Bedford, 20 Fed. 57; Ross v. Bourne, 14 Fed. 858; McCarty v. The New Bedford, 4 Fed. 818.

U. S. Rev. Stat. 45, 46, 47, provide a simple and inexpensive proceeding, on the analogy of a suit in admiralty, by which any judge, justice of the peace, or commissioner may, in proper cases, summon the master of any vessel to show cause why process should not issue against his vessel on account of wages claimed by seamen. It is an instance where congress has given something like admiralty jurisdiction to judicial officers of state courts. The Shelbourne, 30 Fed. 510; The Edwin Post, 6 Fed. 206; Bronde v. Haven, Gilp. 592, 4 Fed. Cas. No. 1,924; The Neptune, 1 Pet. Adm. 180 note, 29 Fed. Cas. No. 17,569; The Ocean Spray, 4 Sawy. 105, 18 Fed. Cas. No. 10,412; The London,



broad sense, and includes all persons employed or engaged to serve in any capacity on board a ship in furthering her employment as an instrument of commerce or navigation.<sup>39</sup>

(B.) MASTER'S WAGES.—Suits for master's wages are within the jurisdiction of admiralty, but must ordinarily be *in personam*, since the master has no lien on the ship for his wages under the general admiralty law.<sup>40</sup> But where a lien exists by the law of the ship's flag, the statute of the state, the court will enforce it by a proceeding *in rem*.<sup>41</sup>

(C.) CARRIAGE BY SEA. — (1.) Generally.—The general subject of carriage by sea, both of goods and of passengers, is of admiralty cognizance, and all contracts or obligations *ex contractu* relating thereto are within its jurisdiction.<sup>42</sup>

(2.) Goods. — The jurisdiction of the admiralty extends to all contracts for the employment of the ship in the carriage of goods, without reference to the place where the contract is made or performed, or who are the parties to it.<sup>43</sup> Such contracts, whether by bill of lading or by charter-party, may be enforced by a proceeding *in rem*, if performance of the engagement has been commenced; if the contract remains wholly executory, no lien is created and the remedy must be *in personam*.<sup>44</sup>

(3.) Passengers. — The admiralty has jurisdiction of contracts for the transportation of passengers by vessel, which may be enforced *in rem* or *in personam*.<sup>45</sup>

Newb. 6, 14 Fed. Cas. No. 7,759; The Eagle, Ole. 232, 8 Fed. Cas. No. 4,233.

39. U. S. Rev. Stat. § 4612; Saylor v. Taylor, 77 Fed. 476, 23 C. C. A. 343; McRae v. Bowers Dredging Co., 87 Fed. 344; The James H. Shrigley, 50 Fed. 287; The W. F. Brown, 46 Fed. 290; The Alanson Sumner, 28 Fed. 670; The Minna, 11 Fed. 759; Walter v. The Kamchatka, 29 Fed. Cas. No. 17,119; The Superior, Gilp. 514, 24 Fed. Cas. No. 14,136; The Sultana, Brown Adm. 13, 23 Fed. Cas. No. 13,602; The Ocean Spray, 4 Sawy. 105, 18 Fed. Cas. No. 10,412. See title "Seamen."

40. See *infra*, II, 3, c, (II), (C), (2), note; The Nebraska, 75 Fed. 598, 21 C. C. A. 448; The Laurel, 113 Fed. 373.

41. The Resolute, 69 Fed. 742; The Angela Maria, 35 Fed. 430; The Wexford, 7 Fed. 674; The Wexford, 3 Fed. 577. See also, The Resolute, 168 U. S. 437, 18 Sup. Ct. 112, 42 L. ed. 533, and *infra*, II, C, 5.

42. The Moses Taylor, 4 Wall. 411, 18 L. ed. 397; The Stanley Dollar, 160 Fed. 911, 88 C. C. A. 93; The Priscilla, 106 Fed. 739; Dunbar v. Weston, 93

Fed. 472; The Queen of the Pacific, 61 Fed. 213; Conkling's Admiralty, c. IV.

A charter of a ship to be built is a maritime contract. The Baracoa, 44 Fed. 102.

43. New Jersey S. Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. ed. 465; The Goldhunter, Blatch. & H. 300, 10 Fed. Cas. No. 5,513; The Leonidas, Ole. 12, 15 Fed. Cas. No. 8,262.

44. See *infra*, II, C, 3, c, (II), (C), (2), and The Freeman, 18 How. 182, 15 L. ed. 341; The J. F. Warner, 22 Fed. 342; The Ira Chaffee, 2 Fed. 401.

45. The Majestic, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. ed. 1039; Butler v. Boston & S. S. Co., 130 U. S. 527, 546, 9 Sup. Ct. 612, 32 L. ed. 1017; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; The Western States, 159 Fed. 354, 86 C. C. A. 354; The Minnetonka, 146 Fed. 509, 77 C. C. A. 217; Shipping Co. v. Pouppirt, 125 Fed. 732, 60 C. C. A. 500; The City of Brussels, 6 Ben. 370, 5 Fed. Cas. No. 2,745; Chamberlain v. Chandler, 3 Mason 242, 5 Fed. Cas. No. 2,575.

(4.) **Demurrage.** — Incidental to the contract of carriage by sea is an agreement, express or implied, against undue delay by the shipper or consignee in loading or receiving the cargo. A breach of this agreement results in demurrage. The admiralty has jurisdiction to recover the damages arising therefrom. The subject also includes the right to award damages for any wrongful detention of the ship, outside of the relations created by the contract of affreightment.<sup>46</sup>

(D.) **TOWAGE**, or the assistance rendered to one vessel by another in pulling her from place to place, or assisting in her propulsion, is a contract within admiralty jurisdiction.<sup>47</sup> Suits for damages sustained by breach of the contract of towage, or by negligence in its performance, are also unquestionably within the admiralty jurisdiction.<sup>48</sup>

The *Moses Taylor*, 4 Wall. (U. S.) 411, 18 L. ed. 397. A contract for the transportation of a passenger on a steamship on the ocean is a maritime contract and clearly within the admiralty and maritime jurisdiction of the federal courts. There is no distinction in principle between such a contract and a contract for the transportation of merchandise. The same liability attaches upon their execution to both the owner and to the ship. The fare, or passage-money, in the one case is the equivalent of the freight in the other and a breach of either is the appropriate subject of admiralty jurisdiction.

The contract for the transportation of the passengers being maritime, the jurisdiction extends to all matters incidental to its performance, in contract or in tort. Hence the jurisdiction obtains in cases for loss of baggage (*The H. M. Wright*, Newb. 494, 29 Fed. Cas. No. 17,115); for refusal to furnish due accommodations (*The Willamette Valley*, 71 Fed. 712); for false representations in regard to the trip (*The Normannia*, 62 Fed. 469); for not furnishing food and accommodation (*The Havre*, 45 Fed. 764); for violation of the obligation of respectful behavior to the passenger (*Pendleton v. Kinsley*, 3 Cliff. 416, 19 Fed. Cas. No. 10,922); for personal injuries (*The Prinzess Irene*, 139 Fed. 810); for overcrowding (*The Sea Bird*, 3 Fed. 573), and for thefts by employees of the ship (*The Minnetonka*, 146 Fed. 509, 77 C. C. A. 217).

46. The *Apollon*, 9 Wheat. (U. S.) 362, 6 L. ed. 111, a libel for an illegal seizure. "But it is now said, that demurrage always arises *ex contractu*, and, therefore, cannot furnish any rule of compensation in cases of tort. The

practice in courts of admiralty has certainly been otherwise; and the very cases cited at the bar, show that no distinction has been taken as to its application, between cases of contract and cases of tort. In truth, demurrage is merely an allowance or compensation for the delay or detention of the vessel. It is often a matter of contract, but not necessarily so." See also *Donnell v. Amoskeag Mfg. Co.*, 118 Fed. 10, 55 C. C. A. 178; *Burrill v. Crossman*, 69 Fed. 747, 16 C. C. A. 381; *Higgins v. United States Mail S. S. Co.*, 3 Blatchf. 282, 12 Fed. Cas. No. 6,469.

47. *Steamship Co. v. Thompson* (C. C. A.), 176 Fed. 499. "It is admitted, and cannot be doubted, that a towage contract is a maritime contract. 1 Conk. Adm. 28, note: *The W. J. Walsh*, 5 Ben. 72, 30 Fed. Cas. No. 17,992; *Porter v. The Sea Witch*, 3 Woods 75, 19 Fed. Cas. No. 11,289; *The May Queen*, Spr. 558, 16 Fed. Cas. No. 9,360."

48. For breach of an executory contract to tow a vessel to a place of safety the admiralty jurisdiction obtains (*Boutin v. Rudd*, 82 Fed. 685, 27 C. C. A. 526); so also, of a breach of a contract by the owners of a steamer to tow a barge during the season of navigation (*The Oscoda*, 66 Fed. 347); and for the failure of the vessel to accept the service of the tug pursuant to the engagement (*The Williams*, Brown's Adm. 208, 29 Fed. Cas. No. 17,710); nor is this jurisdiction affected by the circumstance that the service is not in connection with interstate commerce (*The Volunteer*, 15 Fed. Cas. No. 8,260). Suits for injuries sustained by the tow through the fault of the tug are *ex delicto* and not *ex contractu* (*The Quickstep*, 9 Wall. (U.

(E.) **DOCKAGE**, or the use of a drydock or floating dock by the ship, is a maritime contract and within admiralty jurisdiction.<sup>49</sup> And a vessel used in commerce and navigation does not cease to be a subject of admiralty jurisdiction while she is in a dry dock undergoing repairs.<sup>50</sup>

(F.) **WHARFAGE**, or the compensation for the use of wharfs and piers by vessels, is partially within admiralty jurisdiction. When the ship is engaged in her business of commerce and navigation, wharfage, as an incident thereto, is a maritime obligation *ex contractu* and within admiralty jurisdiction.<sup>51</sup> When it accrues while the ship is out of commission, it is not.<sup>52</sup>

In connection with the use of wharves and piers by vessels, injuries are sustained by the latter on account of submerged obstructions and unsafe berth. The admiralty has jurisdiction of suits against the owner or wharfinger on such account.<sup>53</sup>

(G.) **STEVEDORES' SERVICES** are now regarded as maritime in their nature,<sup>54</sup> and suits therefor may be directly against the ship upon a maritime lien,<sup>55</sup> or against the owner of a

S.) 665, 670, 19 L. ed. 767); and create a maritime lien (The John G. Stevens, 170 U. S. 113, 18 Sup. Ct. 544, 42 L. ed. 969); which a court of admiralty has full jurisdiction to enforce (The Syracuse, 12 Wall. [U. S.] 167, 20 L. ed. 382).

49. The Vidal Sala, 12 Fed. 207; The Mississippi, 6 Fed. 543.

50. In the case of The Jefferson, 215 U. S. 130, 30 Sup. Ct. 54, a libel was filed for salvage service to a steamship while she was in a dry dock for repairs and quite out of the water. Jurisdiction was questioned on the grounds that the boat was virtually on the shore and that she had not been saved from any marine peril, but the court said: "In reason we think it cannot be held that a ship or vessel employed in navigation and commerce is any the less a maritime subject within the admiralty jurisdiction when for the purpose of making necessary repairs to fit her for continuance in navigation, she is placed in a dry dock and the water removed from about her, than would be such a vessel if fastened to a wharf in a dry harbor, where, by the natural recession of the water by the ebbing of the tide, she for a time might be upon dry land."

51. The contract of wharfage is maritime in its nature (The Alexander McNeil, 24 Fed. Cas. No. 14,404), and within the jurisdiction of

the admiralty (The Kate Tremaine, 5 Ben. 60, 14 Fed. Cas. No. 7,622), as against a domestic vessel (The Vanderbilt, 86 Fed. 785), or through a suit against the owner personally (Braisted v. Denton, 115 Fed. 428).

52. As where it is furnished during the winter season on the Great Lakes (The Murphy Tugs, 28 Fed. 429), or to vessels which have been withdrawn from navigation and are kept at the dock for purposes of storage alone (The Niagara, 86 Fed. 785).

53. Smith v. Burnett, 173 U. S. 430, 19 Sup. Ct. 442; 43 L. ed. 756, was a libel by shipowners for damage to their vessel from a submerged rock at the defendant's wharf where she was moored. The court said: "Undoubtedly there was jurisdiction in admiralty in the court below, and the applicable principles of law are familiar."

54. The Main, 51 Fed. 954, 2 C. C. A. 569; The Allerton, 93 Fed. 219; The Anaces, 87 Fed. 565; The Gilbert Knapp, 37 Fed. 215; The Wivanhoe, 26 Fed. 927; The Senator, 21 Fed. 191; The George T. Kemp, 2 Low. 477, 10 Fed. Cas. No. 5,341.

55. Norwegian S. S. Co. v. Washington, 57 Fed. 224, 6 C. C. A. 313; The Main, 51 Fed. 954, 2 C. C. A. 569; The Mattie May, 45 Fed. 899; The Wyoming, 36 Fed. 493; The Scotia, 35 Fed. 916; The Hattie M. Bain, 20 Fed. 389; The Windermere, 2 Fed. 727.



domestic ship personally, as in cases of other maritime obligations."

(H.) REPAIRS AND SUPPLIES.—These import maritime obligations *ex contractu* and are within the admiralty jurisdiction. They are frequently spoken of as contracts of material-men."

There has not been any serious doubt concerning the maritime nature of contracts of material-men and the jurisdiction of the admiralty to entertain suits *in personam* against the owner," or the master,"<sup>56</sup> is beyond question. But where the proceeding involves the question of maritime lien and the right to sue *in rem* on these contracts of material-men, and the question of admiralty jurisdiction became badly confused at an early day by a distinction between foreign and domestic transactions and presumptions as to whether a credit had been extended to the ship or to the owner alone."<sup>57</sup> The supreme court, after some modification of its views, determined that there was a lien by the general maritime law for all necessary supplies or repairs furnished a vessel in a foreign port, on the order of the master, which the admiralty courts of the United States had jurisdiction to enforce."<sup>58</sup> In cases where the supplies or repairs were furnished in the "home port" of the vessel, or on the personal order of the owner, it was held that no lien existed under the general maritime law which the courts of admiralty could enforce."<sup>59</sup> If, however, the local law gave a lien, in the nature of a maritime lien, the courts of admiralty had jurisdiction to enforce it in the same manner as liens under the general law,"<sup>60</sup> and these local liens were subject to the same presumptions and limitations that arise as to liens under the general admiralty law."<sup>61</sup>

56. The *George T. Kemp*, 2 Low. 477, 10 Fed. Cas. No. 5,341.

57. The *General Smith*, 4 Wheat. 438, 4 L. ed. 609; *Jutte v. Davis*, 47 Fed. 592. All contracts for furnishing or refitting vessels are of a maritime character and may be prosecuted in a court of admiralty, *in rem*, if a lien exists, and always *in personam*. The *Stephen Allen*, 1 Blatch. & H. 175, 22 Fed. Cas. No. 13,361.

58. The *General Smith*, 4 Wheat. (U. S.) 438, 4 L. ed. 609; The *Belfast*, 7 Wall. (U. S.) 624, 19 L. ed. 266; The *Kalorama*, 10 Wall. (U. S.) 204, 19 L. ed. 941; General admiralty rule 12.

59. General admiralty rule 12; *Story on Agency* (2nd. ed.), § 296; *Emerigon on Insurance* (Mercedith), 109. "The master is always personally bound by his contracts, and the person who deals with the captain in a matter relative to the usual employment of the ship, or for repairs or supplies furnished her, has a double remedy. He may sue the master on his own personal contract, and he may sue the owner on the contract made on his behalf, by his agent, the master." 3 Kent Co., 161.

60. "Admiralty Liens of Material Men," IX American Law Review, 654; "Features of Admiralty Liens," XVI American Law Review, 193.

61. The *Kalorama*, 10 Wall. (U. S.) 204, 19 L. ed. 941; The *Lulu*, 10 Wall. (U. S.) 192, 19 L. ed. 906; The *Grapeshot*, 9 Wall. (U. S.) 129, 19 L. ed. 651; The *Virgin*, 8 Pet. (U. S.) 538, 8 L. ed. 1036; The *St. Jago de Cuba*, 9 Wheat. (U. S.) 409, 6 L. ed. 122.

62. The *J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. ed. 345; The *Edith*, 94 U. S. 518, 24 L. ed. 167; The *Lottawanna*, 21 Wall. (U. S.) 558, 22 L. ed. 654 (and compare the dissenting opinion of Mr. Justice Clifford); The *General Smith*, 4 Wheat. (U. S.) 438, 4 L. ed. 609; The *Samuel Marshall*, 54 Fed. 396, 41 C. C. A. 385; The *Election*, 74 Fed. 689, 21 C. C. A. 12.

63. *Johnson v. Elevator Co.*, 119 U. S. 388, 397, 7 Sup. Ct. 254, 30 L. ed. 447; The *Lottawanna*, 21 Wall. (U. S.) 558, 22 L. ed. 654; The *Hine v. Trevor*, 4 Wall. 55, 18 L. ed. 451; The *St. Lawrence*, 1 Black (U. S.) 522, 17 L. ed. 180; The *Planter*, 7 Pet. (U. S.) 324, 8 L. ed. 700. See *infra*, II, C, 5.

64. The *Samuel Marshall*, 54 Fed.

Recent legislation of congress, if held constitutional by the supreme court, enacted on suggestions of the Maritime Law Association of the United States, will simplify the jurisdictional questions that have so persistently arisen in regard to the enforcement of liens for repairs, supplies and other necessities, and bring the general admiralty law of this country into more complete harmony with that of other commercial nations.<sup>65</sup>

(I.) INSURANCE. — The contract of marine insurance is maritime in its nature and within the admiralty and maritime jurisdiction granted by the constitution.<sup>66</sup> But where the subject of insurance is a vessel not engaged in the business of commerce and navigation, it has

396, 4 C. C. A. 385; *Mack S. S. Co. v. Thompson*, 176 Fed. 499; *The Westover*, 76 Fed. 381; *The Templar*, 59 Fed. 203; *The Guiding Star*, 18 Fed. 263.

65. Act of Congress of June 23, 1910, chap. 373, an act relating to liens on vessels for repairs, supplies, or other necessities.

Section 1. Any person furnishing repairs, supplies or other necessities, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or by them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding *in rem* and it shall not be necessary to allege or prove that credit was given to the vessel.

Section 2. The following persons shall be presumed to have authority from the owner or owners, to procure repairs, supplies and other necessities for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

Section 3. The officers and agents of a vessel specified in Section 2 shall be taken to include such officers and agents when appointed by a charterer, by an owner *pro hac vice*, or by an agreed purchaser in possession of the vessel, but nothing in this Act shall be construed to confer a lien when the materialman knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies or

other necessities was without authority to bind the vessel therefor.

Section 4. Nothing in this Act shall be construed to prevent a materialman from waiving his right to a lien at any time by agreement or otherwise, and this Act shall not be construed to affect the rules of law now existing; (1) in regard to the right to proceed against a vessel for advances, (2) in regard to laches in the enforcement of liens on vessels, (3) in regard to the priority or rank of liens, and (4) in regard to the right to proceed *in personam*.

Section 5. This Act shall supersede the provisions of all State Statutes conferring liens on vessels in so far as the same purport to create rights of action against vessels for repairs, supplies and other necessities.

Section 6. This Act shall take effect upon its passage.

66. *Insurance Co. v. Dunham*, 11 Wall. (U. S.) 1, 20 L. ed. 90; *The Volunteer*, 1 Sumn. 551, 28 Fed. Cas. No. 16,991; *The Tribune*, 3 Sumn. 144, 24 Fed. Cas. No. 14,171; *The Tilton*, 5 Mason 465, 23 Fed. Cas. No. 14,054; *Steele v. Thacher, Ware* 85, 22 Fed. Cas. No. 13,348; *Plummer v. Webb*, 4 Mason 380, 19 Fed. Cas. No. 11,233; *Peele v. Merchants' Ins. Co.*, 3 Mason 27, 19 Fed. Cas. No. 10,905; *The Huntress*, 1 Davis 93, 12 Fed. Cas. No. 6,914; *Hale v. Washington Ins. Co.*, 2 Story 176, 11 Fed. Cas. No. 5,916; *The Spartan, Ware* 149, 7 Fed. Cas. No. 4,085; *De Lovio v. Boit*, 2 Gall. 398, 7 Fed. Cas. No. 3,776; *Andrews v. Essex Ins. Co.*, 3 Mason 6, 1 Fed. Cas. No. 374.

A court of admiralty has jurisdiction of a suit to recover expenses incurred on land, under the "sue and labor" clause of a policy of marine insurance.



been held that the contract was not maritime.<sup>67</sup> And the admiralty will not entertain jurisdiction of a contract merely preliminary to the contract of insurance,<sup>68</sup> except as an incident to the enforcement of a maritime contract.<sup>69</sup>

The contract to pay insurance premiums is maritime in its nature, but whether it imports a maritime lien on the ship is not finally settled. The liability is enforceable by suit *in personam*, and, where the local law gives a lien for such premiums, a proceeding *in rem* may be entertained. Such lien, however, is not considered as of equal rank with most other maritime liens.<sup>70</sup>

(J.) ADVANCE OF MONEY for the purpose of discharging debts of the ship import a maritime obligation, and the admiralty has jurisdiction of a suit to recover the amounts advanced.<sup>71</sup>

(K.) MARITIME HYPOTHECATIONS.—These include bottomry bonds and contracts of respondentia, and are to be distinguished from ordinary mortgages on the one hand and implied maritime liens on the other. Bottomry is a pledge of the ship to secure a loan in circumstances of urgent necessity; respondentia is a similar pledge of the cargo. If ship or goods are lost or fail to arrive, the lender loses his money since

St. Paul F. & M. Ins. Co. v. Storage Co., 157 Fed. 625.

67. In *City of Detroit v. Grummond*, 121 Fed. 963, 971, 58 C. C. A. 301, it was held by the court of appeals for the sixth circuit that a contract for insurance on a passenger steamer chartered to a city for hospital purposes was not maritime; it did not relate to navigation, but only to a vessel which was to lie moored in the Detroit river for two years as a hospital.

68. *Contract to Procure Insurance*.—St. Paul F. & M. Ins. Co. v. Birrell, 164 Fed. 104.

In *Marquardt v. French*, 53 Fed. 603, Judge Addison Brown said: "Such a claim does not differ in principle, so far as the jurisdiction of a court of admiralty is concerned, from a suit to recover compensation for a broker's services in obtaining a charter-party; or for building a ship, or for soliciting freight. See *The Thames*, 10 Fed. Rep. 848; *The Crystal Stream*, 25 Fed. Rep. 575; *The Paola R.*, 32 Fed. 174; *Doolittle v. Knobloch*, 39 Fed. 40; *Diefenthal v. Hamburg*, 46 Fed. 397."

69. *Nash v. Bolden*, 167 Fed. 427.

70. In *The Dolphin*, 1 Flip. 580, 7 Fed. Cas. No. 3,973, Judge Brown, of the Eastern District of Michigan, in a scholarly opinion, held that there was a maritime lien, in favor of the underwriters against the ship, for premiums due upon marine policies, under the general maritime law, although it

ranked in the lowest class of strictly maritime liens. This opinion was expressly affirmed, on appeal to the circuit court, by Justice Swayne, in *The Dolphin*, 1 Flip. 592, 7 Fed. Cas. No. 3,974. There was a like ruling in *The Theodore Perry*, 8 Cent. Law J. 191, 23 Fed. Cas. No. 13,879; and also in *The Illinois*, 2 Flip. 383, 12 Fed. Cas. No. 7,005, and *The Daisy Day*, 40 Fed. 538.

In *The Jennie B. Gilkey*, 19 Fed. 127, Judge Lowell held there was no maritime lien for insurance premiums under the general law, because insurance was not a necessary supply for the ship. There was a like ruling by Judge Hanford, in *The Hope*, 49 Fed. 279; and by Judge Woods, in *The John T. Moore*, 3 Woods 61, 13 Fed. Cas. No. 7,430, *Insurance Co. v. Proceeds, etc.*, 24 Fed. 559, *affirming* 22 Fed. 109; *The Paola R.*, 32 Fed. 174, are to the same effect. In *The Guiding Star*, 9 Fed. 521, and *The General Burnside*, 3 Fed. 228, the lien was allowed against proceeds on the theory that the contract was maritime and a lien given by local law. See also *The Alliance*, 61 Fed. 507.

71. The admiralty will entertain jurisdiction of a libel for advances of money which has been loaned to be used in repairing a ship or equipping her for a voyage. *Davis v. Child*, 2 Ware 78, 7 Fed. Cas. No. 3,628.

A suit may be maintained in the admiralty to recover sums of money bor-



his security is wholly *in rem*. These are matters of exclusive admiralty jurisdiction.<sup>72</sup>

(L.) CONSORTSHIP. — Agreements of consortship, or engagements by which vessels engaged in a common enterprise agree to act in consort with one another and share mutually in the service and reward, are within the jurisdiction of the admiralty.<sup>73</sup>

(M.) MISCELLANEOUS INSTANCES. — Among the miscellaneous contracts of which jurisdiction has been retained are bonds given to secure performance of maritime obligations,<sup>74</sup> an agreement of guaranty of credit for a vessel,<sup>75</sup> letters of credit to directly aid the voyage,<sup>76</sup> weighing and inspecting cargo,<sup>77</sup> compressing and loading a cargo of cotton,<sup>78</sup> agreements of ransom,<sup>79</sup> contracts of the master to transport goods, collect advances, and repay the consignor,<sup>80</sup> contracts for cooperating a cargo,<sup>81</sup> and for the services of a watchman,<sup>82</sup> and an agreement to insure a cargo.<sup>83</sup>

(IV.) Contracts Held Non-Maritime. — (A.) MORTGAGES. — In American admiralty law the mortgage of a ship is not a maritime contract, and the admiralty has no jurisdiction of a suit to foreclose it.<sup>84</sup> But where a vessel has been sold in the admiralty, and the proceeds have been paid

rowed by the master in a foreign port to repair damages sustained by the vessel on the high seas. *The Rainbow*, Bee 116, 4 Fed. Cas. No. 2,116.

72. *The Julia Blake*, 107 U. S. 418, 2 Sup. Ct. 692, 27 L. ed. 595; *Delaware Mut. S. Ins. Co. v. Gossler*, 96 U. S. 645, 24 L. ed. 863; *The Grapeshot*, 9 Wall. (U. S.) 129, 19 L. ed. 651; *Carrington v. Pratt*, 18 How. (U. S.) 63, 15 L. ed. 267; *The Panama*, Ole. 343, 18 Fed. Cas. No. 10,703; *The Packet*, 3 Mason 255, 18 Fed. Cas. No. 10,654; *The Mary*, 1 Paine 671, 16 Fed. Cas. No. 9,187; *The Jerusalem*, 2 Gall. 191, 13 Fed. Cas. No. 7,293; *The Hilarity*, Blatch. & H. 90, 12 Fed. Cas. No. 6,480; *The Draco*, 2 Sumn. 157, 7 Fed. Cas. No. 4,057.

General admiralty rule 18 provides that the suit shall be *in rem* only, against the property hypothecated, or its proceeds, unless the owner has wrongfully lost or substracted the same, in which case he may be sued *in personam*.

73. *Andrews v. Wall*, 3 How. (U. S.) 568, 572, 11 L. ed. 729; *Conkling's Admiralty* (1848), 236-240.

74. A bond to secure performance of a charter-party (*Haller v. Fox*, 51 Fed. 298); a bond given for salvage in performance of a promise when the salvaged property was delivered (*De Leon v. Leitch*, 65 Fed. 1002); a bond to pay general average (*The San Fernando*, 12 Fed. 341).

75. *The Advance*, 72 Fed. 793.

76. *Freights of The Kate*, 63 Fed. 707.

77. *The River Queen*, 2 Fed. 731.

78. *The Wivanhoe*, 26 Fed. 927.

79. *Maisonnaire v. Keating*, 2 Gall. (U. S.) 325, 16 Fed. Cas. No. 8,978.

80. *The St. Joseph*, 21 Fed. Cas. No. 12,230; *The Hardy*, 1 Dillon 460, 11 Fed. Cas. No. 6,056. But see to the contrary, *The Julia*, 37 Fed. 369; *The New Hampshire*, 21 Fed. 924; *The Virginia*, 2 Paine 115, 1 Fed. Cas. No. 141.

81. *The E. A. Baisley*, 13 Fed. 703.

82. *The Seguranc*, 58 Fed. 908.

83. *Nash v. Bohlen*, 167 Fed. 427.

84. *The Eclipse*, 135 U. S. 599, 608, 10 Sup. Ct. 873, 34 L. ed. 269; *The Clifton*, 143 Fed. 460, 74 C. C. A. 594; *Bogart v. The John Jay*, 17 How. (U. S.) 399, 15 L. ed. 95; *The Slaymaker*, 28 Fed. 767; *The Venture*, 21 Fed. 928; *The C. C. Trowbridge*, 14 Fed. 874; *The Guiding Star*, 9 Fed. 521.

In *The J. E. Rumbell*, 148 U. S. 1, 15, 13 Sup. Ct. 498, 37 L. ed. 345, the law in regard to mortgages is stated: "An ordinary mortgage of a vessel, whether made to secure the purchase money upon the sale thereof, or to raise money for general purposes, is not a maritime contract. A court of admiralty, therefore, has no jurisdiction of a libel to foreclose it, or to assert either title or right of possession under it."

The admiralty does not possess jurisdiction to enforce equities between a

into the registry of the court, it will have jurisdiction to entertain the petition of a mortgagee against the fund, and to make payment to him out of it, after maritime liens have been satisfied.<sup>85</sup> And a mortgagee has such an interest in the vessel that he may sue in admiralty for an injury thereto or appear as a party claimant and defend his interest against others.<sup>86</sup>

(B.) SHIPBUILDING. — Contracts for building and equipping the ship are not considered maritime by the federal courts and the admiralty has no jurisdiction over them.<sup>87</sup>

(C.) SHIPS OUT OF COMMISSION. — Contracts whose subject-matter is a ship which is not used in, or intended for, commerce and navigation.<sup>88</sup>

(D.) STORAGE. — Contracts for storage merely, in a vessel, not connected with transportation, are not maritime, nor within the jurisdiction of American courts of admiralty.<sup>89</sup>

mortgagee and a mortgagor. The *William D. Rice*, 3 Ware 134, 29 Fed. Cas. No. 17,691.

A mortgage of a vessel to secure the purchase money is not a maritime contract nor within the jurisdiction of the admiralty. The *Venture*, 21 Fed. 928.

A bill to redeem from a mortgage on a vessel is not within the cognizance of the admiralty. The *J. B. Lunt*, 13 Fed. Cas. No. 7,247.

85. The *J. E. Rumbell*, 148 U. S. 1, 15, 13 Sup. Ct. 498, 37 L. ed. 345; The *Lottawanna*, 21 Wall. (U. S.) 558, 22 L. ed. 654; The *Conveyor*, 147 Fed. 586; The *Peerless*, 45 Fed. 491; The *Guiding Star*, 18 Fed. 263; General Adm. rule, 43; The *O'Neil*, 65 Fed. 111; The *Advantage* 63 Fed. 704.

86. The *Grand Republic*, 10 Fed. 398; The *Old Concord*, *Brown's Adm.* 270, 18 Fed. Cas. No. 10,482. See *infra*, II, E, 4; II, L.

87. In *Peoples' Ferry Co. v. Beers*, 20 How. (U. S.) 393, 15 L. ed. 961, decided in 1857, the supreme court held that the contract for building a ship was not maritime in its nature and therefore outside of the jurisdiction of the admiralty. The ground of the decision appears to have been that the contract was made, and was to be performed, upon the land. The rule, however, has been extended to all work done on the ship, after launching, and until her original construction is complete. This doctrine is in harmony with the general law or the systems of other countries, but in spite of repeated efforts to obtain a different ruling, the court has adhered to its first position in this respect. See The *Winnebago*, 205 U. S. 354, 27 Sup. Ct. 509,

51 L. ed. 836; *Trans. Co. v. Craig Shipbuilding Co.*, 203 U. S. 577, 27 Sup. Ct. 777, 51 L. ed. 325; The *J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. ed. 345; *Edwards v. Elliott*, 21 Wall. (U. S.) 532, 22 L. ed. 487; *Insurance Co. v. Dunham*, 11 Wall. (U. S.) 1, 20 L. ed. 90; The *Belfast*, 7 Wall. (U. S.) 624, 19 L. ed. 266; *Morewood v. Enquist*, 23 How. (U. S.) 491, 16 L. ed. 516; *Roach v. Chapman*, 22 How. (U. S.) 129, 16 L. ed. 294.

88. *Cope v. Vallette Dry-Dock Co.*, 119 U. S. 625, 7 Sup. Ct. 336, 30 L. ed. 501; The *Richard Winslow*, 67 Fed. 259, 71 Fed. 426, 18 C. C. A. 344; The *E. O. A.*, 69 Fed. 1005; The *Pulaski*, 33 Fed. 383; The *Murphy Tugs*, 28 Fed. 429.

89. The *Richard Winslow*, 71 Fed. 426, 18 C. C. A. 344, involved a contract for the shipment of a cargo of grain by vessel, from Chicago to Buffalo, the grain to be stored in the ship at Chicago during the winter and carried in the spring. This was not a maritime contract in respect of the provisions for such storage, and there was no jurisdiction in the admiralty of a suit for damage to the grain during the storage. This part of the contract had nothing to do with navigation. "It was merely a contract for winter storage, and was no more maritime in its nature than the non-maritime contracts for winter wharfage (The *Murphy Tugs*, 28 Fed. 429); for the employment of a dismantled hull (The *Hendrick Hudson*, 3 Ben. 419; Fed. Cas. No. 6,355; for the storage of a vessel's outfit during winter (Co. v. *Roach*, 2 Fed. 393); or for the service of a shipkeeper during winter (The *Sirius*, 65 Fed. 226)."



(E.) **PRELIMINARY CONTRACTS.**—Contracts which are merely preliminary to maritime agreements are not within the jurisdiction.<sup>89</sup>

(F.) **MISCELLANEOUS INSTANCES.**—Among the various matters of contract which are held non-maritime are an agreement for conducting a boys' school on board ship while making an extensive cruise,<sup>91</sup> a traffic agreement between railroad and shipowner for through transportation,<sup>92</sup> an engagement to reimburse the vessel owner for railroad charges advanced,<sup>93</sup> advertising the business of the ship,<sup>94</sup> contract to procure a charter for a vessel,<sup>95</sup> an agreement to pay a broker a commission for procuring a charter.<sup>96</sup>

c. **Torts.**—(I.) **Definition and Classification.**—The admiralty has jurisdiction over all maritime torts.<sup>97</sup> The term "tort," as used in this connection, has the same general meaning as it has in the common law, and includes all wrongs for which the remedy at law would be an action on the case or a civil proceeding not an action *ex contractu*.<sup>98</sup>

But where the storage is merely incidental to a contract of transportation by water, as where the goods are stored by the carrier for delivery to the consignee, the whole agreement is considered maritime and a court of admiralty will entertain a libel for non-delivery to the consignee. *Evans v. New York & P. S. S. Co.*, 145 Fed. 841.

90. *Taylor v. Weir*, 110 Fed. 1005; *The Humboldt*, 86 Fed. 351; *Marquardt v. French*, 53 Fed. 603; *The Crystal Stream*, 25 Fed. 575; *Wenberg v. A Cargo*, 15 Fed. 285; *The Morning Glory*, 21 Fed. Cas. No. 12,542.

91. *The Pennsylvania*, 154 Fed. 9, 83 C. C. A. 139.

92. *Graham v. Oregon R. & N. Co.*, 135 Fed. 608.

93. *Pacific Coast S. S. Co. v. Ferguson*, 76 Fed. 993, 22 C. C. A. 671, *affirming* 70 Fed. 870.

94. *The Havana*, 54 Fed. 201.

95. *Taylor v. Weir*, 110 Fed. 1005; *Richard v. Hogarth*, 94 Fed. 684.

96. *Brown v. W. H. Steam Nav. Co.*, 112 Fed. 1018, 50 C. C. A. 664.

97. *The Rock Island Bridge*, 6 Wall. (U. S.) 213, 215, 18 L. ed. 753; *Philadelphia W. & B. Co. v. Philadelphia & H. Towboat Co.*, 23 How. (U. S.) 209, 215, 16 L. ed. 433; *Manro v. Almeida*, 10 Wheat. (U. S.) 473, 6 L. ed. 369.

See *The Plymouth*, 3 Wall. (U. S.) 20, 36, 18 L. ed. 125.

98. *The Ferreri*, 9 Fed. 468; *Thomas v. Gray*, Blatch. & H. 493, 23 Fed. Cas. No. 13,898; *Smith v. Wilson*, 22 Fed. Cas. No. 13,128; *The Highland Light*, Chase 150, 12 Fed. Cas. No. 6,477; *The Aberfoyle*, Abb. Adm. 242, 1 Fed. Cas. No. 16.

In *The Yankee*, 1 McAll. 467, 30 Fed. Cas. No. 18,124, jurisdiction was held of a suit against the steamer by a person who, against his will, was put on board of her by a vigilance committee and compelled to remain there so that he was carried away when she sailed. See also *Chamberlain v. Chandler*, 3 Mason 242, 5 Fed. Cas. No. 2,575, where suit was one by a passenger against the master of a vessel for cruel and insulting conduct during the voyage.

"Nor is the definition of the term 'torts,' when used in reference to admiralty jurisdiction, confined to wrongs or injuries committed by direct force. It includes, also, wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case." *Philadelphia W. & B. R. Co. v. Philadelphia & H. Towboat Co.*, 23 How. (U. S.) 209, 215, 16 L. ed. 433.

In *Plummer v. Webb*, 4 Mason 380, 19 Fed. Cas. No. 11,233, it was held that a parent might maintain a suit in the admiralty for the tortious abduction of a minor son on a voyage on the high seas, since, although the wrong originated on the land, it was continued and consummated on the sea. *Steele v. Thacher*, 1 Ware 85, 22 Fed. Cas. No. 13,348, and *Sherwood v. Hall*, 3 Sumn. 127, 21 Fed. Cas. No. 12,777, are similar cases.

In *The State of Missouri*, 76 Fed. 376, 22 C. C. A. 239, a ship was held liable for the tortious act of the master in abducting and carrying away laborers who had been employed to assist in discharging freight.



The term "maritime," as here employed, has a primary reference to the locality of consummation of the wrongful act; and it may also include the further restrictive idea that the wrong must have some connection with a vessel and its owners, or the cargo; in other words, that it must also involve, or be connected with, relations which are maritime in the same sense in which the word is used in the admiralty with respect to matters of contract. This latter point cannot yet be said to be finally settled."

In the *Normannia*, 62 Fed. 469, the jurisdiction was sustained over a libel for false representations in regard to the voyage. The libelant had purchased a ticket for passage to New York but determined to give it up on account of apprehensions as to the risk of cholera. The agents of the ship, however, induced him to sail and he was put to inconvenience and suffering by an outbreak of the disease on the steamer before she reached her destination.

In the *Willamette Valley*, 71 Fed. 712, admiralty jurisdiction in tort was sustained over a suit against the vessel for the refusal of her officers to provide a passenger with the accommodations to which he was entitled.

99. An article in the *Columbia Law Review*, volume IX, 1, by Mr. Justice Brown, of the supreme court, (retired), entitled "Jurisdiction of the Admiralty in Cases of Tort," is most instructive on the general subject. It contains the following: "Whether the word 'tort' as thus used includes every act within the common law definition of the word, or is confined to such as are in some way connected with the equipment, navigation or discipline of the ship, has not been judicially decided. The former definition would cover every wrongful act done upon navigable waters, such as assault by one passenger upon another, or an injury suffered by one through the negligence of another, and make locality the sole test of jurisdiction. The latter would limit it to torts committed by the officers or crew in conducting the navigation or enforcing the discipline of the ship. The broader use is within the letter of the definition, but it may be well doubted whether, for example, a libel or a slander put in circulation on board a ship, could be made the basis of a suit in admiralty. Such cases are peculiarly matters within the jurisdiction of common law courts, and a trial by

jury. This is the view taken by Mr. Benedict in his work upon 'Admiralty.' The suggestion, however, is rather academic than practical, as instances of this kind must be exceedingly rare, while assaults by officers upon seamen are unfortunately frequent, and often attended by the grossest brutality."

In *Campbell v. Hackfeld & Co.*, 125 Fed. 696, 62 C. C. A. 274, the court of appeals for the ninth circuit had to consider a libel by a stevedore against his employer, a corporation engaged in the business of loading and unloading vessels. While assisting in the unloading of a cargo from the hold of a ship anchored in navigable waters, the libelant had sustained injuries by reason of the negligence of the respondent and its servants at the time employed in the discharge of the cargo. No fault was charged against the vessel or her crew and the relations involved were wholly between the parties engaged in unloading her. The locality was undoubtedly on navigable waters. The court held that the tort was not maritime in its character and affirmed the decree below dismissing the libel for want of jurisdiction. It was said in the opinion that "the fundamental principle underlying all cases of tort, as well as of contract, is that, to bring a case within the jurisdiction of a court of admiralty, maritime relations of some sort must exist, for the all-sufficient reason that the admiralty does not concern itself with non-maritime affairs." This opinion should be considered in connection with a note on the decision below, in 16 *Harvard Law Review*, 210, and the question of whether the relationship of the parties has any real connection with the doctrine of torts in the general law. If not, it should have none in the maritime law. The rule as stated in many decisions of the supreme court has been very satisfactory and qualifications of it are of doubtful benefit.

The locality of a maritime tort must be on navigable waters, and this means the place where the wrong is substantially accomplished,<sup>1</sup>

1. Various definitions of this rule have been given. In *Milwaukee v. The Curtis*, 37 Fed. 705, it is stated: "The ultimate judicial authority has determined the principle that the true meaning of the rule of locality is that, although the origin of the wrong is on the water, yet, if the consummation and substance of the injury are on the land, a court of admiralty has not jurisdiction; that the place or locality of the injury is the place or locality of the thing injured, and not of the agent causing the injury." Here jurisdiction was denied in a suit by the city against the vessel for damage done to a bridge. In *Hermann v. Mill Co.*, 69 Fed. 646, the tort complained of was that a laborer working in the hold of a vessel was injured by a piece of timber dropped by a person working on the pier. Admiralty jurisdiction was sustained. The interpretation of the rule was this: "I think that the only true and rational solution of the jurisdictional question, where the tort occurs partly on land and partly on water, is to ascertain the place of the consummation and substance of the injury. This latter element of the wrong is necessarily the only substantial cause of action, otherwise it would be '*damnum absque injuria*.'" In *The Maud Webster*, 8 Ben. 547, 16 Fed. Cas. No. 9,302, it was said that to give admiralty jurisdiction the substantial cause of action must be completed on navigable waters. The *H. S. Pickands*, 42 Fed. 239, was a libel for personal injuries received by a workman injured in repairing the steamer. A ladder extended from the bulwarks to the wharf and was there secured by a cleat. The master moved the ladder from the cleat. In attempting to go on shore the libellant fell from the ladder to the wharf and was injured. The court held that there was no jurisdiction in the admiralty. In *The Mary Stewart*, 10 Fed. 137, jurisdiction was denied where a man standing on a wharf was injured by the fall of a bale of cotton which was being hoisted to the ship by the ship's tackle. *Leathers v. Blessing*, 105 U. S. 626, 26 L. ed. 1192, was the converse of the last case, where the libellant being on board the vessel was in-

jured by a bale of cotton, in the same way. Here jurisdiction was sustained. In *The Strabo*, 90 Fed. 110, a workman attempted to leave the vessel by a ladder which was not properly secured to the ship's rail; he was thereby thrown to the dock and injured. Here the jurisdiction was sustained, the court holding that the breach of duty on the part of the ship had its effect upon the libellant while he was on the ship, and that he there received the effect of the tortious act although his physical injury was completed by his fall upon the dock. The court also said that when the libellant was thrown from the ladder, and before he struck the dock, it might be fairly inferred that he received some injurious nervous shock or otherwise. This decision was affirmed by the circuit court of appeals for the second circuit, in *The Strabo*, 98 Fed. 998.

Where the damage is wholly upon the land, the fact that the cause of the damage originated from a vessel on navigable waters, does not bring the cause within the jurisdiction of the admiralty. In this case, a vessel lying at a wharf caught fire and various buildings on the shore were thereby destroyed. *The Plymouth*, 3 Wall. (U. S.) 20, 18 L. ed. 125.

*Ex parte Phenix Ins. Co.*, 118 U. S. 610, 7 Sup. Ct. 25, 30 L. ed. 274, was a case where buildings on shore were set on fire by sparks from a steamer's smokestack, and it was said to be perfectly clear that there was no jurisdiction in the admiralty, either *in rem* or *in personam*, of suits against the vessel or her owner for the tort, as the damage had been accomplished on the land.

*Johnson v. Chicago & P. El. Co.*, 119 U. S. 388, 7 Sup. Ct. 254, 30 L. ed. 447, was a case where the jib-boom of a vessel struck a warehouse and a large quantity of corn ran out and that under its previous decisions this was lost in the river. The court held was not a tort of admiralty jurisdiction, because the substance and consummation of the wrong took place on land. See also *Cleveland T. & V. R. Co. v. Cleveland S. S. Co.*, 208 U. S. 316, 28 Sup. Ct. 414, 52 L. ed. 508, (a suit for damages to a dock and



and if this is on the high seas,<sup>2</sup> or navigable waters of the United States,<sup>3</sup> or of a foreign country,<sup>4</sup> the jurisdiction of the American admiralty may be rightfully invoked. But whether this jurisdiction extends to the purely internal waters of particular states may still be an open question.<sup>5</sup>

Maritime torts may be generally classified as injuries to the person and injuries to property.<sup>6</sup>

(II.) *Personal Injuries.* — In the class of injuries to the person are included abductions,<sup>7</sup> assaults,<sup>8</sup> personal injuries,<sup>9</sup> as to passen-

bridge by a vessel); *The Troy*, 208 U. S. 321, 28 Sup. Ct. 416, 52 L. ed. 512. These two last cases had been brought in the admiralty by reason of a general impression that the decision of the supreme court, in *The Blackheath*, 195 U. S. 361, 25 Sup. Ct. 46, 46 L. ed. 236, had modified the doctrine previously announced. In that case, the admiralty jurisdiction had been sustained in respect of a libel for damages sustained by a beacon through a ship running into it.

*Ramsdell Transp. Co. v. La Compagnie, etc.*, 182 U. S. 406, 21 Sup. Ct. 831, 45 L. ed. 1155, was an action at law for damages caused by a steamship striking a pier, in which the court said (page 411), that the action being for damages inflicted on land, was not, and could not be, in the admiralty.

2. "The admiralty has also jurisdiction over all torts and injuries committed upon the high seas, and in ports and harbors within the ebb and flow of the tide." *De Lovio v. Boit*, 2 Gall. 398, 7 Fed. Cas. No. 3,776.

3. *The Genesee Chief*, 12 How. (U. S.) 463, 13 L. ed. 1058; *United States v. Ferry Co.*, 21 Fed. 331.

4. *Leading Case.* — *The Avon*, *Brown's Adm.* 170, 2 Fed. Cas. No. 680, where jurisdiction was retained over a case of collision in the Welland canal in Canada. In *Panama R. Co. v. Napier Ship. Co.*, 166 U. S. 280, 17 Sup. Ct. 572, 41 L. ed. 1004, the tort originated at Colon. In *Smith v. Condry*, 1 How. (U. S.) 28, 11 L. ed. 35, the suit was on account of a collision in the port of Liverpool.

5. In *Ex parte Boyer*, 109 U. S. 629, 632, 3 Sup. Ct. 434, 27 L. ed. 1056, a petition for a writ of prohibition to an admiralty court to restrain its exercise of jurisdiction over a cause of collision on the Illinois and Michigan canal, the court sustained the jurisdiction, saying: "Navigable water

situated as this canal is, used for the purposes for which it is used, a highway for commerce between ports and places in different States, carried on by vessels such as those in question here, is public water of the United States, and within the legitimate scope of the admiralty jurisdiction conferred by the Constitution and statutes of the United States, even though the canal is wholly artificial, and is wholly within the body of a State, and subject to its ownership and control; and it makes no difference to the jurisdiction of the district court that one or the other of the vessels was at the time of the collision on a voyage from one place in the State of Illinois to another place in that State. . . . This case does not raise the question whether the admiralty jurisdiction of the district court extends to waters wholly within the body of a State, and from which vessels cannot so pass as to carry on commerce between places in such State and places in another State or in a foreign country; and no opinion is intended to be intimated as to jurisdiction in such a case."

In the case of *Strapp v. Clyde*, 43 Minn. 192, 45 N. W. 430, the supreme court of the State of Minnesota decided that such interior waters were not within federal admiralty jurisdiction.

6. *Parsons, Shipping & Admiralty*, Vol. II, 347-351.

7. *State of Missouri*, 76 Fed. 376, 22 C. C. A. 239; *Uncle Sam*, 1 McAll. 505, 29 Fed. Cas. No. 17,427; *Steele v. Thacher*, Ware 91, 22 Fed. Cas. No. 13,348.

8. *The Miami*, 93 Fed. 218, 35 C. C. A. 281; *The Lord Derby*, 17 Fed. 265 (a case where the ship's dog severely bit the pilot); *McGuire v. The Golden Gate*, 1 McAll. 104, 16 Fed. Cas. No. 8,815.

9. *The Strabo*, 98 Fed. 998, 39 C.



gers,<sup>10</sup> either in respect of bodily harm,<sup>11</sup> or loss of their personal baggage and effects;<sup>12</sup> as well as of members of the ship's company, through defects in the construction and equipment of the vessel,<sup>13</sup> or conduct of the master or officers,<sup>14</sup> or hurts received merely in the service of the ship.<sup>15</sup> So, too, the jurisdiction will cover cases of injuries received by persons not members of the crew or passengers, but lawfully on board.<sup>16</sup>

(III.) *Injuries to Property.*—In this class would be included conversion of goods,<sup>17</sup> wrongful arrests of vessels,<sup>18</sup> unlawful seizures,<sup>19</sup> collisions between vessels,<sup>20</sup> or between a vessel and a fixed object;<sup>21</sup> breaches of the contract of carriage, such as would at law give a right to an action on the case.<sup>22</sup>

(IV.) *Collisions.*—Collision, or the impact of one vessel with another, or with certain other floating or fixed structures, is an important subject of admiralty jurisdiction. In the great majority of instances, it occurs between vessels, is wholly accomplished upon the water, and no questions as to admiralty jurisdiction can arise.<sup>23</sup>

Where the collision occurs between a vessel and a fixed permanent structure forming a part of the realty, such as a pier, or a bridge or a building, no suit can be maintained in the admiralty for the injuries done to the structure. But for the injury received therefrom by the vessel, an action *in personam* against the owner of the structure is cognizable in the admiralty because the injury to the vessel is consummated upon navigable waters; no action *in rem* against the structure is maintainable because maritime liens can only subsist upon movable things engaged in navigation or the subjects of maritime commerce.<sup>24</sup>

C. A. 375; *Grimsley v. Hankins*, 46 Fed. 400; *The Helios*, 12 Fed. 732; *The Mary Stewart*, 10 Fed. 137.

10. *The Western States*, 159 Fed. 354, 86 C. C. A. 354; *The Prinzess Irene*, 151 Fed. 17.

11. *Elder Dempster Ship Co. v. Pouppirt*, 125 Fed. 732, 60 C. C. A. 500.

12. *The Majestic*, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. ed. 1039; *The Kensington*, 94 Fed. 885, 36 C. C. A. 533.

13. *The Max Morris*, 137 U. S. 1, 11 Sup. Ct. 29, 34 L. ed. 586; *The Watson*, 128 Fed. 201.

14. *The Iroquois*, 194 U. S. 240, 24 Sup. Ct. 640, 48 L. ed. 955; *The Troop*, 128 Fed. 856, 63 C. C. A. 584.

15. *Cornell S. Co. v. Fallon* (C. C. A.), 179 Fed. 293; *The Chico*, 140 Fed. 568; *The Kenilworth*, 137 Fed. 1003.

16. *Leathers v. Blessing*, 105 U. S. 626, 26 L. ed. 1192; *The City of Seattle*, 150 Fed. 537, 80 C. C. A. 279.

17. As for the wrongful conversion of a whale upon the high seas. *Taber*

*v. Jenny*, 1 Spr. 315, 23 Fed. Cas. No. 13,720; 2 *Parsons, Shipping & Admiralty*, 349, 350.

18. *Gow v. William W. Brauer S. Co.*, 113 Fed. 672.

19. *Manro v. Almeida*, 10 Wheat. 473, 6 L. ed. 369; *The Martha Anne*, Olc. 18, 16 Fed. Cas. No. 9,146; *Burke v. Trevitt*, 1 Mason 96, 4 Fed. Cas. No. 2,163.

20. *Waring v. Clarke*, 5 How. (U. S.) 441, 12 L. ed. 226; *The Grand Republic*, 10 Fed. 398.

21. Jurisdiction in such a case being limited to the injuries received by the ship. *W. B. Railroad Co. v. H. Towboat Co.*, 23 How. (U. S.) 209, 16 L. ed. 433.

22. *New Jersey S. Nav. Co. v. Merchants Bank*, 6 How. (U. S.) 344, 393, 12 L. ed. 465.

23. *Spencer, Marine Collisions*, title "Jurisdiction." *Marsden, Collisions at Sea* (fifth edition), title "Admiralty Jurisdiction."

24. *Cleveland T. & V. R. Co. v. Cleveland S. S. Co.*, 208 U. S. 316, 28

(V.) **Loss of Life.**—Suits for loss of life on navigable waters have become a recognized branch of admiralty jurisdiction in matters of tort, and may be maintained if the local law, or law of the ship's flag, gives the right of action. The suit may be *in personam* or *in rem*, according to the provisions of the local law, and whether it gives, or does not give, a lien.<sup>25</sup>

(VI.) **Enforcement of Maritime Liens.**—In general, every maritime tort creates a maritime lien upon the instrument causing the wrong or damage,<sup>26</sup> provided that such instrument is

Sup. Ct. 414, 52 L. ed. 508 (collision with a wharf or dock); The Troy, 208 U. S. 321, 28 Sup. Ct. 416, 52 L. ed. 512 (collision with a bridge); Johnson v. Elevator Co., 119 U. S. 388, 7 Sup. Ct. 254, 30 L. ed. 447 (collision with a warehouse); *Ex parte* Insurance Co., 118 U. S. 610, 7 Sup. Ct. 25, 30 L. ed. 274; The Plymouth, 3 Wall. (U. S.) 20, 18 L. ed. 125 (fires in buildings on shore caused by steamboats). These are cases where the action was against the vessel and admiralty jurisdiction was denied. On the other hand, in the following cases, which were prosecuted in behalf of the vessel, for the injury received by her from the fixed structure, the admiralty jurisdiction was sustained. Panama R. Co. v. Napier Ship. Co., 166 U. S. 280, 17 Sup. Ct. 572, 41 L. ed. 1004; Railroad v. Boat Co., 23 How. (U. S.) 209, 16 L. ed. 433; Atlee v. Packet Co., 21 Wall. (U. S.) 389, 22 L. ed. 619. These are all applications of the general principle that locality is the test of jurisdiction in torts.

25. The Albert Dumois, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. ed. 751; The Mariska, 107 Fed. 989, 47 C. C. A. 115; The Onoko, 107 Fed. 984, 47 C. C. A. 111; The Oregon, 81 Fed. 876, 26 C. C. A. 665; The Willamette, 70 Fed. 874, 18 C. C. A. 366; The Transfer No. 4, 61 Fed. 364, 9 C. C. A. 521; The Northern Queen, 117 Fed. 906; The City of Norwalk, 55 Fed. 98.

Where a collision occurs on the high seas between two vessels of the same state, and the statutes of that state give personal representatives a right of action for damages for death by tort, a claim therefor against the owner of one of the vessels at fault may be enforced in the admiralty. The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. ed. 264.

No action *in rem* lies in the admiralty for damages caused by loss of life

through a maritime tort, although by the local law a right of action survives to personal representatives, unless by such local law a lien is expressly created. The Corsair, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. ed. 727.

The admiralty has jurisdiction *in rem* of a libel for a maritime tort resulting in the death of the person injured, on navigable waters of Virginia, because the local statutes of that state give a right of action *in rem* against a vessel wrongfully or negligently causing the death of any person. The Glendale, 81 Fed. 633, 26 C. C. A. 500.

26. "It would appear, therefore, to be the settled rule in the United States that there is a maritime lien for the injury inflicted by maritime torts, with but few exceptions,—for instance, that made by rule 16, that suits for assault and beating shall be *in personam* only." The Anaces, 93 Fed. 240, 243, 34 C. C. A. 558.

In the Malek Adhel, 2 How. (U. S.) 210, 11 L. ed. 239, Mr. Justice Story, delivering the opinion of the court, states the principle as follows: "It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which or by the master or crew thereof, a wrong or offense has been done, as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offense or wrong, or insuring an indemnity to the injured party. . . . The ship is also, by the general maritime law, held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a wilful disregard of duty; as, for example, in cases of collision and other wrongs done upon the high seas, or elsewhere within the admiralty and

a movable thing appertaining to commerce and navigation.<sup>27</sup>

It is the policy of the maritime law, in most instances, to look directly to the thing which does the wrong, as a sort of juridical person and the surest pledge of satisfaction to the party injured.<sup>28</sup> The exceptions to this general rule are limited in number; there is no right to proceed *in rem* for assaults and beatings on the high seas,<sup>29</sup> and for loss of life there is no right of action *in rem* by the general maritime law.<sup>30</sup> Admiralty has jurisdiction of such cases only by virtue of local legislation.<sup>31</sup>

So, also, a maritime tort creates the same personal liability as torts in general do and the admiralty has full jurisdiction to administer its remedies *in personam* accordingly.<sup>32</sup> But for torts committed without the personal participation of the owner, the ship is in practice the only source of satisfaction for the reason that the liability of the owner may be limited to the amount of his interest in the vessel itself.<sup>33</sup>

The enforcement of maritime liens has always been within the jurisdiction of the admiralty<sup>34</sup> whether created by the general maritime

maritime jurisdiction, upon the general policy of that law, which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party." The John G. Stevens, 170 U. S. 113, 120, 18 Sup. Ct. 544, 42 L. ed. 969. "The foundation of the rule that collision gives to the party injured a *ius in re* in the offending ship is the principle of the maritime law that the ship, by whomsoever owned or navigated, is considered as herself the wrongdoer, liable for the tort, and subject to a maritime lien for the damages. This principle, as has been observed by careful text writers on both sides of the Atlantic, has been more clearly established, and more fully carried out, in this country than in England." See also *Rolli v. Troop*, 157 U. S. 386, 402, 403, 15 Sup. Ct. 657, 39 L. ed. 742; *The Panama*, 101 U. S. 453, 462, 25 L. ed. 1061; *The Clarita & The Clara*, 23 Wall. (U. S.) 1, 23 L. ed. 146; *The Merrimac*, 14 Wall. (U. S.) 199, 20 L. ed. 873; *The China*, 7 Wall. (U. S.) 53, 68, 19 L. ed. 67; *The John Fraser*, 21 How. (U. S.) 184, 194, 16 L. ed. 106; *The Palmyra*, 12 Wheat. (U. S.) 1, 14, 6 L. ed. 531; *The A. Heaton*, 43 Fed. 592.

27. *The Rock Island Bridge*, 6 Wall.

(U. S.) 213, 18 L. ed. 753. This was a libel by a shipowner against a bridge over the Mississippi River for damages sustained by two steamboats coming into collision with it. The court said: "A maritime lien can only exist upon movable things engaged in navigation, or upon things which are the subject of commerce on the high seas or navigable waters. It may arise with reference to vessels, steamers, and rafts, and upon goods and merchandise carried by them. But it cannot arise upon anything which is fixed and immovable, like a wharf, a bridge, or real estate of any kind."

28. *Marsden, Collisions at Sea* (fifth ed.), ch. III; *Kennedy, Civil Salvage*, ch. I.

29. General admiralty rule 16.

30. *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. ed. 727.

31. *The Lotta*, 150 Fed. 219.

32. *Workman v. New York City*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. ed. 314; *Guttner v. Pacific S. Whaling Co.*, 96 Fed. 617; *Marsden, Collisions at Sea* (1904), ch. III; *Spencer, Marine Collisions*, § 3.

33. The "Limited Liability Act," U. S. Rev. St. 4282-4289.

34. *Cutler v. Rae*, 7 How. (U. S.) 729, 12 L. ed. 890, where it was said:



law,<sup>35</sup> or a foreign law,<sup>36</sup> or by the statutes of a state,<sup>37</sup> provided, always, that the subject-matter to which the lien appertains is in its nature maritime.<sup>38</sup>

The jurisdiction of the admiralty to enforce maritime liens is an exclusive one, and cannot be administered in any other court,<sup>39</sup> although other courts, as of bankruptcy or equity, may recognize and protect them in dealing with the property to which they may be attached.<sup>40</sup>

(VII.) Contribution.—The admiralty has jurisdiction of a suit for contribution, as between joint tort-feasors, parties to a general average, and the like. This jurisdiction has lately been exercised in adjusting the damages caused by collision, where one of the vessels in fault has paid more than its just proportion of the sum recovered. The admiralty rule in respect of contribution between wrongdoers is not the same as the rule of the common law. It proceeds on the principle that the burden of a loss caused by several should ultimately be equalized among all who ought to share it. Where all parties are before

“The court of admiralty undoubtedly has jurisdiction in cases where the vessel or cargo is subject to a lien created by the maritime law. And where the lien is attached to the vessel, or cargo, it will, until it is discharged, adhere to the property in the hands of third persons, and will follow the proceeds, in certain cases, in the hands of assignees.” See also *The America*, Newb. 195, 4 Fed. Cas. No. 2,046.

35. Wherever a maritime lien arises in a contract or claim, as in controversies of material men or suits for collision, and the like, the injured party may pursue his remedy, whether it be for breach of a maritime contract or a maritime tort, by a suit *in rem* against the vessel, or, at his election, by a suit against the owner personally, or against the owner and master, jointly, if they are both liable. *The Kalorama*, 10 Wall. (U. S.) 204, 19 L. ed. 941.

36. *The Wexford*, 3 Fed. 577. This suit included a claim of lien for master's wages against a British vessel. By English law the master has such a lien. The court enforced it, saying: “The contract with the master is made with reference to the statute, and the lien or interest in the vessel is thereby given to him as part of the consideration for his service. It is immaterial that the lien is not created by the maritime law. The admiralty courts enforce liens created by statute or by agreement, and thereby annexed or made part of a maritime agreement.” See also *The Maggie Ham-*

*mond*, 9 Wall. (U. S.) 435, 19 L. ed. 772.

37. *The Glide*, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. ed. 296.

38. *The Kingston*, 23 Fed. 200.

39. The United States Circuit Court, through its receiver, sold certain vessels subject to maritime liens, and the special master, appointed to pass on all claims, had also determined what were liens on the vessels. The court held that it had no jurisdiction to determine and enforce such liens because that was the province of the district court in admiralty, exclusively. *Hudson v. Transportation Co.*, 175 Fed. 519.

40. “When vessels have passed into the hands of an assignee or receiver, it has been the constant practice of courts of bankruptcy and equity to respect the liens given by the maritime law, to marshal such liens and direct their payment, precisely as a court of admiralty would have done.” *Pratt v. Coke Co.*, 168 U. S. 255, 259, 18 Sup. Ct. 62, 42 L. ed. 458, citing *Scott's Case*, 1 Abb. 336, 21 Fed. Cas. No. 12,517; *In re Kirkland*, 14 Fed. Cas. No. 7,842; *In re People's M. Steamship Co.*, 3 Ben. 226, 19 Fed. Cas. No. 10,970; *High on Receivers*, § 138.

In *McRae v. Bowers Dredging Co.*, 86 Fed. 344, a court of equity administered maritime liens on property in its control and determined various questions in regard to their rank and nature. But it is clear, under the general law of the admiralty, that no sale of the property could divest such liens, against the will of the lienors.

the court in the original suit, the damage is apportioned there; if not, the injured party may be satisfied by one, or any, but this will not absolve the others from their obligation to contribute according to the rights of those who have paid the whole. The principle is one of ordinary equity, and, in maritime cases, the admiralty has full jurisdiction to enforce it through a libel *in personam*.<sup>41</sup>

(VIII.) The marshaling of assets among creditors of the ship is a branch of admiralty jurisdiction which is frequently exercised, the fund being the proceeds of the ship, freight, or cargo. Priorities between various lienors are determined according to the merit of their claims and the rank to which they may be entitled. The court proceeds on general equitable principles and will prefer a creditor having only a claim against the fund to one who has further security or the personal liability of the owner. Its jurisdiction is, however, limited to a marshaling of the fund, and its distribution between parties having maritime liens and the owner. For this purpose, a mortgage, as against the owner, will be treated as a sort of maritime lien, but not otherwise. Mere judgment-creditors of the owner cannot be heard.<sup>42</sup>

(IX.) Licitation and disputes between part-owners are subjects of admiralty jurisdiction. Cases of licitation arise where the ship is sold by the court for the purpose of a partition between the owners. Where equal part-owners of a vessel cannot agree as to her use or employment, the admiralty has jurisdiction, on the application of either party, to take and sell the property and divide the proceeds between the owners. Where the disagreement is between owners of unequal shares, the jurisdiction has been doubted and denied, but without convincing reasons. It has also jurisdiction, where the opposing interests are unequal, to decree the possession of the ship to which-ever will employ her and to take security from that interest, in behalf of the other, for her safe return.<sup>43</sup>

41. *Erie R. Co. v. Transportation Co.*, 204 U. S. 220, 27 Sup. Ct. 246, 51 L. ed. 450; *Dupont v. Vance*, 19 How. (U. S.) 162, 15 L. ed. 584; *The Mariska*, 107 Fed. 989, 47 C. C. A. 115; *The Hudson*, 15 Fed. 162; *The St. Joseph*, 6 McLean 573, 7 Fed. Cas. No. 3,908; *The Fair American*, 1 Pet. Adm. 242, 6 Fed. Cas. No. 3,347.

42. *The Lottawanna*, 21 Wall. (U. S.) 558, 572, 22 L. ed. 654; *The Hudson*, 15 Fed. 162; *The Wexford*, 7 Fed. 674; *The Carrigan*, 7 Fed. 507; *The Adolph*, 7 Fed. 601; *The Sailor Prince*, 1 Ben. 461, 21 Fed. Cas. No. 12,219; *The Packet*, 3 Mason 255, 18 Fed. Cas. No. 10,654; *The Orient*, 10 Ben. 620, 18 Fed. Cas. No. 10,569; *The Enterprise*, 1 Low. 455, 8 Fed. Cas. No. 4,498; *The Linda Flor*, Swabey (Eng.) 309; *The Elin*, 7 Mar. Law Cases 120.

"It need hardly be added, that though a proceeding *in rem* and a petition for payment of a claim out of

proceeds of a sale remaining in the registry are distinct things—the former proceeding on the ground of a lien—yet no one except an owner is entitled to payment out of the registry, unless he has a lien upon the fund therein. The court can marshal the fund only between lien-holders and owners." *The Edith*, 94 U. S. 518, 523, 24 L. ed. 167.

43. "Courts of admiralty, when the part-owners of a ship cannot agree upon her employment, authorize the majority to send her to sea, on giving security to the dissenting minority, to bring back and restore the ship, or, if she be lost, to pay them the value of their shares; and in such case the minority can neither recover part of the profits of the voyage nor compensation for the use of the ship. *Abbott on Shipping*, pt. 1, ch. 3; *The Steamboat Orleans*, 11 Pet. 175, 183; *Adm. Rule 20*; *The Marengo*, 1 Lowell,



(X.) Petitory and possessory suits are undoubtedly within the admiralty jurisdiction and are also specially provided for in the twentieth general admiralty rule of the supreme court. A petitory suit is one in which the mere title to the ship is litigated and sought to be enforced and a possessory suit is one to restore to the owner the possession which he had under a claim of title. They are a species of maritime replevin and will lie in all cases where an owner has been wrongfully deprived of his property.<sup>44</sup>

(XI.) Salvage is essentially a subject of admiralty jurisdiction. Primarily, it is neither *ex contractu* nor *ex delicto*, but a liability imposed by the maritime law on property saved from perils of the sea by those owing no duty to do so. A like liability is similarly imposed upon the persons who receive the benefit of such service by receiving the salvaged property. Hence the admiralty may exercise this jurisdiction *in rem* or *in personam* by granting an adequate reward in proportion to the merits of the service rendered. A maritime lien, of the highest rank, inheres in the property saved and may follow its proceeds. Such property must, in general, be of a maritime character, particularly, a ship or its cargo. Salvage may also rest on contract and such contracts are maritime and in no way lessen the jurisdiction of the admiralty. The court, however, exercises a plenary power to disregard or modify all salvage contracts and may readjust the relations of the parties, in appropriate instances, at its discretion. The right to pure salvage is ordinarily dependent on success. The jurisdiction of the admiralty extends to all the incidents of the transaction, in-

52. If the part-owners are equally divided in opinion upon the manner of employing the ship, then, according to the general maritime law, recognized and applied by Mr. Justice Washington, the ship may be ordered to be sold and the proceeds to be distributed among them. *The Seneca*, 3 Wall. Jr. 395; *Story on Partnership*, 439; the *Nelly Schneider*, 3 P. D. 152." *Head v. Amoskeag Man. Co.*, 113 U. S. 9, 23, 5 Sup. Ct. 441, 28 L. ed. 889.

In a possessory suit a court of admiralty has jurisdiction to take into consideration an equitable title which appears incidentally, and particularly when it is set up by way of defense by the claimant in possession of the vessels. *Chirurg v. Knickerbocker Towage Co.*, 174 Fed. 188.

44. In *Ward v. Peck*, 18 How. (U. S.) 267 15 L. ed. 383, the court said: "Originally, the court of admiralty in England entertained jurisdiction of petitory as well as mere possessory actions. Since the Restoration, that court, through the jealous interference of courts of law, had ceased to pronounce directly on questions of owner-

ship or property. Petitory suits were silently abandoned, and, if in a possessory action a question of mere property arose, especially of a more complicated nature, it declined to interfere.

"This submission to authority rather than reason has continued till the statute of 3 and 4 Vict., c. 65, restored to the admiralty plenary jurisdiction of such questions. *The Aurora*, 3 Rob. 133; *The Warrior*, 2 Dods., 288.

"In this country, where the courts of admiralty have not been subjected to such jealous restraints, the ancient jurisdiction over petitory suits or causes of property has been retained. In the case of *The Tilton*, 5 Mason 465, Mr. Justice Story has examined this question with his usual learning and ability. The authority of that case has never been questioned in our courts." See also *Brig Sarah Ann*, 13 Pet. (U. S.) 387, 10 L. ed. 213; *Manro v. Almeida*, 10 Wheat. (U. S.) 473, 6 L. ed. 369; *Taylor v. Royal Saxon*, 1 Wall. Jr. (U. S.) 311, 23 Fed. Cas. No. 13,803; *The Taranto*, 1 Spr. 170, 23 Fed. Cas. No. 13,751; *The Friendship*, 2 Curt. 426, 9 Fed. Cas. No. 5,123; *The Dove*, 1 Gall. 585, 7 Fed. Cas. No. 4,035.



cluding an appointment of the salvage award among all parties engaged in the service and the assignment of the remnants of the property or fund to those lawfully entitled to receive them. Salvage is not ordinarily the subject of an action at law and the admiralty jurisdiction is usually exclusive. Where an express contract existed, an action at common law, against the party, would, of course, lie, but the result would not be salvage. In point of fact, the common-law courts have had little concern with questions in the law of salvage.<sup>45</sup>

(XII.) **General average** signifies the contribution between the parties to a maritime venture whereby a loss suffered by a part for the safety of the whole is shared by all concerned. It is one of the most ancient principles of the maritime law and its characteristic feature is found in the well-known extract from the Rhodian code, preserved in the digest of Justinian:—"It is provided by the law of Rhodes that if for the sake of lightening a ship a jettison of merchandise is made, that which is given for all shall be recompensed by the contribution of all." The subject is one of admiralty jurisdiction from its nature; it belongs solely to the maritime law and is not a part of the municipal or common law. In fact, the common law courts have expressly declined to enforce the right of contribution in cases where the property of one is sacrificed to avoid a common peril and the difficulties in adjusting the rights of the numerous interests usually involved, in any action known to the common law, has been a practical obstacle to any assumption of jurisdiction by any other than courts which proceed according to the course of the civil law. In this respect, the jurisdiction is based on considerations similar to those which obtain in the law of salvage.<sup>46</sup>

(XIII.) **Limitation of Liability.**—The administration of the statutes of the United States in limitation of the liability of shipowners is a particular field of admiralty jurisdiction and, in so far as the affirmative relief provided by the admiralty rules of the supreme court is

45. **Kennedy Law of Civil Salvage**, title "Jurisdiction of the Court of Admiralty."

The court of admiralty, while not bound to take jurisdiction of controversies growing out of contracts between foreigners domiciled in this country, may lawfully exercise it, and ought so to do, if justice requires it, and accordingly it has jurisdiction in a case of salvage rendered by an American tug to a British vessel in Canadian waters. *The Sailor's Bride*, Brown's Adm. 68, 21 Fed. Cas. No. 12,220.

A contract to raise a wrecked vessel is sufficiently maritime in its nature to give a court of admiralty jurisdiction of a libel for wages earned under it, although the salvage was not successfully accomplished. *Gilchrist v. Goodman*, 79 Fed. 970.

**Retaining Jurisdiction.**—A court of admiralty has jurisdiction of a suit for salvage and will retain it for all purposes although equitable issues may be incidentally involved. *The Stanley H. Miner*, 172 Fed. 486.

46. *The San Fernando*, 12 Fed. 341; *Gloucester Ins. Co. v. Younger*, 2 Curt. 322, 10 Fed. Cas. No. 5,487.

Services performed by average adjusters, including expenses, disbursements, and charges incidental to ascertaining and adjusting the proportionate share chargeable to the cargo, of the expense incurred in saving and discharging the same, and delivering it, are maritime in their nature; and an express contract for such services is a maritime contract and cognizable in the admiralty. *Coast Wrecking Co. v. Phoenix Ins. Co.*, 13 Fed. 127; *Benedict*, Admiralty (fourth ed.), § 230.

sought, this jurisdiction is an exclusive one, and extends to the power of restraining suits or actions in all other courts in respect of the same subject-matter. These statutes are, in effect, an expression of a very old principle of the general maritime law. The rules which the supreme court enacted, by authority of congress, for the administration of this law, are general admiralty rules 54 to 58, inclusive. Original and exclusive jurisdiction of proceedings under them in the district courts in admiralty, alone.<sup>47</sup>

47. The statutes referred to in the text are the original act of 1851 (§§ 4282-4289 inclusive, of U. S. Rev. St.), and the additional laws of June 26, 1884, and June 19, 1886 (23 U. S. St. at L. 57, § 18, 24 U. S. Stat. at L. 80, § 24).

The protection which these statutes in limitation of liability afford the shipowner is available in his behalf as matter of defense in any suit or action, wherever pending, and in whatever courts. It may be pleaded under the general issue at common law (*American Transportation Co. v. Moore* [1858], 5 Mich. 368; *affirmed* by the Supreme Court of the United States, 24 How. (U. S.) 1, 16 L. ed. 674), or, under a plea of the general issue alone, the court may judicially notice it and instruct the jury accordingly (*Craig v. Continental Ins. Co.*, 26 Fed. 798, *affirmed* in 141 U. S. 638, 12 Sup. Ct. 97, 35 L. ed. 886).

This law is, of course, a part of the supreme law of the land, by which the judges in every state are bound, in accordance with Article VI of the constitution.

Section 4 of the Act of 1851, Rev. St. § 4284, provides that in case of loss, either the creditors or the shipowner may take appropriate proceedings in any court, for the purpose of apportioning the sum for which the shipowner might be liable. It does not, however, specify any particular court, and the question of jurisdiction and procedure first came before the supreme court about twenty years after the enactment of the original Act of 1851.

*Norwich Co. v. Wright*, 13 Wall. (U. S.) 104, 20 L. ed. 585, arose out of a collision between the schooner "Van Vliet" and the steamer "City of Norwich," in which the schooner and her cargo were lost, and the steamer was also badly damaged, then caught fire, and sank. Her own cargo was a

total loss, but she was subsequently raised and repaired. The owners of the schooner filed a libel in the district of Connecticut against the owner of the steamer and obtained a decree of about \$20,000 for the value of the schooner and her cargo. When the steamer had been raised and repaired other cargo owners filed libels against her, *in rem*, in the Eastern District of New York, making the aggregate claims against her on account of the disaster about \$150,000. Her value after the collision was \$2,500 and after the repairs \$70,000. The benefit of the act was claimed by the owners in each court. The Connecticut court held that cases of collision were within the protection of the law, but that it did not have jurisdiction to give relief. On appeal to the circuit court, it was held that collision cases were not embraced by the act. The district court in New York held that the owners were entitled to the protection of the law, and that their liability was limited to the sum of \$2,500. This was affirmed by the circuit court and finally by the supreme court in the City of Norwich, 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. ed. 134. In the appeal from Connecticut, *Norwich Company v. Wright*, the supreme court considered the questions of jurisdiction and procedure. It held that the statute was an adoption by congress of a like principle of the general maritime law and then, as to whether the district court had jurisdiction, it said: "We have no doubt that the district courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter; and this court undoubtedly has the power to make all needful rules and regulations for facilitating the course of proceeding." In regard to the procedure, the court indicated what the proper course should be, and announced that, for aiding parties in this behalf, and facilitating proceedings in

The extent of the law of limited liability is as wide as the scope of admiralty and maritime jurisdiction, and, so far as the jurisdiction of the admiralty courts to enforce it is concerned, it is subject to the same restrictions. That is to say, the subject-matter in respect of which limitation of liability is sought, must be maritime in its nature, a maritime tort or a maritime contract or the like. There is no jurisdiction in the admiralty of proceedings in limitation of liability for damage done on the land; its jurisdiction is confined to maritime affairs.<sup>48</sup>

the district courts, it had prepared certain rules which were subsequently announced as General Admiralty Rules 54-57, 13 Wall. xii.

In the subsequent case of *The Benefactor*, 103 U. S. 239, 26 L. ed. 351, the shipowners had defended on the merits and sustained an adverse decree greatly exceeding the value of their ship before filing a petition under the rules. The court below dismissed this petition because not filed in time. In reversing this action, the supreme court said that the rules were intended to facilitate proceedings for claiming the benefit of the statute, but not to restrict the operation of the law, and added: "Precisely when the owners of a ship in fault ought to be regarded as precluded from instituting proceedings for a limitation of liability might be difficult to state in a categorical manner. Perhaps they can never be precluded so long as any damage or loss remains unpaid. But in a particular case relief should not be granted except upon condition of compensating the other party for any costs and expenses he may have incurred by reason of the delay in claiming the benefit of the law."

In *The Providence S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. ed. 1038, the exclusive nature of proceedings under the rules was pointed out. This was an action commenced in a court of Massachusetts to recover the value of goods destroyed by fire on one of the steamship company's vessels. Pending the suit the shipowner commenced proceedings for limitation of liability in the District Court in New York and then pleaded the fact in the Massachusetts case. That court nevertheless gave judgment against the shipowner. The Supreme Court reversed this on writ of error, and held that the proceedings in the District Court superseded all

other actions and suits for the same loss and damage in state or federal courts, upon the matter being properly pleaded therein. The court took occasion to carefully re-examine the grounds on which the law and jurisdiction rest for their support and said: "We have no doubt that Congress had power to pass the law. It is not only a maritime regulation in its character, but is clearly within the scope of the power given to Congress to regulate commerce \* \* \* . We are clearly of opinion that the authority thus vested in this court was adequate and sufficient to enable it to make the rules above referred to. The subject is one pre-eminently of admiralty jurisdiction. The rule of limited liability prescribed by the Act of 1851 is nothing more than the old maritime rule administered in courts of admiralty in all countries except England, from time immemorial."

In proceedings in limitation of liability, the court will not lose jurisdiction by permitting the steamer to go into another state and resume her business, after taking a stipulation for her value. *In re Morrison*, 147 U. S. 14, 13 Sup. Ct. 246, 37 L. ed. 60.

48. *Butler v. Boston S. S. Co.*, 130 U. S. 527, 557, 9 Sup. Ct. 612, 32 L. ed. 1017.

*Ex parte Phenix Ins. Co.*, 118 U. S. 610, 7 Sup. Ct. 25, 30 L. ed. 274, is one of the few instances in which the supreme court has issued a writ of prohibition to restrain a district court from proceeding outside of its jurisdiction in admiralty. A large number of houses and other buildings had been destroyed by fire caused by sparks from the smokestack of a steamboat and many actions had been prosecuted in various state courts for the resulting damages. In this situation, the shipowners filed a petition for limitation of liability in the district court in



(XIV.) **Enforcement of Foreign Decrees.**—The district courts in admiralty have jurisdiction to carry into effect the decrees of other courts of admiralty, either federal or those of a foreign nation. This may be done when either the property or the person is within the district of the court in which the proceeding is brought.<sup>49</sup>

(XV.) **Wreck.**—Wreck of the sea, being those portions of ship or cargo which may be stranded, is within the jurisdiction of the admiralty.<sup>50</sup>

Included in the general subject of wreck, are *flotsam*, goods which float upon the sea when the ship is sunk; *jetsam*, or goods which have been jettisoned or cast out of the ship by reason of necessity, and, as distinguished from *flotsam*, have sunk instead of floating; and *ligan*, or goods lost in the sea by disaster but buoyed or attached to something in such manner that they might be again found. All these an-

admiralty, and the plaintiffs in the actions in other courts moved to dismiss the same for want of jurisdiction. Their motion being denied, they applied to the supreme court for a writ of prohibition. This was granted. The court held that a district court could not take jurisdiction in admiralty of a petition for limitation of liability where it would not have had cognizance in admiralty originally of the cause of action involved, and that where, as in this case, it was clear that the tort involved was not a maritime tort, there could be no jurisdiction in the admiralty to determine the issue of liability or that of limitation of liability. The writ of prohibition accordingly issued.

49. *Penhallow v. Doane*, 3 Dall. (U. S.) 54, 1 L. ed. 54; *Pennsylvania R. Co. v. Gilhooly*, 9 Fed. 618; *Wilson v. Graham*, 4 Wash. C. C. 53, 30 Fed. Cas. No. 17,804; *The Jerusalem*, 2 Gail. 191, 197, 13 Fed. Cas. No. 7,293, 2 Browne, Civil and Adm. Law 120; *Conkling, Adm.* (1848), 15.

50. In ancient times, wreck of the sea was one of the *droits*, or perquisites, of the admiral, by grant from the crown. By the common law, as stated by Blackstone (Commentaries, Book 1, chapter 8), where any ship was lost at sea and the goods or cargo were thrown upon the land, these goods so wrecked were adjudged to belong to the king, for the reason that by the loss of the ship all property was gone out of the original owner. (Doctor and Student, 267.) The statute of Westminster I., 3 Edw. I. c. 4, then declared that if anything alive escaped

from the ship and came alive to the shore, whether man or animal, it was not to be a legal wreck and the owner might avoid the forfeiture and reclaim his property at any time within a year and a day. A distinction was made by the lawyers in former times between wreck of the sea and wreck at sea, jurisdiction of the former being claimed by the common law in the time of Lord Coke; the reason assigned was that wreck of the sea did not become such until it had reached the shore and was then within the body of a county and outside of the jurisdiction of the admiralty. (Coke, Inst. 2; 167, 560.) This was controverted by the admiralty (Sir Leoline Jenkins; Works, Vol. I, 88), and there were many learned distinctions drawn, as where goods were stranded and again floated by the sea, and whether they might be recovered by a person wading, swimming, or in a small boat (3 Hagg. Adm. 294). It was finally determined in the common law that if any living thing had escaped, dog, cat, hawk, or the like, or if there was any evidence of ownership on the goods, the technical doctrines of wreck did not apply so as to result in forfeiture (2 Chitty, Common Law, 102, 2 Kent's Commentaries, 322). The subject on the common law side is now generally covered by statutes in all the states as well as in England. The law of salvage in the admiralty, for the most part, is sufficient to deal with all questions which may arise in connection with the subject of wrecks and wrecked property there. See Kennedy on Salvage, 53, 111, 112, etc.

ciently appertained to the admiral, by royal grant, and in modern times, come within the admiralty jurisdiction.<sup>51</sup>

Shipwrecked property within the admiralty and maritime jurisdiction of the United States is specially protected by statute against spoliation and plunder.<sup>52</sup> The admiralty also has ample civil jurisdiction to protect the rights of owners of such property and will not treat their titles as lost by reason of disaster.<sup>53</sup>

(XVI.) **Equity Jurisdiction.**—While a court of admiralty is not a court of equity or chancery in the ordinary sense of the terms, inasmuch as it does not possess the characteristic powers of such courts to any comprehensive extent,<sup>54</sup> it has all the capacity of a court of equity in the exercise of its own maritime jurisdiction.<sup>55</sup>

(XVII.) **Objections to Jurisdiction.**—Objections to the jurisdiction, if involving subject-matter, may be made at any time and cannot be

51. "None of these goods which are called jetsam, flotsam, or ligam, are called wreck so long as they remain in, on, or upon the sea; but, if any of them by the sea be put upon the land, then they shall be said wreck." Sir Henry Constable's Case, 3 Co. Rep. 106a, 77 Eng. Reprint 218.

52. U. S. Rev. St. § 5358. In *United States v. Stone*, 8 Fed. 232, is an opinion by Judge Hammond distinguishing between the maritime jurisdiction in respect to depredations against wrecks and the doctrines of the common law.

53. *Murphy v. Dunham*, 38 Fed. 503, was a libel in admiralty for the tortious conversion of a cargo of coal which had lain sunken in Lake Michigan for more than the "year and a day" of the common law. The libellant derived his title from the underwriters who had paid a total loss and afterwards sold to him. The respondent had undertaken to raise the coal for his own account and without any authority from the underwriters or the libellant. He succeeded in bringing most of it into port and sold it at private sale, but did not realize sufficient to pay his expenses. Thereupon the owner sued him in the admiralty for the conversion and obtained a decree, the court holding that the title had not been extinguished and that he was entitled to recover its value, less the reasonable expenses of the salvage, as the respondent had evidently acted in good faith.

54. *The Steamer Eclipse*, 135 U. S. 599, 608, 10 Sup. Ct. 873, 34 L. ed. 269.

This was a libel in admiralty in a territorial court against the ship to enforce a contract of sale and wind up a trust concerning a vessel. In declining jurisdiction, the court said: "While the court of admiralty exercises its jurisdiction upon equitable principles, it has not the characteristic powers of a court of equity. It cannot entertain a bill or libel for specific performance, or to correct a mistake (*Andrews v. Essex Ins. Co.*, 3 Mason 6, 16); or to enforce a trust or an equitable title (*Ward v. Thompson*, 22 How. 330; *the Amelia*, 6 Ben. 475; *Kellum v. Emerson*, 2 Curtis 79); or exercise jurisdiction in matters of account merely (*Grant v. Poillon*, 20 How. 162; *Minturn v. Maynard*, 17 How. 477; *The Ocean Belle*, 6 Ben. 253); or decree the sale of a ship for an unpaid mortgage, or declare her to be the property of the mortgagees and direct possession of her to be given to them. *Bogart v. The John Jay*, 17 How. 399. The jurisdiction embraces all maritime contracts, torts, injuries or offenses, and it depends, in cases of contract, upon the nature of the contract, and is limited to contracts, claims and services purely maritime, and touching rights and duties appertaining to commerce and navigation. *People's Ferry Co. v. Beers*, 20 How. 393, 401. There was nothing maritime about the claims of the interveners, and the intervention was properly dismissed for want of jurisdiction over the subject matter."

55. *United States v. Cornell Steamboat Co.*, 202 U. S. 184, 194, 26 Sup. Ct. 648, 50 L. ed. 987, a suit for salvage.

waived, or avoided by consent of parties.<sup>56</sup> But where the jurisdictional question does not involve more than personal privilege, the right to raise it must be seasonably exercised or it will be waived.<sup>57</sup>

**\* II. PROCEDURE.** — A. BASIS OF. — The procedure in admiralty courts is based upon the general maritime law,<sup>58</sup> which in turn is based upon the civil law.<sup>59</sup> The rules and technicalities of the common law are not applied in these courts,<sup>60</sup> whose proceedings are more analo-

56. The *John C. Sweeney*, 55 Fed. 540. After the court had filed an opinion on the merits, the respondent moved to dismiss the libel for want of jurisdiction. "The first question is, can this motion be now entertained? The question of jurisdiction of the court can be made at any time (*Railway Co. v. Swan*, 111 U. S. 382, 4 Sup. Ct. Rep. 510); indeed, can be made after decree below and writ of error, for the first time in the supreme court (*Capron v. Van Noorden*, 2 Cranch 126; *King Bridge Co. v. Otoe Co.*, 120 U. S. 226, 7 Sup. Ct. Rep. 552). . . . Where the record discloses a controversy of which the court cannot take cognizance, its duty is to proceed no further; and this it can do on its own motion, if need be. . . . The motion is granted; but, as the motion is made at this stage of the case, the respondent must pay all the costs which accrued anterior to his motion."

In *The Oceano*, 148 Fed. 131, the court said: "Consent, however, cannot give jurisdiction, if it does not exist as to the subject-matter of the suit; if the contract sued on be not maritime, jurisdiction of the subject-matter is lacking; while if there be no maritime lien there can be no foundation for a suit *in rem*."

57. *Atkins v. Fiber Dis. Co.*, 18 Wall. 272, 21 L. ed. 841; *The August Belmont*, 153 Fed. 639; *The Ucayali*, 159 Fed. 800; *The Ffeshire*, 11 Fed. 743; *The Bee*, 1 Ware 332, 3 Fed. Cas. No. 1,219.

58. *The Chusan*, 2 Story 455, 5 Fed. Cas. No. 2,717. See *The Osceola*, 189 U. S. 158, 168, 23 Sup. Ct. 483, 47 L. ed. 760; *Manro v. Almeida*, 10 Wheat. (U. S.) 473, 6 L. ed. 369; *Lane v. Townsend*, 1 Ware 286, 14 Fed. Cas. No. 8,054; U. S. Rev. Stat. § 913; *Conkling's Admiralty* (1848) 376; *Clerke's Praxis*, title 19; 2 *Browne's Civil and Admiralty Law*, 413.

The general maritime law prevailing throughout the civilized world is the basis of the admiralty law and proce-

cedure in any particular country, but governs only in so far as it has been actually adopted and followed therein. *The Lottawanna*, 21 Wall. (U. S.) 558, 572, 22 L. ed. 654.

The distinction between plenary and summary formerly prevailing in admiralty practice does not obtain in America, where all proceedings are summary in their nature. *Pratt v. Thomas*, 1 Ware 427, 435, 19 Fed. Cas. No. 11,379.

59. See *Lane v. Townsend*, 1 Ware 286, 298, 14 Fed. Cas. No. 8,054; *The Sloop Merchant*, Abb. Adm. 1, 17 Fed. Cas. No. 9,434; *Hutson v. Jordan*, 1 Ware 385, 12 Fed. Cas. No. 6,959; *The Brig Harriett*, Ole. Adm. 222, 11 Fed. Cas. No. 6,096; *Bett's Admiralty Practice*, Introduction.

In *American Ins. Co. v. Johnson*, Blatchf. & H. 9, 1 Fed. Cas. No. 303, Judge Betts, discussing the basis of the practice and pleadings in admiralty, said: "The civil jurisdiction of the Admiralty is generally held to be according to the forms of civil law, by which is understood, in the United States and England, the positive law of the Romans, exhibited in the compilations of Justinian, and not, as on the continent of Europe, the modern private laws of the various nations which adopted the Roman law. Its course of proceeding in the United States was originally appointed to be conformable to the same law, (Act of September 29th, 1789, 1 U. S. Stat. at Large, 93), and is remarkable for comprehension, brevity, celerity and simplicity."

"In prize cases, in an especial manner, the allegations, the proofs, and the proceedings are, in general, modelled upon the civil law, with such additions and alterations as the practice of nations and the rights of belligerents and neutrals unavoidably impose." *The Schooner Adeline*, 9 Cranch (U. S.) 244, 284, 3 L. ed. 719.

60. *The David Pratt*, 1 Ware 495, 7 Fed. Cas. No. 3,597. See *American Steel Barge Co. v. Chesapeake & O. Coal*



gous to those in equity,<sup>61</sup> although more flexible even than the latter.<sup>62</sup>

But while equitable principles are applied in a court of admiralty,<sup>63</sup> it has no equitable jurisdiction.<sup>64</sup>

**B. REGULATION OF. — 1. Generally.** — The power to regulate admiralty procedure is vested exclusively in congress<sup>65</sup> and therefore state statutes are inapplicable,<sup>66</sup> unless adopted by act of congress or rule of court.<sup>67</sup> A state, however, may give a right of action upon a transaction maritime in its nature.<sup>68</sup> In that case the substantive rights of the parties would depend upon the statute,<sup>69</sup> but the proceedings in the enforcement thereof would be in accordance with the admiralty and not the state law.<sup>70</sup>

Agency Co., 116 Fed. 857, 54 C. C. A. 207; and *infra*, II, G, 1.

"Neither the common law nor code practice and pleadings obtain in admiralty." *Fairgrieve v. Marine Ins. Co.*, 94 Fed. 686, 687.

"The aim and purpose of the court is to bring all parties before it and determine the controversy on the merits as it appears from the proof." *The Volunteer*, 149 Fed. 723, 79 O. C. A. 429.

61. *Richmond v. New Bedford Cop. Co.*, 2 Low. 315, 20 Fed. Cas. No. 11,800; *Pratt v. Thomas*, 1 Ware 427, 435, 19 Fed. Cas. No. 11,379; *The Sloop Merchant*, Abb. Adm. 1, 17 Fed. Cas. No. 9,434. See *Davis v. Adams*, 102 Fed. 520, 42 C. C. A. 493.

62. *Richmond v. New Bedford Copper Co.*, 2 Low. 315, 20 Fed. Cas. No. 11,800, in which the court compares various proceedings in admiralty and in equity and at common law. See *American Steel Barge Co. v. Chesapeake*, etc. Co., 115 Fed. 669, 674, 53 C. C. A. 207, and *infra*, II, G, 1.

63. *American Steel Barge Co. v. Cargo of Coal*, 115 Fed. 669, 116 Fed. 857. See *infra*, II, C, 4.

64. *The Steamer Eclipse*, 135 U. S. 599, 10 Sup. Ct. 873, 34 L. ed. 269. See *supra*, I, B, 5, e; and *infra*, II, C, 4.

65. *The Genesee Chief*, 12 How. (U. S.) 443, 13 L. ed. 1058; *In re Long Island & C. Transp. Co.*, 5 Fed. 599; *The Chusan*, 2 Story 455, 5 Fed. Cas. No. 2,717.

**Procedure in Alaska.** — The act of congress providing for the procedure in the courts of Alaska has not changed the jurisdiction or practice in admiralty cases in the courts of that territory, from that prevailing in other districts. *Bruce v. Murray*, 123 Fed. 366, 59 C. C. A. 494.

66. *The Chusan*, 2 Story 455, 5 Fed.

Cas. No. 2,717. See *The San Rafael*, 141 Fed. 270, 280, 72 C. C. A. 388; *American Steel Barge Co. v. Chesapeake & O. Coal Agency Co.*, 116 Fed. 857, 54 C. C. A. 207; *Lane v. Townsend*, 1 Ware 286, 14 Fed. Cas. No. 8,054.

**Commencement of Suit.** — A state statute providing what constitutes the commencement of a suit has no application to admiralty proceedings. *Laidlow v. Oregon R. & N. Co.*, 81 Fed. 876, 26 C. C. A. 665. Nor does one providing for the examination of parties before trial. *The Australia*, 3 Ware 240, 2 Fed. Cas. No. 667.

The act of Congress providing that the pleadings, practice, and procedure in the circuit and district courts shall follow the state practice expressly excepts proceedings in admiralty. This general exception extends to other acts regulating the practice in the federal courts, although not expressly repeated in the latter. *The Westminster*, 96 Fed. 766 (an act providing for the issuance of commissions to take depositions "according to common usage" does not apply to admiralty courts so as to require them to follow state practice).

67. See *Stone v. Murphy*, 86 Fed. 158; *Louisiana Ins. Co. v. Nickerson*, 2 Low. 310, 15 Fed. Cas. No. 8,539; and Adm. Rule 47.

68. See *supra*, I, B, 5; and *infra*, II, C, 5.

69. *Quinette v. Bisso*, 136 Fed. 825, 69 C. C. A. 503, 5 L. R. A. (N. S.) 303. See also *The Lottawanna*, 21 Wall. (U. S.) 558, 22 L. ed. 654; *Robinson v. Detroit & C. Steam Nav. Co.*, 73 Fed. 883, 20 C. C. A. 86; and *infra*, II, C, 5.

70. *Davis v. The New Brig, Gilp*, 473, 7 Fed. Cas. No. 3,643; *Boon v. The Hornet*, Crabbe 426, 3 Fed. Cas. No. 1,640.

Whether acts of congress regulating procedure in federal courts are applicable to the admiralty court depends upon their form and the apparent legislative intent.<sup>71</sup>

**2. Basis and Extent of Power of Congress.**—The power of congress to regulate admiralty procedure is derived from the admiralty clause and not from the commerce clause of the federal constitution.<sup>72</sup> In some of the earlier cases the power to regulate foreign and interstate commerce was relied upon, but inasmuch as the admiralty jurisdiction is not bounded by the limits of such power,<sup>73</sup> regulations of admiralty procedure cover a wider field, and the power to make them is deduced as a necessary implication from that clause in the constitution vesting jurisdiction of admiralty and maritime causes in the federal courts.<sup>74</sup> This power, however, can be exercised only with respect to matters which are in their nature maritime.<sup>75</sup>

**3. Rules of Court.**—a. *By Supreme Court.*—(I.) **Generally.**—Pursuant to the authority conferred by the congress upon the supreme court to regulate the practice to be followed in admiralty suits,<sup>76</sup> that court has enacted rules<sup>77</sup> which have all the effect of law<sup>78</sup> and which must be followed wherever they are applicable.<sup>79</sup>

But inasmuch as the procedure in admiralty is very flexible and in some respects dependent upon the individual judge, it is to some extent influenced by the practice of the state where the court sits.

71. See *infra*, II, C, 1; II, H, 2, b note; and *The Westminster*, 96 Fed. 766.

72. See *Butler v. Boston & S. S. Co.*, 130 U. S. 527, 9 Sup. Ct. 612, 32 L. ed. 1,017; *In re Long Island etc. Transp. Co.*, 5 Fed. 599.

73. See *supra*, I, B, 1, a, (II); and the *Robert W. Parsons*, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. ed. 73.

74. *Ex parte Garnet*, 141 U. S. 1, 11 Sup. Ct. 840, 35 L. ed. 631; *Butler v. Boston & S. S. Co.*, 130 U. S. 527, 9 Sup. Ct. 612, 32 L. ed. 1,017; *The Genesee Chief*, 12 How. (U. S.) 443, 13 L. ed. 1058; *The Chusan*, 2 Story 455, 5 Fed. Cas. No. 2,717.

75. See *Butler v. Boston & S. S. Co.*, 130 U. S. 527, 9 Sup. Ct. 612, 32 L. ed. 1,017; *Ex parte Phoenix Ins. Co.*, 118 U. S. 610, 7 Sup. Ct. 25, 30 L. ed. 274. See *Knapp v. McCaffrey*, 177 U. S. 638, 20 Sup. Ct. 824, 44 L. ed. 921.

76. U. S. Rev. Stat. § 917; *The Sabine*, 101 U. S. 384, 25 L. ed. 982; *The Steamer St. Lawrence*, 1 Black (U. S.) 522, 17 L. ed. 180.

Under the authority conferred by Congress, the supreme court may establish a rule authorizing admiralty courts

in proceedings for limitation of liability to enjoin the prosecution in state courts of suits against the vessel owners. *Matter of Providence, etc. Steamship Co.*, 6 Ben. 124, 20 Fed. Cas. No. 11,451.

It may authorize the arrest of the defendant in an admiralty suit although imprisonment for debt is unlawful in the state where the district court is sitting. *Hodge v. Bemis*, 12 Fed. Cas. No. 6,557; *Gaines v. Travis*, Abb. Adm. 442, 9 Fed. Cas. No. 5,180. See *Hanson v. Fowle*, 1 Sawy. 497, 11 Fed. Cas. No. 6,041; *Gardner v. Isaacson*, Amm. Adm. 141, 9 Fed. Cas. No. 5,230.

77. The admiralty rules as originally enacted, together with the amendments thereto, may be found in 210 U. S., Appendix.

78. *The Corsair*, 145 U. S. 335, 347, 12 Sup. Ct. 949, 36 L. ed. 727; *The Sabine*, 101 U. S. 384, 25 L. ed. 982; *Scott v. The Propeller Young America*, Newb. Adm. 107, 21 Fed. Cas. No. 12,550.

79. Although the parties do not complain of infractions of the rules, the court may of its own motion compel compliance therewith. *The Bark Havre*, 1 Ben. 295, 11 Fed. Cas. No. 6,232.

In territorial courts these rules do not apply, as such, since Congress has given the supreme court authority to prescribe rules for the federal courts



The rules and changes therein do not operate retrospectively.<sup>80</sup> But their operation is not postponed until their publication.<sup>81</sup>

(II.) **Limit of Power To Make.** — Under the power to make rules the supreme court has no authority to change the jurisdiction of the admiralty courts<sup>82</sup> or the substantive rights of the parties,<sup>83</sup> nor to repeal or modify an existing regulation of congress.<sup>84</sup>

b. *By Other Courts.* — Both by act of congress and the rules formulated by the supreme court, other courts of admiralty are entitled to regulate the procedure which they will follow in a manner consistent with such rules and any regulation by congress.<sup>85</sup> This power, while recognized by, did not originate in the admiralty rules.<sup>86</sup> It may be exercised either by the promulgation of a formal rule or by a decision directing the method of future procedure.<sup>87</sup> For this reason the

only. *Braithwaite v. Jordan*, 5 N. D. 196, 235, 65 N. W. 701, 714, 31 L. E. A. 238.

80. *The Steamer St. Lawrence*, 1 Black (U. S.) 522, 17 L. ed. 180.

81. *Bell v. Nelson*, 3 Fed. Cas. No. 1,257.

82. *The Steamer St. Lawrence*, 1 Black (U. S.) 522, 17 L. ed. 180, holding that the making and altering of the 12th rule, giving an action *in rem* to material-men for the enforcement of a lien given by state law on domestic vessels, did not affect the jurisdiction of the admiralty courts. See also *The Lottawanna*, 21 Wall. (U. S.) 558, 22 L. ed. 654.

83. *Saylor v. Taylor*, 77 Fed. 476, 23 C. C. A. 343 ("rights acquired under the statutes . . . or under the general maritime law, . . . are rules of property and it is beyond the potency of judicial power to alter them or take them away by rules of practice"); *The Selt*, 3 Biss. 344, 21 Fed. Cas. No. 12,649; *The Eledona*, 2 Ben. 31, 8 Fed. Cas. No. 4,340.

84. *The Kentucky*, 4 Blatchf. 448, 14 Fed. Cas. No. 7,717. But see *Gardner v. Isaacson*, Abb. Adm. 141, 9 Fed. Cas. No. 5,230; *Gaines v. Travis*, Abb. Adm. 422, 9 Fed. Cas. No. 5,180.

85. *The Planet Venus*, 113 Fed. 387; *The Montana*, 22 Fed. 730; *The Hudson*, 15 Fed. 162; *Louisiana Ins. Co. v. Nickerson*, 2 Low. 310, 15 Fed. Cas. No. 8,539; Adm. Rule 46.

"This authority is a power held in trust for the benefit of litigants, and it is the duty of the court to exercise it in proper cases, by adapting its procedure to the practical needs of justice. On this point, Benedict, J., in the case of *The Epsilon*, 6 Ben. 378, 389, says: 'The admiralty creates its own forms

of proceedings, and adapts methods of its own to the varied necessities which present themselves to its consideration. The power to do this is part, and the important part, of the jurisdiction of the admiralty. The principles, rules, and usages which belong to courts of admiralty (Process Act 1792) enable these courts to work justice between man and man with celerity and economy. They accomplish this by ways unknown to other courts, and for many of which it were vain to look in any statute. Stripped of the power to pursue these methods, there would be little left to distinguish a court of admiralty from a court of equity or of law . . . When cases arise which have not been provided for in the rules prescribed by the supreme court, the district courts, as the only courts of original jurisdiction in admiralty, have the power, and are bound, to devise modes of proceeding which shall enable them to carry into effectual execution any law which they are called to administer.'" *The Alert*, 40 Fed. 836, 838.

Although, by local rule, the practice, where not specifically provided for, is assimilated to that of the supreme court of the state, this does not change essentially the features of admiralty practice when variant from that of the common law. *The Brig Harriet*, Olc. Adm. 222, 11 Fed. Cas. No. 6,096.

Where an act of Congress regulates the practice it overrides local rules of court. *Donovan v. Salem & P. Nav. Co.*, 134 Fed. 316.

86. *Louisiana Ins. Co. v. Nickerson*, 2 Low. 310, 314, 15 Fed. Cas. No. 8,539.

87. *The Planet Venus*, 113 Fed. 387, changing the previous practice in that district, under which a joinder of pro-



course of procedure rests to a considerable extent in the discretion of each district court until a permanent direction shall have been given to it by the paramount authority of the supreme court.<sup>88</sup>

Where the supreme court has provided a rule, the inferior courts cannot prescribe rules in conflict therewith.<sup>89</sup> A rule of the district or circuit courts covering the same matters as a subsequent rule of the supreme court is superseded by the latter.<sup>90</sup>

The circuit court of appeals has no authority to prescribe rules for the district courts.<sup>91</sup>

**C. REMEDIES AND PROCEEDINGS.—1. Generally.**—Whether proceedings in admiralty are included within the term “suits” used in acts of congress depends to some extent upon the form of the act and the intention of the legislators, as deduced from the purpose of the act and its relation to other acts.<sup>92</sup>

ceedings *in rem* and *in personam* was improper. See *The Hudson*, 15 Fed. 162, 175. But see *The Willowdene*, 97 Fed. 509.

The authority to make rules “extends no less to the enactment of general rules than to just provisions for cases as they arise not previously provided for by any express rule.” *The City of Hartford*, 11 Fed. 89. But see *The Mutual*, 78 Fed. 144.

A violation of the rules may be disregarded by the court making them. *The S. S. Osborne*, 105 U. S. 447, 26 L. ed. 1,065.

88. *Borden v. Herne, Blatchf. & H. Adm.* 293, 3 Fed. Cas. No. 1,665. See also *The Planet Venus*, 113 Fed. 387; *The J. F. Warner*, 22 Fed. 342; *The Zenobia*, Abb. Adm. 48, 30 Fed. Cas. No. 18,208.

89. *Ward v. Chamberlain*, 9 Am. L. Reg. 171, 29 Fed. Cas. No. 17,152.

The rules in admiralty prescribing proceedings in certain cases are not to be regarded as restrictive but only as enumerating the more common remedies, leaving such further and other proceedings to be had by the court as may be found necessary in any case to give effect to their jurisdiction. *Hudson v. Whitmire*, 77 Fed. 846 (rule 19 governing the proceedings in suits for salvage does not operate to prevent a salvor from suing the owner *in personam*), *Gates v. Johnson*, 10 Fed. Cas. No. 5,268. See also *The City of Hartford*, 11 Fed. 89; *The Virgo*, 13 Blatchf. 255, 28 Fed. Cas. No. 16,976; *Louisiana Ins. Co. v. Nickerson*, 2 Low. 310, 314, 15 Fed. Cas. No. 8,539. But see *The Bremena v. Card*, 38 Fed. 144; *Northrop* 5. Gregory, 2 Abb. 503, 18 Fed.

Cas. No. 10,327. Compare *infra*, II, F, 3.

But where a subsequent act of congress has partially abrogated or invalidated a rule of the supreme court, the district courts have a right to adapt their processes anew to the changed practice until the supreme court shall make some further order in the premises. *Louisiana Ins. Co. v. Nickerson*, 2 Low. 310, 15 Fed. Cas. No. 8,359.

90. *The Edwin Baxter*, 32 Fed. 296 (requiring interrogatories to be propounded at the close of the libel); *Scobel v. Giles*, 19 Fed. 224 (same); *Gardner v. Isaacson*, Abb. Adm. 141, 9 Fed. Cas. No. 5,230.

91. *The Glide*, 72 Fed. 200, 18 C. C. A. 504; *The Philadelphia*, 60 Fed. 423, 9 C. C. A. 54.

92. Thus in *In re Louisville Underwriters*, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. ed. 991, an act providing that no “civil suit” shall be brought in the district or circuit court except in the district where the defendant is an inhabitant, was held not to include admiralty proceedings. See also *Atkins v. The Disintegrating Co.*, 18 Wall. (U. S.) 272, 21 L. ed. 841.

But in *The L. B. X.*, 88 Fed. 290, the term “all suits” used in an act creating and providing for the holding of terms of court in the several divisions of the western district of Missouri was interpreted to include suits in admiralty. Compare *The Willamette*, 70 Fed. 874, 18 C. C. A. 366, 31 L. R. A. 715, where the same question was raised with reference to a similar statute but not decided.

A proceeding *in rem* is not an "action"<sup>93</sup> or "suit"<sup>94</sup> within the meaning of such terms as ordinarily used in statutes.

The names given to the pleadings and process do not make that an admiralty proceeding which in its nature is not such.<sup>95</sup>

2. **Contract or Tort.** — Where the facts justify a suit either upon contract or tort, the libellant may choose which remedy he will pursue, his election being indicated by the form and substance of the libel.<sup>96</sup>

An error in designating the nature of the suit, at the beginning of the libel, does not change the character of the cause of action actually set forth.<sup>97</sup>

3. **Proceedings In Rem and In Personam.** — a. *Generally.* — There are two sorts of remedies which may be pursued in a court of admiralty, namely *in rem* and *in personam*.<sup>98</sup> Proceedings *in personam* antedate those *in rem*, although the latter are more distinctly maritime in their nature.<sup>99</sup>

b. *Election of Remedies.* — A party entitled to a remedy both *in personam* and *in rem* may, at his election, pursue either.<sup>1</sup>

c. *Proceedings In Rem.* — (I.) *Generally.* — A proceeding *in rem* is one directly against marine property without regard to its ownership, to enforce a maritime obligation for which it is primarily responsible and in which the owner or possessor is not recognized until he appears as a claimant.<sup>2</sup>

93. See *The Longford*, 14 Prob. Div. (Eng.) 34, in which a statute providing that "no 'action' should be brought against a certain Company without one calendar month's notice, had no application to the proceeding *in rem* against a vessel belonging to such Company. The word 'action' mentioned in the section in question was not applicable when the Act was passed, to the procedure of the Admiralty Court. Admiralty actions were then called 'suits' or 'causes.'"

94. **Suit.** — "A suit is defined to be 'the following of a person' and is not only not technically, but not even in common parlance applied to seizures or proceedings *in rem*. It would be, to say the least, a form of speech liable to considerable criticism to speak of a suit being brought against a vessel or a bale of goods. A person is sued, but things are libelled." *The Little Ann*, 1 Paine 40, 15 Fed. Cas. No. 8,397.

95. *The Confiscation Cases*, 20 Wall. (U. S.) 92, 22 L. ed. 320.

96. *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 Fed. 180, 193, 36 C. C. A. 135 (holding the suit to be upon contract rather than tort in spite of an averment in the libel as to negligence); *The Quickstep*, 9 wall. (U. S.) 665, 19 L. ed. 767, (holding that a

libel for negligent collision was not converted into a proceeding on contract merely because a contract of towage was set out by way of inducement).

97. *The Steamer Oler*, 2 Hughes 12, 18 Fed. Cas. No. 10,485, such error may be corrected by amendment.

98. *Leon v. Galceran*, 11 Wall. (U. S.) 185, 20 L. ed. 74; *The Rock Island Bridge*, 6 Wall. (U. S.) 213, 18 L. ed. 753; *Manro v. Almeida*, 10 Wheat. (U. S.) 473, 6 L. ed. 369; *Thatcher v. McCulloh*, Olc. Adm. 365, 23 Fed. Cas. No. 13,862; *American Ins. Co. v. Johnson*, 1 Blatch. & H. 9, 1 Fed. Cas. No. 303.

99. *The Merchant*, Abb. Adm. 1, 17 Fed. Cas. No. 9,434.

Historically considered, the proceeding *in rem* grew out of the suit *in personam* in which the property was attached. *The Dictator* (1892), Prob. Div. (Eng.) 304, 7 Asp. M. C. 251.

1. *Norton v. Surtzer*, 93 U. S. 355, 23 L. ed. 903 (may sue *in personam*); *The Belfast*, 7 Wall. (U. S.) 624, 643, 19 L. ed. 266; *The Slingsby*, 116 Fed. 227, 120 Fed. 748, 57 C. C. A. 52 (may sue *in rem*).

*Joinder.* — See *infra*, II, F, 3.

Effect of judgment in one suit as bar to another. See *infra*, II, T, 2.

2. *The Sabine*, 101 U. S. 384, 388

The distinguishing characteristic is that the property proceeded against is regarded as a responsible or offending thing.<sup>3</sup>

The object of the suit is to enforce a quasi proprietary interest therein.<sup>4</sup>

**As Against the Owner.**—A proceeding *in rem* against a ship or other maritime property is not an action against the owner,<sup>5</sup> except indirectly as it affects his property rights.<sup>6</sup>

**(II.) When Available.**—(A.) **GENERALLY.**—Whenever a lien exists in support of a maritime cause of action, a proceeding *in rem* may be maintained unless expressly forbidden by the rules of practice<sup>7</sup> or by statutes,<sup>8</sup> except where the property is exempt from attachment or seizure.<sup>9</sup>

25 L. ed. 982; The J. W. French, 13 Fed. 916.

Any suit which seeks to hold responsible the thing itself is a proceeding *in rem*. Reed v. Hussey, Blatchf. & H. Adm. 525, 20 Fed. Cas. No. 11,646.

**Against Personal Property.**—The proceeding *in rem* against personal property is unknown to the common law and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the state courts, though by analogy loosely termed proceedings *in rem*, are evidently not within the category. The Yankee Blade, 19 How. (U. S.) 82, 89, 15 L. ed. 554.

Proceedings which involve no maritime cause of action are not admiralty proceedings although they are *in rem*. *Ex parte* Graham, 10 Wall. (U. S.) 541, 19 L. ed. 981; Union Ins. Co. v. United States, 6 Wall. (U. S.) 759, 18 L. ed. 879.

3. The Robert W. Parsons, 191 U. S. 17, 37, 24 Sup. Ct. 8, 48 L. ed. 73; Aitcheson v. Endless Chain Dredge, 40 Fed. 253; Comings v. The Ida Stockdale, 6 Fed. Cas. No. 3,052.

"The distinguishing and characteristic feature of such suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly." The Moses Taylor, 4 Wall. (U. S.) 411, 427, 18 L. ed. 397; The Ville de St. Nazaire, 124 Fed. 1008.

Actions begun by attachment but against an individual are not proceedings *in rem*. Olsen v. Birch, 133 Cal. 479, 65 Pac. 1032, 85 Am. St. Rep. 215.

4. "Process *in rem* is founded on a supposed right in the thing and the object of the process is to obtain the thing itself or a satisfaction out of it, for some claim resting on an alleged proprietary right in the thing." Kil-

lam v. The Eri, 3 Cliff. 456, 14 Fed. Cas. No. 7,765.

5. The Langford, 14 Prob. Div. (Eng.) 34. See *infra*, II, C, 3, g; II, E, 1.

6. The Parlement Belge, 5 Prob. Div. (Eng.) 197.

7. See The Glide, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. ed. 296; American Steel Barge v. Chesapeake & O. Coal Agency Co., 115 Fed. 669, 53 C. C. A. 207; The Anaces, 93 Fed. 240, 34 C. C. A. 558; The Oceana, 148 Fed. 131; Beane v. The Mayurka, 2 Curt. 72, 2 Fed. Cas. No. 1,175, and *infra*, II, C, 3, c, (II), (C).

**General Average.**—Right to may be enforced *in rem*. Dupont de Nemours & Co. v. Vance, 19 How. (U. S.) 162, 15 L. ed. 584. But see Beane v. The Mayurka, 2 Curt. 72, 2 Fed. Cas. No. 1,175.

**Pilotage.**—The William Law, 14 Fed. 792; The Alzena, 14 Fed. 174 (where tender of services refused).

**Materialmen**, under the twelfth rule, may proceed either *in personam* or *in rem*, but of course can proceed by the latter method only where a lien exists, as by a state statute. The Lottawanna, 21 Wall. (U. S.) 558, 22 L. ed. 654.

8. Canal boats cannot be libeled for wages. Rev. Stat. U. S., § 4251. A vessel engaged in navigating a canal is a canal boat, without regard to its form, and one not engaged in such navigation is not. The William L. Norman, 49 Fed. 285. The fact that it is being towed by a steam yacht is immaterial. The George Urban, Jr., 70 Fed. 791. The act of April 18, 1874, ch. 110, does not remove this exemption. The J. S. Woodward, 6 Fed. 636.

9. See *infra*, II, C, 3, c, (II), (B); II, H, 5, b.



The existence of other remedies will not prevent a party from availing himself of his remedy *in rem*.<sup>10</sup>

(B.) AGAINST PUBLIC PROPERTY.—The property of the government,<sup>11</sup> federal,<sup>12</sup> or state and municipal,<sup>13</sup> cannot, without its consent,<sup>14</sup> be made the subject of a suit *in rem* when in its possession, being under such circumstances exempt from execution. And the rule is the same with respect to the ships of a foreign sovereign with whom we are at peace,<sup>15</sup> if they are engaged in the public service.<sup>16</sup>

(C.) NECESSITY OF LIEN. — (1.) Generally. — A lien upon the ship or *res* is an essential prerequisite to a proceeding *in rem*.<sup>17</sup> And the lien must be maritime in its nature.<sup>18</sup>

(2.) Contracts. — Although a contract is maritime in its nature, it cannot be made the basis of a proceeding *in rem* unless it binds the ship or *res* as a responsible party,<sup>19</sup> or in other words, unless there is annexed to it a maritime lien.<sup>20</sup>

10. *Bank of British North Am. v. Freights etc. of the Orsigar*, 137 Fed. 534, 70 C. C. A. 118, *affirming* 127 Fed. 589, right to proceed in equity.

11. *Young v. Steamship Scotia*, 89 L. T. (Eng.) 374; *The Swallow*, 36 L. T. (Eng.) 231.

12. *The Davis*, 10 Wall. (U. S.) 15, L. ed. 875; *The Siren*, 7 Wall. (U. S.) 152, 19 L. ed. 129; *United States v. Morgan*, 99 Fed. 570, 39 C. C. A. 653; *Briggs v. The Light Boats*, 11 Allen (Mass.) 157.

13. *The John McCracken*, 145 Fed. 705 (by the federal government); *The F. C. Latrobe*, 28 Fed. 377; *The Seneca*, 8 Ben. 509, 21 Fed. Cas. No. 12,668; *The Fidelity*, 16 Blatchf. 569, 8 Fed. Cas. No. 4,758. See *Workman v. New York City*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. ed. 314, and *infra* II, H, 5, b.

Except, perhaps, in vindication of the breach of some paramount law of the federal government. *The John McCracken*, 145 Fed. 705.

14. Government property inflicting damage may be proceeded against *in rem* where the government consents to such proceeding. *The Siren*, 7 Wall. (U. S.) 152, 19 L. ed. 129.

15. *Long v. The Tampico*, 16 Fed. 491; *The Pizarro v. Matthias*, 19 Fed. Cas. No. 11,199; *The Parlement Belge*, 5 Prob. Div. (Eng.) 197.

16. *Long v. The Tampico*, 16 Fed. 491. See *The Charkieh*, L. R. 4 Adm. & Ecc. 59; *The Ticonderoga*, Swabey (Eng.) 215.

17. *The Glide*, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. ed. 296; *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949, 36 L.

ed. 727; *The Lottawanna*, 21 Wall. (U. S.) 558, 22 L. ed. 654; *The Rock Island Bridge*, 6 Wall. (U. S.) 213, 18 L. ed. 753; *The Steamer St. Lawrence*, 1 Black (U. S.) 522, 17 L. ed. 180; *The General Smith*, 4 Wheat. (U. S.) 438, 4 L. ed. 609; *The John McCracken*, 145 Fed. 705; *The Henry Dennis*, 47 Fed. 918; *The Monte A*, 12 Fed. 331; *Vandewater v. Yankee Blade*, McAll. 9, 28 Fed. Cas. No. 16,847; *The Celestine*, 1 Biss. 1, 5 Fed. Cas. No. 2,541; *Boon v. The Hornet*, Crabbe 426, 3 Fed. Cas. No. 1,640; *Harmer v. Bell*, 22 Eng. L. & Eq. 72; *The Bold Buccleugh*, 7 Moore P. C. 267, 13 Eng. Reprint 884. See *The Dictator* (1892), Prob. Div. (Eng.) 304.

"I consider a proceeding *in rem* in admiralty to be a proceeding to give effect to a maritime lien arising either *ex contractu* or *quasi contractu* or *ex delicto* or *quasi delicto*, and that such a lien must always exist to form the basis of such proceedings." *Beane v. The Mayurka*, 2 Curt. 72, 2 Fed. Cas. No. 1,175.

18. *The Larch*, 2 Curt. 427, 14 Fed. Cas. No. 8,085. See *Boon v. The Hornet*, Crabbe 426, 3 Fed. Cas. No. 1,640.

19. See *The Ville de St. Nazaire*, 124 Fed. 1008; *The Ship Grand Turk*, 1 Paine 73, 10 Fed. Cas. No. 5,683; *The Eli Whitney*, 1 Blatchf. 360, 8 Fed. Cas. No. 4,345.

Breach of a partnership agreement to sail a vessel on shares does not give a right of action *in rem*. *Milne v. The John Cook*, 17 Fed. Cas. No. 9,617a.

20. *The Williams*, Brown Adm. 208, 29 Fed. Cas. No. 17,710; *Vandewater*

Contracts relating to marine property which are wholly executory do not give rise to a lien and there is therefore no remedy *in rem* for their breach.<sup>21</sup>

Contracts of affreightment<sup>22</sup> and charter parties,<sup>23</sup> if purely executory, cannot be enforced by proceedings *in rem*. But if their performance has been entered upon, the marine property bound thereby may be libeled for a breach of their terms.<sup>24</sup>

(3.) Torts. — (a.) *Generally*. — Maritime torts ordinarily give a lien and may therefore be redressed by a proceeding *in rem*,<sup>25</sup> unless the

*v. Yankee Blade*, 1 McAll. 9, 28 Fed. Cas. No. 16,847.

The master has no lien for his wages (*Willard v. Dorr*, 3 Mason 91, 29 Fed. Cas. No. 17,679; *The Gate City*, 5 Biss. 200, 10 Fed. Cas. No. 5,267; *Bartlette v. The Viola*, 2 Fed. Cas. No. 1,083) or for his advances or disbursements, and cannot maintain a proceeding *in rem* therefor. *The Larch*, 2 Curt. 427, 14 Fed. Cas. No. 8,085. But statute may give him a lien. *Whitney v. The Mary Gratwick*, 2 Sawy. 342, 29 Fed. Cas. No. 17,591. See also *The William M. Hoag*, 168 U. S. 443, 18 Sup. Ct. 114, 12 L. ed. 537; *The Tagus* (1903), Prob. Div. (Eng.) 44. *Contra*, *The Raleigh*, 2 Hughes 44, 20 Fed. Cas. No. 11,539. And the rule does not apply to one who though he designates himself as master is in fact an ordinary seaman. *The Imogene M. Terry*, 19 Fed. 463. The master may, however, petition that the proceeds of the ship be applied to the payment of his claims. *The Stephen Allen*, 1 Blatchf. & H. Adm. 175, 22 Fed. Cas. No. 1,336; and *infra*, II, L, 5.

The mate may sue *in rem* for his wages as such, but not for extra compensation to which he is entitled as acting master. *The Schooner Leonidas*, Olc. Adm. 12, 15 Fed. Cas. No. 8,262. Compare *The Tagus* (1903), Prob. Div. (Eng.) 44.

*Materialman*. — *The Lottawanna*, 21 Wall. (U. S.) 588, 22 L. ed. 654; *Boon v. The Hornet*, Crabb 426, 3 Fed. Cas. No. 1,640. See *infra*, II, C, 5.

Advances made solely on the credit of the owner or master cannot be recovered by a proceeding *in rem*. *Maitland v. The Brig Atlantic*, Newb. Adm. 514, 16 Fed. Cas. No. 8,980.

*Salvage*. — Although a salvage contract does not make compensation contingent on success it may be sued for *in rem*. *The Williams*, Brown. Adm. 208, 29 Fed. Cas. No. 17,710.

*Stevedore's Services*. — A suit *in rem* may be maintained. *The Seguranca*, 58 Fed. 908; *The Mattie May*, 45 Fed. 899.

*Wharfage*. — Lien for may be enforced by proceeding *in rem*. *Ex parte Easton*, 95 U. S. 68, 24 L. ed. 373; *The Kate Tremaine*, 5 Ben. 60, 14 Fed. Cas. No. 7,622.

*Passenger's Contract of Carriage*. — *Stone v. Relampago*, 23 Fed. Cas. No. 13,486.

21. *The Thomas P. Sheldon*, 113 Fed. 779; *The Henry Dennis*, 47 Fed. 918.

*Contracts of Carriage of Passengers*. *The Eugene*, 83 Fed. 222.

*Contract of Towage*. — *The Francesco*, 116 Fed. 83.

22. *The J. F. Warner*, 22 Fed. 842; *Scott v. The Ira Chaffee*, 2 Fed. 401.

23. *The Margaretha*, 167 Fed. 794, 93 C. O. A. 184; *The Missouri*, 30 Fed. 384; *The Monte A*, 12 Fed. 331; *Salzobel v. The Rolling Wave*, 21 Fed. Cas. No. 12,274; *The Schooner General Sheridan*, 2 Ben. 294, 10 Fed. Cas. No. 5,319.

24. *The Oceano*, 148 Fed. 131; *The Wilmington*, 48 Fed. 566, 5 Hughes 205 (charter party); *The Baracoa*, 44 Fed. 102.

The sub-freights may be proceeded against by the shipowner. *American Steel Barge Co. v. Chesapeake & O. Coal Agency Co.*, 115 Fed. 669, 53 C. C. A. 207.

25. *The Anaces*, 93 Fed. 240, 34 C. C. A. 558. See *McGrath v. Candelero*, Bee Adm. 64, 16 Fed. Cas. No. 8,810.

*Under State Statutes*. — See *infra*, II, C, 5.

A structure attached to or forming part of the land and therefore not within the jurisdiction of the admiralty court cannot be proceeded against by a libel *in rem*, although its owner

statute<sup>29</sup> or rule of court<sup>27</sup> expressly or inferentially negatives.

(b.) *Assault and Beating*.—By the admiralty rules the remedy for an assault or beating is limited to a suit *in personam*.<sup>28</sup> And the fact that the tort also constitutes the breach of contract does not alter the rule.<sup>29</sup> But injuries due to negligence of the officers or crew do not fall within the rule,<sup>30</sup> unless perhaps the negligence is so gross as to amount to intentional violence.<sup>31</sup>

(4.) *Remedy Against Proceeds*.—A proceeding *in rem* may be maintained against the proceeds of marine property if the lien still continues.<sup>32</sup> And even though a claim be such that it could not have

may be liable *in personam* for the damage caused by a collision therewith, the reason being that there is no maritime lien on such a structure. *The Arkansas*, 17 Fed. 383; *The Rock Island Bridge*, 6 Wall. (U. S.) 215, 18 L. ed. 753. See *Cleveland Term.*, etc. R. Co. v. *Cleveland S. S. Co.*, 208 U. S. 316, 28 Sup. Ct. 414, 52 L. ed. 508; *The Blackheath*, 195 U. S. 361, 25 Sup. Ct. 46, 19 L. ed. 236; *West v. Martin*, 51 Wash. 85, 97 Pac. 1, 102.

Where the vessel is exempt from arrest a proceeding *in rem* for a maritime tort cannot be maintained. See *The Pizarro v. Matthias*, 19 Fed. Cas. No. 11,199, and *supra*, II, C, 3, c, (II) (B).

*Collision*.—See the title "Collision." See also *infra*, II, F, 3, c; II, F, 5, c.

One hired to repair a vessel may sue *in rem* for injuries received when the vessel started. *Todd v. The Tulchen*, 14 Phila. (Pa.) 550.

26. *The Highland Light*, Chase 150, 12 Fed. Cas. No. 6,477, injuries from escaping steam.

27. See Admiralty Rules, and section following.

28. Adm. Rule 16; *The Sallie Ion*, 153 Fed. 659 (by master upon member of crew); *The Falls of Keltie*, 114 Fed. 357; *The Lyman D. Foster*, 85 Fed. 987; *The Miami*, 78 Fed. 818 (assault by master on stowaway).

29. *Smith v. The Ship Challenger*, 2 Wash. Ter. 447, 7 Pac. 851. See also *The Guiding Star*, 2 Flipp. 596, 1 Fed. 347, where Brown, J., says that the opinion of Benedict (§ 309) that the rule is confined to cases technically for assault and battery as a mere tort, and that if the action be on contract as for not carrying safely, or for not treating with kindness a passenger or seaman, an assault being the gravamen of the breach, the suit may be *in rem*—is not sustained by the authorities. See

*McGuire v. The Golden Gate*, 1 McAll. 104, 16 Fed. Cas. No. 8,815. But see *The Western States*, 159 Fed. 354, 86 C. C. A. 354. (See note following.)

30. *The Lord Derby*, 17 Fed. 265 (passenger bitten by dog negligently allowed on board may sue *in rem*). See also *The Slingsby*, 116 Fed. 227.

The rule does not apply to an assault upon a passenger in her state room by third persons, rendered possible through the negligent failure of the owners of a vessel to provide some means of securing the door. The action in such case is not for assault but for negligence in the performance of the contract of transportation. *The Western States*, 159 Fed. 354, 86 C. C. A. 354.

The rule does not extend to a cause of action for negligence of the officers in aggravating the results of an assault (*The Eva B. Hall*, 114 Fed. 755), or in failing to protect from continued abusive treatment by a subordinate officer. *The Marion Chilcott*, 95 Fed. 688. See also *The Lizzie Burrill*, 115 Fed. 1015. But see *The Sallie Ion*, 153 Fed. 659, discussing these and other cases and citing *The Oceola*, 189 U. S. 158, 23 Sup. Ct. 483, 17 L. ed. 760, as holding that a seaman is not allowed to recover indemnity for the negligence of the master or any member of the crew, but is entitled merely to maintenance and care, whether the injuries were received by negligence or accident. And see *Smith v. The Ship Challenger*, 2 Wash. Ter. 447, 7 Pac. 851.

31. See *The Lord Derby*, 17 Fed. 265. But see *Steamboat New World*, 16 How. (U. S.) 469, 14 L. ed. 1019.

32. *Bank of British North America v. Freights*, etc., of the *Arisgar*, 137 Fed. 534, 70 C. C. A. 118, affirming 127 Fed. 589; *Snow v. 180½ Tons of Scrap Iron*, 11 Fed. 517; *Church v. Seventeen Hun-*



been the basis of an original suit either *in rem* or *in personam*, it may be satisfied out of the proceeds in the registry.<sup>33</sup>

(D.) POSSESSION OF RES.—Possession, actual or constructive, of the *res* is essential to the jurisdiction of the court to entertain a libel *in rem*.<sup>34</sup> Hence property which cannot be seized or attached cannot be libeled, even though there be a lien upon it.<sup>35</sup>

But the fact that the *res* was not within the district when the libel was filed will not defeat the jurisdiction acquired by a subsequent seizure within the district.<sup>36</sup> Nor is it necessary that the possession continue.<sup>37</sup>

The unauthorized removal of the *res* from the district does not defeat jurisdiction once lawfully obtained.<sup>38</sup>

d. *Suits In Personam*.—(I.) Generally. —A suit *in personam* is one in which an individual is charged personally with respect to some matter of admiralty or maritime jurisdiction.<sup>39</sup> Such suits bear a strong

dred and Twelve Dollars, 4 Adm. Rec. 647, 5 Fed. Cas. No. 2,713. See also *Andrews v. Wall*, 3 How. (U. S.) 568, 11 L. ed. 729; *The Schooner George Prescott*, 1 Ben. 1, 10 Fed. Cas. No. 5,339. But see *The Optima*, 74 L. J. P. 94, 93 L. T. 638.

Although the jurisdiction *in rem* is acquired by virtue of a maritime lien or liens, the court will, after the satisfaction of such liens, proceed to dispose of the surplus proceeds from a sale of the *res*, upon principles of equity to the persons entitled thereto. *The Guiding Star*, 18 Fed. 263.

Wrongful Death.—Remedy against proceeds for wrongful death where a state statute or the law governing the case gives a right of action. See *La Bourgogne*, 210 U. S. 95, 138, 28 Sup. Ct. 664, 52 L. ed. 973; *The Hamilton*, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. ed. 264.

33. See *infra*, II, L, 5.

34. *The Rio Grande*, 23 Wall. (U. S.) 458, 23 L. ed. 158; *The Josefa Segunda*, 10 Wheat. (U. S.) 312, 16 L. ed. 329; *Brennan v. Steam Tug Anna P. Dorr*, 4 Fed. 459 (seizure necessary); *Otis v. The Rio Grande*, 1 Woods 279, 18 Fed. Cas. No. 10,613. But see *Jones v. The Willamette*, 70 Fed. 874, 18 C. C. A. 366, 31 L. R. A. 715; *The Richmond*, 13 Fed. Cas. No. 7,492; *Flaherty v. Doane*, 1 Low. 149, 9 Fed. Cas. No. 4,849, and *infra*, II, D, 3.

Constructive Possession or Seizure.—See *Snow v. 180¾ Tons of Scrap Iron*, 11 Fed. 517; *Two Hundred and Fifty Tons of Salt*, 5 Fed. 216, and *infra*, II, H, 6.

The giving of a stipulation before an actual seizure obviates the necessity therefor as the stipulation becomes a substitute for the *res*. *The Frank Underkerchen*, 87 Fed. 763.

Property in Custodia Legis.—See *supra*, I, B, 8; and *infra*, II, H, 5, c.

35. See *The Davis*, 10 Wall. (U. S.) 15, 19 L. ed. 875; *supra*, II, C, 3, c, (II), (B); *infra*, II, H, 5.

An undivided interest in a ship cannot be libeled. *Manhattan Fire Ins. Co. v. The Schooner C. L. Breed*, 1 Flip. 655, 16 Fed. Cas. No. 9,021.

36. *Kelsey v. The William Kallahan*, 14 Fed. Cas. No. 7,680; *The Queen of the Pacific*, 61 Fed. 213.

37. *The Rio Grande*, 23 Wall. (U. S.) 458, 23 L. ed. 158; *The Tug E. W. Gorgas*, 10 Ben. 460, 8 Fed. Cas. No. 4,585.

Custody of the proceeds of a sale of the *res* by order of the court is a substitute for the *res* itself. *George v. Skeatis*, 19 Ala. 738. See *Church v. Seventeen Hundred and Twelve Dollars*, 4 Adm. Rec. 647, 5 Fed. Cas. No. 2,713.

38. *The Rio Grande*, 23 Wall. (U. S.) 458, 23 L. ed. 158; *Otis v. The Rio Grande*, 1 Woods 279, 18 Fed. Cas. No. 10,613.

39. *The Sabine*, 101 U. S. 384, 388, 25 L. ed. 922.

“The prerequisite in admiralty to the right to resort to a libel *in personam* is the existence of a cause of action, maritime in its nature. ‘By the ancient and settled practice of courts of admiralty a libel *in personam* may be maintained for any cause within their jurisdiction wherever a monition can be

resemblance to common law actions,<sup>40</sup> and may be maintained on a maritime cause of action even though no remedy *in rem* is available.<sup>41</sup> Thus the fact that public property is exempt from seizure and that a proceeding *in rem* cannot therefore be maintained will not prevent a suit *in personam* to enforce the owners' personal liability.<sup>42</sup> A personal liability over which admiralty has jurisdiction is, however, essential to the maintenance of such a suit.<sup>43</sup>

(II.) By Foreign Attachment.—A proceeding by foreign attachment is one *in personam* wherein the goods or credits of the defendant are attached,<sup>44</sup> and is available where the defendant is out of the jurisdic-

served upon the libelee, or an attachment made of any personal property or credits of his.''" *Workman v. New York City*, 179 U. S. 552, 573, 21 Sup. Ct. 212, 45 L. ed. 314.

40. *The Belfast*, 7 Wall. (U. S.) 624, 644, 19 L. ed. 266.

"Common-law remedies in cases of tort, as given in common-law courts, and suits *in personam* in the admiralty courts of this country, bear a strong resemblance to each other in respect to parties, and the effect of a recovery by the injured party against one or all of the wrong doers, and the extent of redress to which an innocent party is entitled against the wrong-doer." *The Atlas*, 93 U. S. 302, 316, 23 L. ed. 863.

41. *Workman v. New York City*, 179 U. S. 552, 573, 21 Sup. Ct. 212, 45 L. ed. 314. "A liability . . . *in personam*, however, is not dependent upon ability to maintain a proceeding *in rem* . . . A maritime lien may not exist . . . or such a lien, if it exist, may not be enforceable . . . or the remedy *in rem* may not be available owing to the offending thing being actually in another country or because of its loss . . ." *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. ed. 729; *The Rock Island Bridge*, 6 Wall. (U. S.) 213, 18 L. ed. 753; *The Arkansas*, 17 Fed. 383; *Endner v. Greco*, 3 Fed. 411 (suit for repairs to domestic vessel).

Although a party has lost his right to proceed *in rem*, this fact alone will not prevent him from availing himself of a remedy *in personam*. *Hudson v. Whitmire*, 77 Fed. 846.

42. *Workman v. New York City*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. ed. 314; *The F. C. Latrobe*, 28 Fed. 377.

43. See *supra*, I, B, 9.

Salvage.—The remedy given by rule 19 *in personam* may be invoked not only against the legal owner of the

property saved, but against one who has a direct pecuniary interest in such property (*United States v. Cornell Steamboat Co.*, 202 U. S. 184, 26 Sup. Ct. 648, 50 L. ed. 987) if he has received the property saved (*The Sabine*, 101 U. S. 384, 25 L. ed. 982 [consignee]; *The Emblem*, 2 Ware 61, 8 Fed. Cas. No. 4,434) or requested the services. The request may be implied by law under circumstances where the claim for salvage might otherwise be defeated. *The Public Bath No. 13*, 61 Fed. 692, which was a libel *in rem* against a public bath, municipal property, and a private corporation *in personam* which was in possession of the bath for the purpose of repairing it, and through whose negligence it was cast loose. The court held that it was equally of the highest interest to the company as bailee, and to the city as owner, to have the bath rescued and secured as soon as possible. It appeared that the watchman had gone ashore to seek assistance. "Under such circumstances, where there is no one present to represent the owners, general or special, at the time of need, and the watchman is in quest of aid, and where the right to proceed *in rem* is doubtful, the 'request' provided for by S. Ct. admiralty rule 19 may, I think, be properly implied by law as respects both personal defendants; while the 'benefit' both to the company and to the city from the service is manifest."

Death by wrongful act gives no cause of action to the survivor or representative unless a state statute or act of congress so provides. *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. ed. 358. See also *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. ed. 727, and *infra*, II, C, 5; II, T, 3, a.

44. *Reed v. Hussey, Blatchf. & H. Adm.* 525, 20 Fed. Cas. No. 11,646. See

tion or cannot be found.<sup>45</sup> Although in some respects like a *suit in rem*,<sup>46</sup> it is different in that the property is not in the first instance the responsible thing, but is liable only after attachment to satisfy the personal obligation of the owner.<sup>47</sup>

The parties may, however, by stipulation change a *suit in rem* to one *in personam* by foreign attachment.<sup>48</sup>

e. *Penalties and Forfeitures*.—An information or libel of information to enforce a penalty or forfeiture is regarded as a civil and not a criminal proceeding.<sup>49</sup> Whether such proceedings to recover a penalty should be *in personam* or *in rem* depends upon the form of the statute, that is, whether it penalizes the owner, the property, or both.<sup>50</sup> If a lien is given on the ship the proceeding may be *in rem*.<sup>51</sup>

A forfeiture is enforced by a libel *in rem*.<sup>52</sup>

f. *Petitory and possessory suits* are suits to determine the title or right of possession of marine property<sup>53</sup> and are of a mixed nature, being both *in rem* and *in personam*,<sup>54</sup> and substantially equivalent to the action of replevin.<sup>55</sup>

g. *Changing Form of Suit*.—Both by stipulation of the parties<sup>56</sup>

also *Essler v. Worth*, 8 Fed. Cas. No. 4,533a; and *infra*, II, H, 2, c.

45. *Manro v. Almeida*, 10 Wheat. (U. S.) 473, 6 L. ed. 369. See *infra*, II, H, 2, c.

Against a Foreign Corporation.—See *infra*, II, D, 3, d.

46. See *Card v. Hines*, 39 Fed. 818.

47. *Reed v. Hussey, Blatchf. & H.* 525, 20 Fed. Cas. No. 11,646.

48. *The Margaretha*, 167 Fed. 794, 93 C. C. A. 184.

49. *United States v. The Three Friends*, 166 U. S. 1, 49, 17 Sup. Ct. 495, 41 L. ed. 897; *Friedenstein v. United States*, 125 U. S. 225, 231, 8 Sup. Ct. 838, 31 L. ed. 736.

50. *Pollock v. Steamboat Sea Bird*, 3 Fed. 573; *United States v. The C. B. Church*, 1 Woods 275, 25 Fed. Cas. No. 14,762; *The Lewellen*, 4 Biss. 167, 15 Fed. Cas. No. 8,308.

51. *The Scotia*, 39 Fed. 429; *The Laura M. Starin*, 11 Fed. 177; *The Arctic*, 11 Fed. 177a; *Pollock v. Steamboat Sea Bird*, 3 Fed. 573.

52. *The Slavers*, 2 Wall. (U. S.) 383, 17 L. ed. 911.

Prize cases are always *in rem* or quasi *in rem* against the proceeds. *Carson v. Jennings*, 1 Wash. C. C. 129, 5 Fed. Cas. No. 2,464.

53. *Blanchard v. The Cavalier*, 3 Fed. Cas. No. 1,508. See rule 20.

Possessory and Petitory Suits.—“Possessory actions may be brought in this court to recover ships, or other property, to which a party is entitled by virtue of a maritime right, being

analogous to the common law actions of replevin and detinue, in which the specific property is recovered, instead of damages. These actions may be brought by owners to try the right to the possession of a ship as among themselves, and by a master or owner to recover possession. Petitory, as well as possessory suits, are also within the admiralty jurisdiction, and may be brought in all cases to reinstate the owners of ships who have been wrongfully deprived of their property. *Ben. Adm.* 276, 311.” *The Bonnie Doon*, 36 Fed. 770.

54. *Briggs v. Taylor*, 84 Fed. 681, 683, 28 C. C. A. 518; *The Propeller S. C. Ives*, *Newb. Adm.* 205, 214, 14 Fed. Cas. No. 7,958. See *The Margaretha*, 29 Fed. 324; *Adm. Rule* 20. But see *Blanchard v. The Cavalier*, 3 Fed. Cas. No. 1,508, holding *per Betts, J.*, that such suits are *in personam*. See also *The Taranto*, 1 Spr. 170, 23 Fed. Cas. No. 13,751 (a maritime lien is not affected by the decree in such suit).

55. *The Director*, 26 Fed. 708.

56. The parties to a libel *in rem* which has been filed in a cause of action on which an action *in rem* cannot be maintained may stipulate for the entry of an order that the security given to release the vessel shall stand as if given by the respondent to release property covered by foreign attachment in an action *in personam*. *The Margaretha*, 167 Fed. 794, 93 C. C. A. 184, in which such stipulation was made.



and by amendment under some circumstances,<sup>57</sup> a suit *in rem* may be changed to one *in personam* for the purpose of enforcing the personal responsibility of the claimant, where appropriate steps have been taken for that purpose.<sup>58</sup> Otherwise, however, personal liability of a respondent cannot be enforced in a proceeding purely *in rem*.<sup>59</sup> But in some cases where the parties were all before the court and no injustice would result, the court has treated a suit *in rem* as one *in personam*.<sup>60</sup> And it is no valid objection to an interpleader and payment into court that such action will change the proceeding to one *in rem*.<sup>61</sup>

The character of the proceeding is not changed by the manner in which the process is served.<sup>62</sup>

**4. Equitable Remedies.**—a. *Generally.*—A court of admiralty as such has no equity jurisdiction,<sup>63</sup> and cannot therefore directly administer purely equitable remedies.<sup>64</sup> But inasmuch as the admiralty

57. See *infra*, II, G, 21, d, (II.), (B.); II, V, 2, b, and *The Lowlands*, 147 Fed. 986; *The Ethel*, 66 Fed. 340; *The Mount A*, 12 Fed. 331; *The Steamship Zodiac*, 5 Fed. 220; *The Leonidas*, Ole. Adm. 12, 15 Fed. Cas. No. 8,262; *Kynoch v. The S. C. Ives*, Newb. Adm. 205, 14 Fed. Cas. No. 7,958; *The Dictator* (1892), Prob. Div. (Eng.) 304.

58. See *Reed v. Hussey*, Blatchf. & H. 525, 20 Fed. Cas. No. 11,646.

59. See *infra*, II, I; II, V, 2, b.

60. *One Hundred and Eighteen Sticks of Timber*, 10 Ben. 86, 18 Fed. Cas. No. 10,519. This was an action to enforce a lien against a cargo for freight and demurrage. The consignee appeared as claimant and filed a stipulation for the release of the goods and in his answer admitted his personal liability on the claim. The court (Benedict, J.), held that, the lien having been lost, a proceeding *in rem* could not be maintained. "The question, then, is presented whether it is not permissible in a court of admiralty to treat this action as an action *in personam* against the person whose stipulation is in court, and give a decree accordingly. There is no possibility of any injustice being done by such a course. The issue raised by the pleadings presented every question that can be raised in respect to the liability of the claimant, and one additional question, viz: that of a lien. The fact that the claimant was the consignee of the cargo, who received and sold the same, and now has of the proceeds an amount equal to the freight and demurrage, appears by the testimony of the consignee himself; and in addition to the admission of liability in the answer, the evi-

dence tendered in support of the libel proves every fact upon which the liability of the claimant depends, nor is there any pretense that any or different state of facts can be shown. Inasmuch, therefore, as the pleadings involve the question of the claimant's liability and as a decree in favor of the libellant in this action will be, in substance, a decree against the claimant, for a liability admitted by his answer, it would seem to be not only just, but in harmony with the principles upon which proceedings in admiralty are conducted, to disregard the form of the proceeding, and instead of remitting these parties to an action *in personam*, where precisely the same facts would appear, to determine in this action the question which the pleadings present, viz: the amount of freight due the libellant, and give a decree for that amount, against the consignee, who has volunteered to intervene in this action, and has obtained the release of the cargo by giving his own stipulation for its value." But no costs were allowed to the libellant.

61. *Copp v. De Castro and D. Sugar Refin. Co.*, 8 Ben. 321, 6 Fed. Cas. No. 3,215.

62. The action of the marshal in executing the process by serving it on the owner or master, rather than by arresting the *res* as directed, does not change the character of the proceedings. *The L. B. X.*, 88 Fed. 290.

63. See *supra*, I, B, 5, e; and *United States v. Cornell Steamboat Co.*, 202 U. S. 184, 26 Sup. Ct. 648, 50 L. ed. 987; *Bernard v. Hyne*, 6 Moore P. C. 56, 13 Eng. Reprint 604.

64. *United States v. Cornell S. Co.*,

law is administered upon principles of equity, the court having acquired jurisdiction of the subject-matter, may control and dispose of the same in an equitable manner.<sup>65</sup>

b. *Interpleader*.—Interpleader is a practice recognized in admiralty.<sup>66</sup>

5. **Rights and Remedies Created by Statute.**—If an injury is maritime in its nature, a right of action therefor *in personam* given by a statute may be enforced in a court of admiralty although no right of action *in rem* or *in personam* was theretofore recognized in such courts in the United States,<sup>67</sup> and though the statute attempts to restrict the remedy thereon to the state courts.<sup>68</sup>

202 U. S. 184, 26 Sup. Ct. 648, 50 L. ed. 987.

65. See *The City of New Bedford*, 20 Fed. 57; *Richmond v. New Bedford Cop. Co.*, 2 Low. 315, 20 Fed. Cas. No. 11,800; *The David Pratt*, 1 Ware 495, 7 Fed. Cas. No. 3,597; *Cure v. Bullus*, Abb. Adm. 555, 6 Fed. Cas. No. 3,486. Compare *Nash v. Bolen*, 167 Fed. 427; *Bernard v. Hyne*, 6 Moore P. C. 56, 13 Eng. Reprint 604.

A court of admiralty within the scope of its powers acts upon the equitable principles, and when the facts before it in a matter within its jurisdiction are such that a court of equity would relieve and a court of law could not, it is the duty of the court of admiralty to grant relief. *Watts v. Camors*, 115 U. S. 353, 361, 6 Sup. Ct. 91, 29 L. ed. 406; *Pacific Coast Co. v. Anderson*, 107 Fed. 973 (enforcing an equitable assignment in a suit brought in the name of the equitable assignee). See *American Steel Barge Co. v. Cargo of Coal*, 115 Fed. 669, 116 Fed. 857.

**Proceedings in an Admiralty Court Are Extremely Flexible.**—"Extreme powers of a peculiar character have been conferred upon it to enable it to determine speedily, and with the least possible expense by means of simple methods, all questions which may arise in respect to affairs of the sea. Not only has it the power, but it is charged with the duty of devising methods by which all questions of which it can take cognizance, can be adjudicated speedily and justly." *Copp v. De Castro and D. Sugar Refin. Co.*, 6 Fed. 521. See *Neall v. Curran*, 93 Fed. 831.

In the distribution of proceeds in their possession or under their control admiralty courts may give effect to equitable claims. *United States v. Cornell*

*Steamboat Co.*, 202 U. S. 184, 26 Sup. Ct. 648, 50 L. ed. 987; *The L. B. Goldsmith*, Newb. Adm. 123, 15 Fed. Cas. No. 8,152. See also *infra*, II, L, 5.

**Marshaling Assets.**—See *The Olivia A. Corrigan*, 7 Fed. 507; *The Brig Wexford*, 7 Fed. 674; *The City of Tawas*, 3 Fed. 170; and fully the title "**Maritime Liens**." But see *Bernard v. Hyne*, 6 Moore P. C. 56, 13 Eng. Reprint 604.

**Injunction.**—As an incident to the granting of a petition to interplead a third party, the court may also enjoin the party interpleaded from pursuing an independent action to recover the property in question. *Copp v. De Castro and D. Sugar Refin. Co.*, 8 Ben. 321, 6 Fed. Cas. No. 3,215.

Where an equitable defense is pleaded the court is not ousted of its jurisdiction, although it cannot administer the relief claimed by the defendant. *Meyer v. Pacific Mail Steamship Co.*, 58 Fed. 923; *Dexter v. Munroe*, 2 Spr. 39, 7 Fed. Cas. No. 3,863.

66. *Copp v. De Castro & D. Sug. Refin. Co.*, 8 Ben. 321, 6 Fed. Cas. No. 3,215, setting out substantially a form of petition where the property in question was freight money.

The party sued, if notified before decree of the claims of third parties, may compel them to interplead. *The Propeller Monticello v. Mollison*, 17 How. (U. S.) 152, 155, 15 L. ed. 68 (*dictum*).

67. *The Corsair*, 145 U. S. 335, 347, 12 Sup. Ct. 949, 36 L. ed. 727, action for wrongful death. See *Quinette v. Bisso*, 136 Fed. 825, 69 C. C. A. 503, 5 L. R. A. 303; *In re Petition of Long Island, etc. Co.*, 5 Fed. 599.

68. *Biglow v. Nickerson*, 70 Fed. 113, 120; *Holmes v. O. & C. R.*, 5 Fed. 81; *Andrews Am. Law*, 2nd ed., p. 1215, n. 31.

Where the applicatory statute,<sup>69</sup> state,<sup>70</sup> federal,<sup>71</sup> or foreign,<sup>72</sup> gives a lien for a right or cause of action which is maritime in its nature, a proceeding *in rem* may be maintained thereon in an admiralty court. But where no lien is given the remedy *in rem* is not available.<sup>73</sup>

So far as the right or cause of action given by a state statute is concerned it is limited and governed by the terms of the statute and by the same principles which would be applied to it if enforced in a state court.<sup>74</sup> But the remedy is administered in accordance with the principles and practice of admiralty,<sup>75</sup> except in so far as it is governed by the provisions of the statute itself.<sup>76</sup>

**6. Extraordinary Legal Remedies.**— Courts of admiralty in so far as necessary to enforce their jurisdiction have power to issue writs of mandamus, habeas corpus, certiorari and other appropriate writs.<sup>77</sup>

69. As to what law is applied in determining the rights of the parties, see *Panama R. Co. v. Napier Shipping Co.*, 166 U. S. 280, 17 Sup. Ct. 572, 41 L. ed. 1004; *Rundell v. La Compagnie Transatlantique*, 100 Fed. 655, 40 C. C. A. 625, 49 L. R. A. 92; *The Jane Grey*, 95 Fed. 693; *The Lamington*, 87 Fed. 752; *Robinson v. Detroit & C. Steam Nav. Co.*, 73 Fed. 883, 894; *Armstrong v. Beadle*, 5 Sawy. 484, 1 Fed. Cas. No. 541; *McDonald v. Mallory*, 77 N. Y. 546, 43 Am. Rep. 664.

70. *The Glide*, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. ed. 296; *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. ed. 345; *The Lottawanna*, 21 Wall. (U. S.) 558, 22 L. ed. 654; *The Steamer St. Lawrence*, 1 Black (U. S.) 522, 17 L. ed. 180; *The Willamette*, 70 Fed. 874, 18 C. C. A. 366, 31 L. R. A. 715; *The J. F. Warner*, 22 Fed. 342; *Boon v. Hornet*, *Crabbe* 426, 3 Fed. Cas. No. 1,640.

State statutes do not apply to nor affect those causes of action for which a lien is given by the general maritime law. *The San Rafael*, 141 Fed. 270, 280; *The Chusan*, 2 Story 455, 5 Fed. Cas. No. 2,717. See also *The Electron*, 74 Fed. 689, 21 C. C. A. 12; *The Lyndhurst*, 48 Fed. 839. But see *The Del Norte*, 90 Fed. 506; *McRae v. Dredging Co.*, 86 Fed. 344.

71. *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. ed. 358; *The Wydale*, 37 Fed. 716. See *supra*, II, B, 1 and 2, for the right of Congress to govern admiralty procedure.

72. See *Robinson v. Detroit etc. Steam Nav. Co.*, 73 Fed. 883, 894, 20 C. C. A. 86. But see *Rundell v. La Compagnie Gen. Trans.* 100 Fed. 655, 40 C. C. A. 625, 49 L. R. A. 92.

73. *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. ed. 727; *The Celestine*, 1 Biss. 1, 5 Fed. Cas. No. 2,541. See *supra*, II, C, 3, c; (II), (C).

**Wrongful Death.**— No proceeding *in rem* can be maintained under a state statute unless it gives a lien. *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. ed. 727; *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. ed. 358; *The Mariska*, 107 Fed. 989, 47 C. C. A. 115 (Michigan statutes); *The Onoko*, 107 Fed. 984, 47 C. C. A. 111 (Illinois and Wisconsin statutes); *The Wydale*, 37 Fed. 716; *The Glendale*, 77 Fed. 906 (amended Virginia statute); *The Manhasset*, 18 Fed. 918 (Virginia statute); *The Sylvan Glen*, 9 Fed. 335 (N. Y. statute); *The Jane Grey*, 95 Fed. 693; *The Willamette*, 70 Fed. 874, 18 C. C. A. 366, 31 L. R. A. 715. Under the English act there is no remedy *in rem*. *The Vera Cruz*, 10 App. Cas. (Eng.) 59. The same is true under the Canadian act. *Robinson v. Detroit etc. Steam Nav. Co.*, 73 Fed. 883, 894, 20 C. C. A. 86.

74. See *Stern v. La Compagnie Gen. Trans.*, 110 Fed. 996, and *infra*, II, T, 3, a.

75. *The Asher W. Parker*, 84 Fed. 832, 23 C. C. A. 224; *Boon v. The Hornet*, *Crabbe* 426, 3 Fed. Cas. No. 1,640; *The Guiding Star*, 18 Fed. 263. See *The James G. Swan*, 106 Fed. 94; *The William M. Hoag*, 69 Fed. 742; and *infra*, II, T, 3, a.

76. See *infra*, II, T, 3, a; and *Stern v. La Compagnie Gen. Trans.*, 110 Fed. 996.

77. *The Steamboat New England*, 3 Sumn. 495, 18 Fed. Cas. No. 10,151.



**D. COMMENCEMENT OF SUIT. — 1. Generally.** — In determining the question of laches or limitations, the filing of a libel constitutes the commencement of a suit in admiralty, whether the proceeding be *in rem* or *in personam*.<sup>78</sup> But for the purpose of determining the court's jurisdiction of the person or thing the suit is not deemed commenced until the service of process.<sup>79</sup>

**2. Premature Commencement.** — A suit prematurely commenced may be dismissed<sup>80</sup> upon a timely exception.<sup>81</sup> But where in the meantime the cause of action has matured, the court upon allowing the respondent his accrued costs may in furtherance of justice permit the libel to stand.<sup>82</sup> And where under such circumstances a suit has been dismissed by the district court, the appellate court may restore it.<sup>83</sup>

The irregularity may be waived by previous agreement of the respondent,<sup>84</sup> or by pleading to the merits.<sup>85</sup>

See *The Margaret B. Roper*, 106 Fed. 740, 45 C. C. A. 577; *Ex parte The Union Steamboat Co.*, 178 U. S. 317, 20 Sup. Ct. 904, 44 L. ed. 1,084, and the titles "Certiorari," "Mandamus," "Prohibition."

78. *Laidlow v. Oregon R. & N. Co.*, 81 Fed. 876, 26 C. C. A. 665, holding that a state statute providing that an action is not commenced until process is served has no application to suits in admiralty, even though jurisdiction of the *res* is not acquired until its seizure.

But for the purposes of notice to intending bona fide purchasers, a suit *in rem* cannot be deemed to be commenced until the original process has been served. *The Robert Gaskin*, 9 Fed. 62.

The filing of a petition in intervention constitutes the commencement of the suit with respect to the cause of action therein set forth. *Laidlow v. Oregon R. & N. Co.*, 81 Fed. 876, 26 C. C. A. 665.

In *Eight Hundred and Forty-one Tons of Iron Ore*, 15 Fed. 615, Benedict suggests that if the procedure of the civil law is to govern, the suit is not commenced even by the service of process, and that in strictness it is not commenced until the issues are made up.

Effect of lapse of time as a defense, see *infra*, II, T, 3.

79. *Kelsey v. William Kallahan*, 14 Fed. Cas. No. 7,680, holding that a vessel being within the district when seized, the court had jurisdiction, although the libel *in rem* was filed at a

time when the vessel was outside the district. See *infra*, II, D, 3, b.

80. *One Thousand Two Hundred and Sixty-five Vitrified Pipes*, 14 Blatchf. 274, 18 Fed. Cas. No. 10,536; *The Martha, Blatchf. & H. Adm.* 151, 16 Fed. Cas. No. 9,144.

81. *The Isaac Newton, Abb. Adm.* 11, 13 Fed. Cas. No. 7,089; *Furniss v. The Magoun, Olc. Adm.* 55, 9 Fed. Cas. No. 5,163. See *infra*, II, G, 20.

82. *The Hyperion's Cargo*, 2 Low. 93, 12 Fed. Cas. No. 6,987; *The Papa*, 46 Fed. 576; *The L. B. Snow*, 15 Fed. 282. See *Henderson v. Three Hundred Tons of Iron Ore*, 38 Fed. 36.

"The premature filing of a libel, if the right to libel accrues afterwards, and before the determination of the issue, affects the question of costs only. It is not necessary, nor is it the practice in admiralty, to dismiss such libel, if when the matter is presented to the court for final determination, it appears that the right to libel exists." *The Pioneer*, 53 Fed. 279. Quoted with approval in *Clark v. 505,000 Feet of Lumber*, 65 Fed. 236, 12 C. C. A. 628.

83. *Clark v. 505,000 Feet of Lumber*, 65 Fed. 236, 12 C. C. A. 628.

84. *The Salem's Cargo*, 1 Spr. 389, 21 Fed. Cas. No. 12,248.

85. *The Martha, Blatchf. & H. Adm.* 151, 16 Fed. Cas. No. 9,144; *Granon v. Hartshorne, Blatchf. & H. Adm.* 454, 460, 10 Fed. Cas. No. 5,689; *Furniss v. The Magoun, Olc. Adm.* 55, 9 Fed. Cas. No. 5,163; *The Edward, Blatchf. & H. Adm.* 286, 8 Fed. Cas. No. 4,289. See *The L. B. Snow*, 15 Fed. 282.

A supplemental libel cannot correct this defect, however, by alleging matter occurring subsequent to the filing of the suit.<sup>86</sup> But the court may order it to stand as an original libel.<sup>87</sup>

3. *Place of Bringing Suit.* — a. *In Personam.* — A libel *in personam* may be maintained wherever a monition can be served upon the libelee, or an attachment made of any personal property or credits belonging to him.<sup>88</sup>

b. *In Rem.* — (I.) *Generally.* — Proceedings *in rem* may be commenced in any district where the property can be found and arrested.<sup>89</sup> Although the *res* be not within the district at the time of filing the libel, the jurisdiction of the court attaches upon the subsequent arrest or attachment of the *res* within the district.<sup>90</sup>

(II.) *Forfeitures.* — Proceedings to enforce a forfeiture should be instituted in the district where the property was seized,<sup>91</sup> or to which it has been brought, in case of a seizure in a foreign port or on the high seas,<sup>92</sup> rather than in the district where the offense was committed.

c. *Suits To Limit Liability.* — If no suit against the vessel or owner has been begun, the proceeding to limit his liability to the value of the ship may be instituted in the district where the ship is then situated,<sup>93</sup> unless the case has been appealed.<sup>94</sup>

86. *Henderson v. Three Hundred Tons of Iron Ore*, 38 Fed. 36. *Eight Hundred and Forty Tons of Iron Ore*, Ore, 15 Fed. 615.

87. *Henderson v. Three Hundred Tons of Iron Ore*, 38 Fed. 36. *Eight Hundred and Forty Tons of Iron Ore*, 15 Fed. 615. See *O'Connell v. One Thousand and Two Bales of Sisal Hemp*, 75 Fed. 408.

88. *In re Louisville Underwriters*, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. ed. 991 (holding that the Act of March 3, 1888, c. 373, § 1, requiring "all civil suits" to be commenced in the district where the defendant resides, is inapplicable to admiralty suits).

*Foreign Attachment.* — Suits *in personam* may be filed against a non-resident or absent defendant wherever he has property which may be attached. *Atkins v. The Disintegrating Co.*, 18 Wall. (U. S.) 272, 21 L. ed. 841; *Manro v. Almeida*, 10 Wheat. (U. S.) 473, 6 L. ed. 369.

89. *The Propeller Commerce*, 1 Black (U. S.) 574, 581, 17 L. ed. 107; *The Slavers (Reindeer)*, 2 Wall. (U. S.) 383, 403, 17 L. ed. 911; *Town v. The Western Metropolis*, 28 How. Pr. 283, 24 Fed. Cas. No. 14,114; *Killam v. The Evi*, 3 Cliff. 456, 14 Fed. Cas. No. 7,765; *The Ada*, 2 Ware 407, 1 Fed. Cas. No. 38; *Aitcheson v. Endless Chain Dredge*, 40 Fed. 253.

90. *The Queen of the Pacific*, 61

Fed. 213 (holding that where the libel was prepared and verified before but filed after the departure of the vessel from the district, the court acquired jurisdiction by the subsequent arrest of the vessel on alias monition after it returned to the district); *St. Paul F. & M. Ins. Co. v. Lake Superior*, 21 Fed. Cas. No. 12,244; *Kelsey v. The William Kallahan*, 14 Fed. Cas. No. 7,680.

91. *The Merino*, 9 Wheat. (U. S.) 391, 6 L. ed. 118; *The Idaho*, 29 Fed. 187; *The Octavia*, 1 Gall. 488, 18 Fed. Cas. No. 10,422. See *Oakes v. United States*, 174 U. S. 778, 19 Sup. Ct. 864, 43 L. ed. 1169.

92. *The Merino*, 9 Wheat. (U. S.) 391, 6 L. ed. 118. See *Oakes v. United States*, 174 U. S. 778, 19 Sup. Ct. 864, 43 L. ed. 1169.

93. See Rule 57, and *In re Morrison*, 147 U. S. 14, 13 Sup. Ct. 246, 37 L. ed. 60; *Ex parte Slayton*, 105 U. S. 451, 26 L. ed. 1066. See also *The John Bramall*, 10 Ben. 495, 13 Fed. Cas. No. 7,334; and more fully the title "Shipping."

But if such suit has been begun, the district where it has been filed is the proper venue. *In re The Luckenback*, 26 Fed. 870; *In re Leonard*, 14 Fed. 53; *The Alpena*, 8 Fed. 280.

94. See Rule 58, and *The Luckenback*, 26 Fed. 870.

d. *Against Foreign Corporations.*—A suit against a foreign corporation may be filed in any district where legal service can be made upon it,<sup>95</sup> or where its property can be attached.<sup>96</sup>

Where a resident agent has been appointed pursuant to state law, such a corporation may be sued in any district in the state.<sup>97</sup>

e. *Divisions of Districts.*—An act creating territorial “divisions” in a district and providing for the holding of terms of court in each division so created and for the bringing of all suits not of a local nature in the division where defendant resides, in effect makes each division a “district” within the meaning of the rules and statutes governing the district in which admiralty suits must be brought.<sup>98</sup> And the fact that the same act provides for the service of process anywhere in the district is not inconsistent with this rule.<sup>99</sup>

A suit *in rem*, being of a local nature, should be brought in the division where the property is found.<sup>1</sup>

f. *Boundaries of District.*—The boundaries of a district are determined by those of the state, for the purpose of determining whether navigable waters between states are in the district in which the suit has been filed.<sup>2</sup>

g. *Removal.*—Where a suit is filed in the wrong district or division, it will, upon motion by the defendant, be transferred to the division or district where it should have been filed.<sup>3</sup>

h. *Waiver.*—The right of a defendant to be sued in any particular district or division thereof is a privilege which may be waived.<sup>4</sup> And his appearance in a suit and failure to make objection constitutes a waiver.<sup>5</sup> Analogous rules are applicable to proceedings *in rem*.<sup>6</sup>

E. PARTIES.—1. *Generally.*—Admiralty does not have the strict regard to parties which obtains in chancery courts.<sup>7</sup> But the same

95. *Reilly v. Philadelphia & R. R. Co.*, 109 Fed. 349. See *Doe v. Springfield Boiler & Mfg. Co.*, 104 Fed. 684, 44 C. C. A. 128.

96. *In re Louisville Underwriters*, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. ed. 991; *Clarke v. N. J. Steam Nav. Co.*, 1 Story 531, 5 Fed. Cas. No. 2,859. See *In re Devos Mfg. Co.*, 108 U. S. 401, 2 Sup. Ct. 894, 27 L. ed. 764.

97. *In re Louisville Underwriters*, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. ed. 991.

98. *The L. B. X.*, 88 Fed. 290, 295.

99. *The L. B. X.*, 88 Fed. 290, holding that such provision does not extend the territorial jurisdiction of the court beyond the division in which it is sitting, but merely applies to process which may lawfully be executed beyond the territorial jurisdiction of the court.

1. *The L. B. X.*, 88 Fed. 290, 295; *The Willamette*, 53 Fed. 602.

2. *In re Devos Mfg. Co.*, 108 U. S. 401, 2 Sup. Ct. 894, 27 L. ed. 764; *Aitcheson v. The Endless Chain Dredge*, 40 Fed. 253 (Potomac River); *The Norma*, 32 Fed. 411; *The Sarah E. Kennedy*, 25 Fed. 569.

3. *The Willamette*, 53 Fed. 602.

4. *The Willamette*, 70 Fed. 874, 18 C. C. A. 366, 31 L. R. A. 715.

5. *The Willamette*, 70 Fed. 874, 18 C. C. A. 366, 31 L. R. A. 715. See *infra*, H, G, 20.

Appearance and filing security for costs is not a waiver if at the same time exceptions to the jurisdiction are filed. *Reilly v. Philadelphia & R. R. Co.*, 109 Fed. 349.

6. *The Willamette*, 70 Fed. 874, 18 C. C. A. 366, 31 L. R. A. 715. See fully *infra*, II, G, 20, D, (III).

7. *American Steel B. Co. v. Chesapeake, etc. Co.*, 115 Fed. 669, 674, 53 C. C. A. 207, 116 Fed. 857.



person cannot be both plaintiff and defendant.<sup>8</sup> He may, however, under some circumstances occupy the somewhat inconsistent positions of claimant and intervenor;<sup>9</sup> and, although a part owner of a vessel, he may libel the same for services or materials furnished in some other capacity, after all other maritime claims against it, for which he is individually responsible, have been satisfied.<sup>10</sup>

**2. Capacity To Sue.**—Any person legally competent may sue in admiralty to enforce maritime rights.<sup>11</sup>

**Incompetent Persons.**—Persons mentally incompetent to conduct a suit,<sup>12</sup> or not *sui juris*,<sup>13</sup> should sue by their proper legal representatives, and the court in such cases will protect the incompetent from the misconduct of the representative.<sup>14</sup> But a minor may sue in his own name for wages due under a contract made with him personally, if there is no other person legally entitled to recover them.<sup>15</sup> And in such case the defendant or respondent cannot compel the appointment of a guardian *ad litem* or next friend.<sup>16</sup>

**8.** The Brothers, 7 Fed. 878, which was a libel by the members of a mercantile firm against the owners of a vessel, one of the libelants being made also defendant as a part owner. Since the matter was one which could not be cured by amendment, owing to the necessity of joining of the owners as defendants, the suit was dismissed.

Where a co-owner of a fishing vessel contracts with the other co-owners to serve as master and to deliver to them the catch and they agree to sell the same and deliver to him a certain portion of the proceeds, his suit to obtain the amount agreed upon cannot be objected to on the ground that he is suing himself. *Dexter v. Munroe*, 2 Spr. 39, 7 Fed. Cas. No. 3,863.

**9.** The Two Marys, 12 Fed. 152. See *infra*, II, L, 4, e.

**10.** The Charles Hemje, 5 Hughes 359, 19 Fed. Cas. No. 11,047a. See *Learned v. Brown*, 94 Fed. 876, 36 C. C. A. 524; *Petrie v. Steam-Tug Coal Bluff* No. 2, 3 Fed. 531.

**11.** A foreign sovereign or any other foreigner may sue to enforce their rights against persons or things in the jurisdiction of the court. The *Sapphire*, 11 Wall. (U. S.) 164, 20 L. ed. 127 (a libel by the French Emperor for damages to a ship belonging to him in his official capacity. It was held that in such case the suit did not abate because of his death).

A foreigner may sue in a court of admiralty where the ship or party to be charged is in the jurisdiction of the court. *Fairgrieve v. Marine Ins. Co.*, 94 Fed. 686.

A married woman may sue in her own name for the loss of her wearing apparel by a carrier. *The State of New York*, 7 Ben. 450, 22 Fed. Cas. No. 13,328.

**12.** *Sunday v. Gordon*, 1 Blatchf. & H. Adm. 569, 23 Fed. Cas. No. 13,616 in which the libel was filed by an African savage of low mentality.

**13.** See *The Etna*, 1 Ware 462, 8 Fed. Cas. No. 4,542.

**14.** *The Etna*, 1 Ware 462, 474, 8 Fed. Cas. No. 4,542. This was a suit for a minor's wages, brought in the name of his father as next friend. It appeared, however, that the latter had forfeited his parental rights by his mistreatment and abandonment of his family. The court therefore refused to recognize a compromise of the suit which claimant surreptitiously induced the father to make, applying the general rule that a minor's rights cannot be prejudiced by the fraudulent acts of his legal representatives.

**15.** *Wicks v. Ellis*, Abb. Adm. 444, 29 Fed. Cas. No. 17,614; *The Melissa*, Brown Adm. 476, 16 Fed. Cas. No. 9,400; *The Schooner David Faust*, 1 Ben. 183, 7 Fed. Cas. No. 3,595.

Where surviving parent has emancipated the libellant by allowing him to contract in his own name and receive his own wages, or would be otherwise estopped from claiming the wages, the objection that the libel should be by the parent cannot be raised. *The Melissa*, Brown, Adm. 476, 16 Fed. Cas. No. 9,400.

**16.** *Wicks v. Ellis*, Abb. Adm. 444, 29 Fed. Cas. No. 17,614.

A corporation may maintain a suit in admiralty to enforce its maritime rights.<sup>17</sup>

Objection to the incompetency of the libellant must be pleaded<sup>18</sup> and is properly taken by means of exceptions.<sup>19</sup> Such an exception, however, is sometimes designated as a demurrer when the incompetency is apparent from the libel,<sup>20</sup> and as a plea when additional averments are necessary to show it.<sup>21</sup> But neither of these terms is strictly appropriate to admiralty practice.<sup>22</sup>

3. Names of. — a. *Generally*. — The complaining party in suits in admiralty is called the libellant.<sup>23</sup>

b. *Defendant, Respondent, and Claimant*. — The terms "defendant" and "respondent" are used interchangeably in the admiralty rules as including all persons who appear and defend against or respond to the libel, and include the "claimant."<sup>24</sup> The latter, however, should be distinguished from an intervenor.<sup>25</sup>

4. Libellants. — a. *Necessary and Proper Parties*. — (1.) *Generally*. — Suits in admiralty should be instituted by the real party in interest.<sup>26</sup> And where it appears that the claim was assigned before the libel was filed, the assignee must be made a party.<sup>27</sup> In such case the court may enter an order that the assignee be subrogated to the rights of the libellant.<sup>28</sup> The rule as to the real party in interest does not, however, require a suit for a trespass or injury to marine property to be brought by the owner thereof, but in such case the suit may be insti-

17. *The Camanche*, 8 Wall. (U. S.) 448, 469, 19 L. ed. 397, a libel for salvage, where it was contended that a corporation, as such, was incapable of rendering any personal services, and that no party can be regarded as a salvor unless personally engaged in the service. See also *Sun Mut. Ins. Co. v. Mississippi*, etc. *Transp. Co.*, 14 Fed. 699.

18. *Wicks v. Ellis*, Abb. Adm. 444, 29 Fed. Cas. No. 17,614; *Knight v. The Brig Attila*, Crabbe 326, 14 Fed. Cas. No. 7,881. See also *The Melissa*, Brown Adm. 476, 16 Fed. Cas. No. 9,400 (where the incompetency appeared during cross-examination of the libellant and it was contended in the argument that the libel should be dismissed).

19. See *infra*, II, G, 20.

20. *Knight v. The Brig Attila*, Crabbe 236, 14 Fed. Cas. No. 7,881.

21. See *Wicks v. Ellis*, Abb. Adm. 444, 29 Fed. Cas. No. 17,614; *Knight v. The Brig Attila*, Crabbe 326, 14 Fed. Cas. No. 7,881.

22. See *Fairgrieve v. Marine Ins. Co.*, 94 Fed. 686, where the court says: "Neither the common law nor code practice and pleadings obtain in admiralty. Under the practice in admiralty, the right of the libellant to sue could not be raised by demurrer or plea

in abatement, but could be raised only by answer, as was done." See also *infra*, II, G, 15 and 16.

23. See *Fretz v. Bull*, 12 How. (U. S.) 466, 13 L. ed. 1068.

24. *Atlantic Mut. Ins. Co. v. Alexandre*, 16 Fed. 279, 281. See also *The Toledo*, Brown Adm. 445, 23 Fed. Cas. No. 14,077. But see *The Bristol*, 4 Ben. 55, 4 Fed. Cas. No. 1,889. Compare *Com. v. Certain Intox. Liquors*, 122 Mass. 8, 11.

25. See *infra*, II, L, 2.

26. *Fretz v. Bull*, 12 How. (U. S.) 466, 13 L. ed. 1,068; *The Trader*, 129 Fed. 462; *The Anchoria*, 9 Fed. 840. But see *The Thames*, 14 Wall. 98, 20 L. ed. 804.

"So well established is this rule that, long before the assignee of a chose in action was allowed in courts of the common law to sue in his own name, the right to sue as the real party in interest was recognized in the admiralty." *The Minturn v. Alexandre*, 5 Fed. 117.

27. *The Sarah J. Weed*, 2 Low. 555, 21 Fed. Cas. No. 12,350. But see *The Wasp*, 16 L. T. N. S. 854 (the assignor may sue as a trustee for the benefit of the assignee).

28. See *The Cadiz*, 20 Fed. 157.

tuted by any one who by virtue of his contractual or other relations with the legal owner stands in place of the latter until he sees fit to act for himself.<sup>29</sup> One who is equitably entitled,<sup>30</sup> as by virtue of an equitable assignment,<sup>31</sup> may sue in his own name.

(II.) Bailee.—(A.) GENERALLY.—The bailee of marine property being responsible for its preservation may maintain an action for an injury to it.<sup>32</sup>

(B.) THE MASTER being the bailee of a ship and cargo and the owners' general agent in relation to the ship, cargo, and freight, may sue in his own name on any cause of action which the owners may have in relation thereto.<sup>33</sup> Thus he may sue for damages arising from a collision,<sup>34</sup> or may sue the consignee for freight.<sup>35</sup>

29. *Messena v. Neilson*, 17 Fed. Cas. No. 9,493a. See *infra*, II, E, 4, b.

The agent of an absent owner "may libel either in his own name, as agent, or in the name of his principals, as he thinks best." And a power of attorney, though subsequent to the filing of the libel, is sufficient ratification. *Houseman v. The Schooner North Carolina*, 15 Pet. (U. S.) 40, 49, 10 L. ed. 653.

A purchaser of a vessel under a contract of sale who is in possession thereof may maintain a libel for collision, although by virtue of the contract the title is still in the vendor, the purchase price not having been fully paid. *The John B. Dallas*, 94 Fed. 895.

A mortgagee in possession of a vessel may maintain a libel in his own name for a towage service. *Kearney v. A Pile Driver*, 3 Fed. 246, holding that such person being entitled to all the earnings thereof which the owner might claim if he had retained control "may use all the remedies that the legal owner has."

30. *The Propeller Monticello v. Molison*, 17 How. (U. S.) 153, 155, 15 L. ed. 68 (*dictum*).

31. *Pacific Coast Co. v. Anderson*, 107 Fed. 973, 47 C. C. A. 106, holding that a contract giving the right to collect freights as security for the payment of the hire of the vessel amounted to an equitable assignment of the freights, entitling the assignee to recover them in his own name.

32. *Newell v. Norton*, 3 Wall. (U. S.) 257, 18 L. ed. 271; *The Jersey City*, 51 Fed. 527, 2 C. C. A. 365.

A bailee of a vessel is entitled to maintain a suit *in rem* for the full

damages done to the vessel in a collision. *The Venture*, 18 Fed. 462, where, in answer to the contention that the libelants did not have sufficient interest to maintain the suit, the court says, "the libelants . . . as bailees of the flat might have maintained an action at common law for these damages . . . and no good reason' is perceived for denying to such bailees the right to recover in admiralty full damages for an injury to property under bailment whether the suit is *in personam* or *in rem*, and for this rule there is judicial authority. *The Minna*, L. R. 2 Adm. and Ecc. 97."

A sheriff, from whose custody an attached vessel has been taken, may file a libel to recover possession of it in the district where it is found. *The Bonnie Doon*, 36 Fed. 770.

33. *Disney v. Furness, Withy & Co.*, 79 Fed. 810 (approving the rule laid down in *Benedict's Admiralty*, 3d ed. § 384). See also *Tuells v. Torras*, 113 Ga. 691, 39 S. E. 455.

34. *The Lighter Una*, 3 Ben. 198, 24 Fed. Cas. No. 14,331.

The master in charge of a tug and tow which are both injured by collision with another vessel may sue the latter in his own name for the injury. "In the character of bailee, he is entitled to maintain an action against a wrong doer who destroyed the property, and in such action, to recover its full value, and after deducting whatever may be his own loss under his contract for towage or other lawful charges, he will hold the residue in trust for the owner." *The Mercedes*, 108 Fed. 559.

35. *Thatcher v. McCulloh*, Ole. Adm. 365, 23 Fed. Cas. No. 13,862.



(C.) THE OWNER OF A SHIP may sue for injury to or loss of the cargo,<sup>36</sup> without making the owner of the latter a party.<sup>37</sup> So the owner of a tug may sue for injury to the tow.<sup>38</sup>

(III.) **Suit by Consignee or Indorsee of Bill of Lading.**—A suit may be maintained by the consignee for injury to or non-delivery of the goods,<sup>39</sup> or by an indorsee of a bill of lading.<sup>40</sup>

(IV.) **Assignee.**—In accordance with the principle that suit may and should be brought by the real party in interest,<sup>41</sup> the weight of authority is that an assignee may sue in his own name.<sup>42</sup> In some cases,

36. The Commander in Chief, 1 Wall. 43, 17 L. ed. 609.

"It is perfectly well settled that the carrier is so far the representative of the owner that he may sue in his own name, either at common law or in admiralty, for a trespass upon or injury to the property carried." The Beaconsfield, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. ed. 993.

37. Leonard v. Whitwill, 10 Ben. 638, 15 Fed. Cas. No. 8,261.

38. The Jersey City, 51 Fed. 527, 2 C. C. A. 365.

39. The Nail City, 22 Fed. 537 (laying it down as a well established rule that a consignee may sue in a court of admiralty either in his own name or in the name of the principal). See also McKinlay v. Morrish, 21 How. (U. S.) 343, 16 L. ed. 100 (where the court lays down the same general rule without qualification); Houseman v. The Schooner North Carolina, 15 Pet. (U. S.) 40, 49, 10 L. ed. 653; Lawrence v. Minturn, 17 How. (U. S.) 100, 15 L. ed. 58. But see Minturn v. Alexandre, 5 Fed. 117.

A party who has been treated by the claimants as consignee, and as such has made advances on the cargo, may sue in his own name as consignee. The Waterwitch, 1 Black (U. S.) 494, 17 L. ed. 155.

**Necessity for Averment of Ownership.**—See The Steamship Ville de Paris, 3 Ben. 276, 28 Fed. Cas. No. 16,942.

40. The Thames, 14 Wall. (U. S.) 98, 20 L. ed. 804, even though he be the mere agent or trustee of others.

41. See *supra*, II, E, 4, a.

42. Park v. The Hull of the Edgar Baxter, 37 Fed. 219; Cobb v. Howard, 5 Fed. Cas. No. 2,925. See Burke v. The Brig M. P. Rich, 1 Cliff. 308, 4 Fed. Cas. No. 2,161; Reynolds v. Steamboat Favorite, 10 Minn. 242.

In The Sarah J. Weed, 2 Low. 555,

21 Fed. Cas. No. 12,350, the court exhaustively discusses the authorities for and against the right of an assignee to sue in his own name and says: "It is every day's practice in admiralty," said Nelson, J., 'to allow suits to be brought in the name of the assignee and of a *chose in action*.' Cobb v. Howard, 3 Blatchf. 525. Judge Sprague made a similar remark in Swett v. Black, 1 Sprague, 574; and the remarks in those cases were not *dicta* only, but were a necessary part of the decision. In *The Hull of a New Ship*, Davies, 199 (2 Ware 203), Judge Ware examined the point upon principle and authority, and held that the debt due a materialman could be assigned, and that the hypothecation went with it. A similar point was decided by Judge Betts, in the *Panama*, Olcott, 343. In Judge Sprague's reports there is a head-note which passed under his revision to the like effect in *The General Jackson*, 1 Sprague 554, though the case did not require, perhaps, a decision of the point, as the debt had been assigned only as security. A similar *dictum* by Judge Betts is found in *The Boston*, Blatch. & How. 309. In *The Cabot*, Abb. Adm. 150, the holder of a bottomry bond bought the debts due the seamen, and took an assignment, and filed a separate libel for them. The learned judge upheld the assignment, and, of course, decided this point; but he informed the bottomry holder that he had caused unnecessary expense, because the law would have made the assignment for him, and that one libel would have sufficed for his bond and the assigned wages. The subrogation which the learned judge refers to is nothing but an assignment operated by the law itself, and is perfectly well established in the admiralty. . . . In *The John Cock*, 17 Jur. 306, the assignee in insolvency of a master of a vessel applied for

however, it is held that a maritime lien or claim is personal and will only be recognized in admiralty at the suit of the party in whom it originally vested.<sup>43</sup> One whose only interest is by an assignment made merely for the purpose of the litigation will not be recognized in admiralty.<sup>44</sup> But this rule does not apply in case the libellant has a *bona fide* claim of his own and takes an assignment of another claim for the purpose of including both in a single suit and thereby saving expense.<sup>45</sup>

(V.) Subrogee.—Where an insurer has paid the full value of the property lost to the insured, he may sue the party liable for the loss, in his own name; but where the insurance covers only a portion of the loss, the action must be in the name of the insured, unless it appears that the remainder of the claim has been paid or otherwise satisfied.<sup>46</sup>

leave to prosecute *in rem* for the balance due the master, without the usual stipulation for costs, and we learn from Pritchard's Digest, vol. ii, p. 524, that leave was given."

**Maritime Wages.**—The *New Idea*, 60 Fed. 294. But see U. S. Rev. Stat. § 4,536, 6 Fed. Stat. Ann. § 874, and *contra*, *Rusk v. The Free-stone*, 2 Bond 234, 21 Fed. Cas. No. 12,143; *The A. D. Patchin*, 18 Fed. Cas. No. 10,794; *Logan v. Aeolian*, 1 Bond 267, 15 Fed. Cas. No. 8,465.

A suit *in rem* cannot be maintained in Canada by an assignee of maritime wages. *Byerre v. The J. L. Card*, 6 Can. Exch. 271; *Rankin v. The Ship Eliza Fisher*, 4 Can. Exch. 461.

**Materialman's Claim.**—The *American Eagle*, 19 Fed. 879; *The Rolling Wave*, 6 Fed. Cas. No. 2,959a. *Contra*, *Reppert v. Robinson*, Taney 492, 20 Fed. Cas. No. 11,703.

**Salvage.**—The *M. Vandercook*, 24 Fed. 472.

**Passenger Ticket.**—Transferee may sue in his own name for breach of contract. *Cobb v. Howard*, 3 Blatchf. 524, 5 Fed. Cas. No. 2,924.

43. *The Champion*, 1 Brown Adm. 520, 5 Fed. Cas. No. 2,583; and see preceding note, "Maritime Wages."

44. *The Trader*, 129 Fed. 462, holding in a case of collision that an intervening libellant whose only interest was derived through assignments of claims, intended only to give color to the right to sue, had no standing. "Courts of admiralty do not encourage litigation by mere volunteers."

45. *Fretz v. Bull*, 12 How. (U. S.) 466, 13 L. ed. 1068; *The Prussia*, 100 Fed. 484, which was an action *in rem* for breach of contract of affreightment

in which the libellant had taken an assignment of a claim similar to his own and growing out of the same facts, merely for the purpose of including both claims in one suit. The court says: "Courts of admiralty are not favorably inclined toward the practice of carrying on litigation in the name of a party whose rights are not involved, but who appears as a mere volunteer to conduct litigation in his own name for the benefit of some one else. Nevertheless, in a case like this, where the libellant has a claim in his own right arising from the same facts, and to be tried in part on the same evidence, so that there will be a saving of expense by trying the two cases together, there appears to be no substantial ground for objecting to an assignment of one cause of action to a party having a definite purpose to bring suit upon a different cause of action, which he claims in his own right."

46. *Norwich Union Fire Ins. Soc. v. The Standard Oil Co.*, 59 Fed. 984, 8 C. C. A. 433; *Fairgrieve v. Marine Ins. Co.*, 94 Fed. 686; *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 Fed. 180 (holding that the insurance company who had paid the loss on a policy taken out by a partnership to the firm could sue in the name of the surviving partners after the dissolution of the partnership); *The Liberty* No. 4, 7 Fed. 226; *Mutual Safety Ins. Co. v. Cargo of St. George, Ole. Adm.* 89, 17 Fed. Cas. No. 9,981. But see *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 462, 9 Sup. Ct. 469, 32 L. ed. 788.

No express stipulation in the policy is necessary to give the insurer who



(VI.) *Suit for Penalty.* — Whether the United States must be a party to a suit for a penalty depends upon whether the statute by its terms permits the penalty to be recovered by the injured person.<sup>47</sup>

b. *Suit in Name or for Benefit of Another.* — It has been said that suit in the name of another is only permissible in particular cases,<sup>48</sup> and, as hereinbefore stated the suit should be instituted by the real party in interest.<sup>49</sup> Yet the latter is not always obliged to sue in his own name.<sup>50</sup> Thus the assignee may sue in his assignor's name.<sup>51</sup> And there are many cases in which one person either by reason of his official position,<sup>52</sup> or on account of his interest in the subject-matter,<sup>53</sup> may sue for the benefit of others.<sup>54</sup>

5. *Defendants and Claimants.* — a. *Generally.* — Who are proper or necessary parties defendant<sup>55</sup> or claimant<sup>56</sup> will be discussed in succeeding portions of this article.

b. *The United States government* cannot lawfully be sued without

has been subrogated the right to sue in his own name. *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 6 Sup. Ct. 750, 29 L. ed. 873.

47. *Suit for Penalty.* — The United States is not a necessary party to a suit for the penalty prescribed by statute for overcrowding a steamer. *The Laura M. Starin*, 11 Fed. 177; *Pollock v. The Steam-Boat Sea Bird*, 3 Fed. 573.

48. *Fretz v. Bull*, 12 How. (U. S.) 466, 13 L. ed. 1068.

49. See *supra*, II, E, 4, a, (I).

50. *Byrnes v. Rockaway*, 4 Fed. Cas. No. 2,274, holding that where a surviving partner had conducted business in the name of the firm he could sue a party dealing with him in that way, in the firm name.

The agent of an absent owner may sue in his own name as agent or in the name of his principal. *Houseman v. The Schooner North Carolina*, 15 Pet. (U. S.) 40, 49, 10 L. ed. 653.

51. *The Wasp*, 16 L. T. N. S. 854, L. R. 1 A. & E. 367. See *supra*, II, E, 4, a, (IV).

The assignee of a bottomry bond may maintain a suit thereon in the name of the assignor, or, at least, where he intervenes by supplemental libel there is no error in proceeding to trial. *Burke v. The Brig M. P. Rich*, 1 Cliff. 308, 4 Fed. Cas. No. 2,161.

52. A consul may be a party libellant on behalf of interested but absent citizens of his own country. *Robson v. The Huntress*, 2 Wall. Jr. 59, 20 Fed. Cas. No. 11,971; s. c. 1 Phila. 122, 12 Fed. Cas. No. 6,912, in which a British consul was made a party to a libel for a salvage on behalf of

others interested, the libel setting forth the persons whom he represented. See also *The Bello Corrunes*, 6 Wheat. (U. S.) 152, 5 L. ed. 229, and *infra*, II, J, 3.

53. See *supra*, II, E, 4, a, (I).

A salvor may sue on behalf of himself and other parties. *The Huntress*, 1 Phila. 122, 12 Fed. Cas. No. 6,912; 2 Wall. Jr. 59, 20 Fed. Cas. No. 11,971; *The Schooner Boston & Cargo*, 1 Sumn. 328, 3 Fed. Cas. No. 1,673. See *The Camanche*, 8 Wall. (U. S.) 448, 476, 19 L. ed. 397. But see *Hessian v. The Edward Howard*, Newb. Adm. 522, 12 Fed. Cas. No. 6,436; and *infra*, II, E, 6, a, (IV).

An owner may sue for salvage on his own behalf and "on behalf of the master, officers and crew. While it would be better to mention the names it is not essential to do so." *The Flottbek*, 118 Fed. 954, 55 C. C. A. 448.

A mortgagee who intervenes to protect his interest may, with the consent of the insurer, represent the latter to the extent of the right to which the insurer has been subrogated. *The Republic* 10 Fed. 398.

Where the insurance only partially covers the loss the assured may sue for himself and for the insurer to recover the whole loss. *Fretz v. Bull*, 12 How. (U. S.) 466, 13 L. ed. 1,068; *The Anchoria*, 9 Fed. 840. See *supra*, II, E, 4, a, (V).

By Consignee or Indorsee of Bill of Lading. — See *supra*, II, E, 4, a, (III).

54. Necessary averments in such cases. See *infra*, II, G, 14, c, (VI).

55. See *infra*, II, E, 6; II, F.

56. See *infra*, II, J.



its consent;<sup>57</sup> and the fact that it voluntarily comes into court for the enforcement of a claim does not authorize the defendant to file a cross suit.<sup>58</sup>

**6. Joinder. — a. Libelants. — (I.) When Necessary. —** Where the right of action is a joint one, all of the parties thereto must be joined in the libel.<sup>59</sup> Where the rights or claims are several, the owners are not obliged to join in the same suit,<sup>60</sup> unless required to do so by the admiralty rules.<sup>61</sup> But where they are such that they might be joined in one suit without injustice to the litigants, thus saving expense and the time of the court, the costs allowed may be limited to an amount which would be proper in a single suit.<sup>62</sup>

**(II.) When Proper. —** All persons entitled on the same state of facts to participate in the same relief may join as libelants whether the suit be *in rem* or *in personam*.<sup>63</sup> Where one or more of several parties to a joint cause of action refuse to consent to a suit, the others may sue in the name of all.<sup>64</sup>

57. *Bowker v. United States*, 105 Fed. 398; *The Othello*, 5 Blatchf. 342, 18 Fed. Cas. No. 10,611. See *supra*, II, C, 3, c, (II), (B).

58. *Bowker v. United States*, 105 Fed. 398, discussing other authorities as to the effect of the government's voluntarily submitting itself to the jurisdiction of the court. For a full discussion of this question, see the title "United States."

59. *Richmond v. New Bedford Copper Co.*, 2 Low. 315, 20 Fed. Cas. No. 11,800.

All the owners of a vessel injured in a collision may and should be joined as libelants in an action therefor. *The Propeller Richard Doane*, 2 Ben. 111, 20 Fed. Cas. No. 11,765.

A contract of mate-ship between two whaling ships whereby the one securing the largest returns for the season is bound to share the excess with the other, does not give one such a joint interest in a whale caught by the other as to require its owner to be made a party to a libel by the owner of the other vessel for the conversion of the whale. *Taber v. Jenny*, 1 Spr. 315, 23 Fed. Cas. No. 13,720.

Although one joint owner has without the knowledge or consent of the other made an agreement with the shipper, to apply the freight due to the payment of the shipper's debt to such joint owner individually, both owners may join in a suit to recover the freight

money. *Donovan v. Dymond*, 3 Woods 141, 7 Fed. Cas. No. 3,993.

60. *The Young Mechanic*, 3 Ware 58, 30 Fed. Cas. No. 18,182.

61. See Admiralty Rules, and *infra*, II, F, 5.

62. See *The Young Mechanic*, 3 Ware, 58, 30 Fed. Cas. No. 18,182, and *infra*, II, Z, 3, c.

63. *Fretz v. Bull*, 12 How. (U. S.) 466, 13 L. ed. 1068; *Jacobsen v. Dalles P. & A. Nav. Co.*, 93 Fed. 975; *The Anchoria*, 9 Fed. 840.

"It may be stated as a general rule in the admiralty, that when several persons have claims *in rem* against a single thing, whether arising from tort or contract, of a like nature and all involving one question, all may join in a single libel for the purpose of having that question tried, although, when that is settled, there may be special defences applicable to each case. When the general question is decided, the case of each libellant becomes separate and independent, and is litigated on its own merits. But though they may, they are not obliged to unite, and if separate libels are brought this will have no influence in a hearing on the merits of the case, but unless satisfactory cause is shown for separate libels, it will affect the question of costs." *The Young Mechanic*, 3 Ware 58, 30 Fed. Cas. No. 18,182.

64. *Richmond v. New Bedford Copper Co.*, 2 Low. 315, 20 Fed. Cas. No. 11,800.

**Necessity of Joint Interest.**—Contrary to the rule prevailing at common law it is not necessary that the interests of the libelants be joint.<sup>65</sup>

(III.) **Subrogee.**—One who has been partially subrogated to the right of another may join with him in the suit, as where an insurer has paid part of a loss.<sup>66</sup>

Persons who have been subrogated to different portions of the same claim or right may unite in a libel for its enforcement.<sup>67</sup>

(IV.) **Salvage.**—In a salvage suit all the salvors or sets of salvors may join in the suit<sup>68</sup> or become parties thereto after it has been filed.<sup>69</sup> Such persons should be joined as libelants,<sup>70</sup> but the suit will not be abated for failure to do so,<sup>71</sup> and they may make claim to the proceeds in the registry without filing new libels.<sup>72</sup>

b. **Defendants.**—(I.) **Generally.**—In a suit on a joint liability, all parties jointly liable must be joined as defendants.<sup>73</sup> Where two or more persons<sup>74</sup> or things<sup>75</sup> are jointly and severally liable, the libelant

65. *Rich v. Lambert*, 12 How. (U. S.) 347, 352, 13 L. ed. 1017; *Jacobsen v. Dalles P. & A. Nav. Co.*, 93 Fed. 975 (all persons injured in same collision may join in a suit against owner of vessel liable); *The Young Mechanic*, 3 Ware 58, 30 Fed. Cas. No. 18,182; *American Ins. Co. v. Johnson*, 1 Blatchf. & H. 9, 1 Fed. Cas. No. 303. See *infra*, II, F, 5.

66. See *Fretz v. Bull*, 12 How. (U. S.) 466, 13 L. ed. 1068; *The Anchoria*, 9 Fed. 840.

67. *American Ins. Co. v. Johnson*, 1 Blatchf. & H. 9, 1 Fed. Cas. No. 303, several insurers have each partially indemnified the assured.

68. *The Marechal Suchet* (1896), Prob. Div. (Eng.) 233, in which case the owners, masters, and crews of four-teen steam tugs joined in the same suit.

69. *The Camanche*, 8 Wall. (U. S.) 448, 476, 19 L. ed. 397; *The Schooner Boston & Cargo*, 1 Sumn. 328, 3 Fed. Cas. No. 1,673; *The Ship Henry Ewbank*, 1 Sumn. 400, 11 Fed. Cas. No. 6,376 (without filing a new libel).

70. *Lewis v. Lot of Whalebone*, 51 Fed. 916; *The R. D. Bibber*, 33 Fed. 55; *Hessian v. The Edward Howard*, Newb. Adm. 522, 12 Fed. Cas. No. 6,436 (holding that a libel by a few salvors who fraudulently conceal the fact that others are entitled to a share in the award will be dismissed); *The Ship Henry Ewbank*, 1 Sumn. 400, 11 Fed. Cas. No. 6,376; *The Schooner Boston & Cargo*, 1 Sumn. 328, 3 Fed. Cas. No. 1,673; *The Calcon*, 1 Handy (Ohio) 363, 12 Ohio Dec. (Reprint) 185.

71. *The Camanche*, 8 Wall. (U. S.) 448, 476, 19 L. ed. 397; *The Flottbek*, 118 Fed. 954, 55 C. C. A. 448; *The Steamship Merrimac*, 1 Ben. 68, 9 Fed. Cas. No. 4,927. See the *A. D. Patchin*, 1 Blatchf. 414, 1 Fed. Cas. No. 87.

Co-salvors whose claims are barred by laches need not be joined. *Staten Island etc. Ferry Co. v. The Thomas Hunt*, 22 Fed. Cas. No. 13,327.

72. *The Leipsic*, 5 Fed. 108; *The Henry Ewbank*, 1 Sumn. 400, 11 Fed. Cas. No. 6,376. See also *The R. D. Bibber*, 33 Fed. 55.

Notice should be given by the libelant to other persons entitled to share in the award, before the proceeds are apportioned and distributed. *Brooks v. The Adirondack*, 2 Fed. 872.

73. Thus, all of the co-owners of a vessel sued for breach of a contract of charter party or affreightment made by their agent in their behalf, must be joined. *Card v. Hines*, 35 Fed. 598.

74. *The National Board of Marine Underwriters v. Melchers*, 45 Fed. 643.

Where the liability of the owners of a vessel is joint and several, the suit may be brought against any one of them and in such case if they are all absent from the jurisdiction, process of attachment will issue against the common property which may be held responsible for the debt. *Card v. Hine*, 39 Fed. 818.

**Joint Tort Feasors.**—*The St. Lawrence*, 19 Fed. 328; *Borden v. Hiern*, 1 Blatchf. & H. 293, 3 Fed. Cas. No. 1,655.

75. *The Franconia*, 16 Fed. 149



may sue either or both, at his election,<sup>76</sup> unless the admiralty rules forbid.<sup>77</sup> But even if both are sued process may be issued and served on one only.<sup>78</sup> However, the party proceeded against may by petition bring in the other as co-respondent for the purpose of determining liability as between themselves.<sup>79</sup>

And in a suit on a joint and several debt of the owners of a vessel, which proceeds by foreign attachment, it is not necessary to make all the owners defendants, to bind their interests in the vessel.<sup>80</sup>

For the purpose of preventing circuity of action and multiplicity of suits, any person may be joined as an original defendant or respondent who might be brought in by petition of the respondent primarily liable to the libellant.<sup>81</sup> Thus persons bound to indemnify the defendant may be joined although the cause of action for indemnity is non-maritime and could not be made the basis of an independent proceeding in admiralty.<sup>82</sup> But only those persons primarily or ultimately liable may be made parties defendant.<sup>83</sup>

(II.) Doubt as to Responsible Party. — Where a libellant is in doubt as to which of two or more persons is liable for an injury to him by reason of a particular transaction, the court, in its discretion, may permit him to join all of such persons as parties defendant, if no injustice is thereby done to them.<sup>84</sup>

(III.) Persons and Things. — A ship or other marine property and a

76. Two vessels jointly liable for a tort may be joined as defendants and the one proceeded against cannot complain that because of libellant's failure to have process served on the other its power to respond has been partially cut off by intervening liens. *The F. W. Vosburgh*, 93 Fed. 481.

Collision. — The person damaged by a collision may pursue both vessels or either, or the owners of both or either; and in case he proceeds against one only and both are held in fault he may recover his entire damages of the one sued. *The Beaconsfield*, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. ed. 993. See also *The Washington* and *The Gregory*, 9 Wall. (U. S.) 513, 19 L. ed. 787.

77. See *infra*, II, F, 3; and Adm. Rules 13-20.

Rule thirteen prevents the joinder of the owner and master in a suit by a seaman for his lay or share in the proceeds of a voyage. *Matern v. Gibbs*, 1 Spr. 158, 16 Fed. Cas. No. 9,273.

78. *The F. W. Vosburgh*, 93 Fed. 481.

79. *The F. W. Vosburgh*, 93 Fed. 481. See *infra*, II, L, 9.

80. *Card v. Hine*, 39 Fed. 818, holding that the Limited Liability Acts do not operate to limit the recovery to the value of that portion of the ship

owned by the person who is made a party defendant.

81. *Evans v. New York & P. S. S. Co.*, 163 Fed. 405. See *infra*, II, L, 9.

82. *Evans v. N. Y. & P. S. S. Co.*, 163 Fed. 405. This was a libel by the owner of a portion of a cargo which had been lost or stolen from a warehouse where it had been stored by the carrier prior to delivery. The warehouseman was made an original party defendant and the court held this was proper practice because the warehouseman being bound to indemnify the carrier could have been brought in on the latter's petition in analogy with rule fifty-nine. See *infra*, II, L, 9.

83. See *Dugan v. Pence*, 2 Hughes 66, 7 Fed. Cas. No. 4,121, holding that a libel in personam for supplies and repairs to a vessel against two registered owners would be dismissed as to one who although registered as an owner was shown to be merely a mortgagee and was not publicly known as owner, and to whom no credit had been given for supplies.

In a possessory action, one who is not in possession and who claims no right of possession or control over the vessel is not a proper party defendant. *The Marguereta*, 29 Fed. 324.

84. *Neall v. Curran*, 93 Fed. 831.



person or persons may be made parties defendant to the same libel under circumstances elsewhere discussed.<sup>85</sup>

*c. Non-Joinder and Misjoinder.*—(I.) How and When Questioned. — Non-joinder or misjoinder apparent from the face of the pleading may be objected to by exceptions;<sup>86</sup> if not so apparent, by setting up the facts necessary to make the defect appear.<sup>87</sup> The objection is deemed waived unless it is seasonably made so that the defect may be corrected by amendment or supplemental libel.<sup>88</sup> It should not be delayed until the final hearing,<sup>89</sup> nor until the appeal.<sup>90</sup>

(II.) Who May Object. — Persons appearing as claimants may object to the want of proper parties.<sup>91</sup>

7. Adding New Parties. — New parties may be added by supplemental libel,<sup>92</sup> or by petition in intervention.<sup>93</sup>

Where a suit has been brought against one of the co-owners of a vessel, it is too late to make others parties by amendment after the attached vessel has been released on stipulation.<sup>94</sup>

8. Striking Out. — The name of a party who has been improperly joined,<sup>95</sup> or who has lost interest in the suit,<sup>96</sup> or whose interest therein is merely representative of that of other parties thereto,<sup>97</sup> or who refuses to furnish the required stipulation for costs,<sup>98</sup> may on motion

85. See *supra*, II, F, 3.

86. See *The Camanche*, 8 Wall. (U. S.) 448, 476, 19 L. ed. 397; *The Commander-in-Chief*, 1 Wall. (U. S.) 43, 52, 17 L. ed. 609; *Card v. Hines*, 35 Fed. 598; and *infra*, II, G, 20.

**Exhibit at Variance With Averments of Libel.** — Where a libel alleges facts showing that all the necessary parties have been made defendant, the fact that an exhibit is apparently at variance with this allegation does not make the libel subject to demurrer for non-joinder. *Card v. Hines*, 35 Fed. 598.

87. See *The Camanche*, 8 Wall. (U. S.) 448, 476, 19 L. ed. 397; *Card v. Hines*, 35 Fed. 598.

88. *The Commander-in-Chief*, 1 Wall. (U. S.) 43, 17 L. ed. 609. See *Disney v. Furness, Withy & Co.*, 79 Fed. 810. See *infra*, II, F, 7; II, G, 20, d.

Misjoinder not excepted to is waived. *Merritt, etc. Co. v. Chubb*, 113 Fed. 173, 51 C. C. A. 119.

89. *Staten Island & N. Y. F. Co. v. The Thomas Hunt*, 22 Fed. Cas. No. 13,326.

90. *The Commander-in-Chief*, 1 Wall. (U. S.) 43, 51, 17 L. ed. 609; *The Flottbek*, 118 Fed. 954, 55 C. C. A. 448.

Although a cross complaint improperly makes defendant persons not parties to the original libel, it is too late to object to such misjoinder on appeal. *The Ping-on v. Blethen*, 11 Fed. 607.

91. *The Commander-in-Chief*, 1 Wall. (U. S.) 43, 52, 17 L. ed. 609.

92. *The Commander-in-Chief*, 1 Wall. (U. S.) 43, 52, 17 L. ed. 609; *The Schooner Boston & Cargo*, 1 Sumn. 323, 3 Fed. Cas. No. 1,673.

93. See *infra*, II, L.

Bringing in additional defendants under rule 59 and by petition in analogy therewith. See *infra*, II, L, 9.

94. *National Board of Marine Underwriters v. Melchers*, 45 Fed. 643.

95. *The Commander-in-Chief*, 1 Wall. (U. S.) 43, 52, 17 L. ed. 609.

A party improperly joined as defendant may be stricken from the suit with his costs. *Dugan v. Pentz*, 2 Hughes 66, 7 Fed. Cas. No. 4,121; *The Margareta*, 29 Fed. 324.

96. *The Falcon*, 4 Blatch. 367, 8 Fed. Cas. No. 4,618.

97. The master, when a party libellant with others to whom the rights in question really belong, may upon his own motion have his name stricken from the libel. *Thompson v. The Jachin*, 23 Fed. Cas. No. 13,959 (on bottomry bond), in which the motion was made for the purpose of qualifying the party as a witness and was granted on condition of his paying the costs of the hearing on the motion, and that the defendant be allowed to add to the defense already interposed such matter as might be appropriate to or required by the change of parties.

98. *The Steamboat Planter, Newb.* Adm. 262, 27 Fed. Cas. No. 16,054.

and a proper showing be stricken from the record. But a libellant, though unwilling to prosecute a suit to which he is a necessary party because of the joint nature of the cause of action, cannot have his name stricken out.<sup>99</sup> He may, however, require his co-libellants to furnish him indemnity for costs.<sup>1</sup>

**9. Substitution.**—*a. Of Real Party in Interest.*—The real party or parties in interest may be substituted for those whose interest is nominal or representative. Thus an assignee,<sup>2</sup> or the real owner,<sup>3</sup> of the claim in suit may be substituted for the original libellant, and a new owner of the libeled *res* for the original claimant.<sup>4</sup> Such action does not involve the bringing in of new parties, nor does it result in discharging the sureties upon stipulation for the release of the vessel.<sup>5</sup>

Before a substitution will be ordered, however, the party asking for it must produce the person to be substituted and subject him to the jurisdiction of the court.<sup>6</sup>

*b. On Death of Party.*—On the death of a party to a cause of action which is not thereby abated, his legal representative or other proper party may be substituted.<sup>7</sup>

**F. JOINDER OF CAUSES.**—**1. Generally.**—The rules regulating joinder in admiralty resemble those of equity<sup>8</sup> and are different from<sup>9</sup> and in some respects more liberal than those obtaining at common law;<sup>10</sup> thus the mere fact that a libel joins a cause of action *ex contractu* with one *ex delicto* does not make it objectionable if their joinder is otherwise proper.<sup>11</sup>

99. *Richmond v. New Bedford Copper Co.*, 2 Low. 315, 20 Fed. Cas. No. 11,800.

1. *Richmond v. New Bedford Copper Co.*, 2 Low. 315, 20 Fed. Cas. No. 11,800.

2. *The Cadiz*, 20 Fed. 157. See also *Burke v. The M. P. Rich*, 1 Cliff. 308, 4 Fed. Cas. No. 2,161.

3. Where a suit is brought by the master of a tug for injuries to the tow and cargo thereof by collision with a third vessel, and the claimants of the latter by petition bring in the tug as co-defendant, there should be a substitution of the owners of the tow and cargo as libellants. *The Mercedes*, 108 Fed. 559. *The Beaconsfield*, 158 U. S. 303, 309, 15 Sup. Ct. 860, 39 L. ed. 993.

4. *The Cerea*, 149 Fed. 924, a libel *in rem* in which it appeared that the original claimant had died and a motion by the libeled vessels to substitute a corporation as the new and sole owner, was granted. See also *The Bark Laurens*, Abb. Adm. 302, 14 Fed. Cas. No. 8,121. But see *The Ann C. Pratt*, 1 Curt. 340, 1 Fed. Cas. No. 409, distinguishing between an ownership acquired by voluntary assignment and one acquired by operation of law.

5. *The Beaconsfield*, 158 U. S. 303,

15 Sup. Ct. 860, 39 L. ed. 993; *The Cerea*, 149 Fed. 924.

6. *The Eliza Lines*, 61 Fed. 308, 315.

7. See *infra*, II, N; and *The Ann C. Pratt*, 1 Curt. 340, 1 Fed. Cas. No. 409.

8. *Pratt v. Thomas*, 1 Ware 437, 19 Fed. Cas. No. 11,377. See the title "*Joinder and Splitting of Actions.*"

9. *Pratt v. Thomas*, 1 Ware 437, 19 Fed. Cas. No. 11,377.

10. In *Borden v. Hiern*, 1 Blatchf. & H. Adm. 293, 3 Fed. Cas. No. 1,655, Betts, J., attributes the obscurity in respect to the right of a libellant to unite distinct causes of action in an admiralty suit, to the propensity of the bar and courts in modern times to identify the pleadings in admiralty with those of common law tribunals, but remarks that in this respect there is no analogy between the two systems of pleading.

11. *Borden v. Hiern*, Blatchf. & H. 293, 3 Fed. Cas. No. 1,655, which was a libel against the mate and master for a joint assault, and against the master for wages. The owner, besides excepting to the alleged misjoinder, averred a wilful desertion without leave and justified the assaults



The general principle governing joinder of causes is the same as that applied to joinder of parties,<sup>12</sup> consolidation of suits,<sup>13</sup> and intervention,<sup>14</sup> namely, the administration of justice to all parties concerned in the speediest and most economical manner possible.<sup>15</sup>

**2. Non-Maritime Cause of Action.** — An independent non-maritime cause of action cannot be joined with a maritime cause of action,<sup>16</sup> but in a suit on a maritime contract a non-maritime agreement forming part thereof may be proved as an incident and damages for its breach awarded.<sup>17</sup>

**3. Joinder of Proceedings In Rem and In Personam.** — *a. Generally.* — The admiralty rules formulated by the supreme court permit or forbid in certain classes of cases, the joinder, in the same libel, of

as moderate corrections necessary to subdue mutinous spirit and maintain discipline. Betts, J., says with reference to the contrary common law practice: "The reason which sustains that practice at law, very slightly, if at all, applies to the pleadings in admiralty, where no regard is paid to the names or forms of actions, or to modes of complaint or defense, and where it is never made a point of pleading whether the case rests upon contract or tort. Leaving out of view the uniting of the mate with the master, in a suit for wages, this case illustrates what I regard as the spirit of the admiralty practice, and its advantages on this very head. The testimony to support and resist the claims to wages and to damages is essentially the same, because the inquiry, whether or not the conduct of the libellant on the voyage was wrongful, goes directly to the merits of the claim and defense, as to both causes of action. The expense and delay of taking the evidence at large in two suits, and of having two distinct trials on the same facts, must be incurred at common law, whilst the court hears all the proofs and disposes of the rights of both parties in one action." See also *The Guiding Star*, 1 Fed. 347; *The Steamer Oler*, 2 Hughes 12, 14, 18 Fed. Cas. No. 10,485 (where there is a cause of action for breach of contract or bailment and for collision, both may be joined).

12. See *infra*, II, E, 1 and 6.

13. See *infra*, II, M, 1.

14. See *infra*, II, L.

15. See *Rich v. Lambert*, 12 How. (U. S.) 347, 13 L. ed. 1017; *The Queen of the Pacific*, 61 Fed. 213.

"The general principle is that several

issues may be tried in one action, when that course will promote the cause of justice, and conduce to the convenience of parties and of the court, and when no considerable inconvenience will arise therefrom. On this principle actions are sustained against a defendant for several independent but analogous claims, and also against several defendants for claims arising out of the same transaction, where the claims themselves are analogous." *Heney v. The Josie*, 59 Fed. 782.

16. *Bruce v. Murray*, 123 Fed. 366, 59 C. C. A. 494, holding that the act of congress providing for the jurisdiction and procedure of the courts in Alaska and for the joinder of causes of action, does not permit the joining of an admiralty cause of action with a legal or equitable one. See *United States v. The Queen*, 4 Ben. 237, 27 Fed. Cas. No. 16,107.

But a person liable to indemnify the defendant, although by reason of a non-maritime right of action, may be made a party defendant. See *supra*, II, E, 6, b, (I.).

17. *Nash v. Bohlen*, 167 Fed. 427 (holding that breach of a contract to insure might be proved as part of the breach of the general contract sued on); *Keyser v. Blue Star S. S. Co.*, 91 Fed. 267, 33 C. C. A. 496 (holding that while the mere fact of such an agreement being embraced in a charter party would not give it the character of a maritime contract, its relation to the other stipulations of the charter party might be such as to connect it with the main contract in such a manner as to authorize the parties to apply to a court of admiralty to adjudicate alleged breaches of such stipulation).



a cause of action *in rem* with one *in personam*.<sup>18</sup> In the cases covered by such rules there can be no joinder of such remedies other than is therein permitted.<sup>19</sup> But, as indicated by the rules themselves, there is no such incompatibility between the two forms of remedy as to prevent their joinder.<sup>20</sup> And where a controlling rule of practice has not been established by the supreme court, the propriety of joining proceedings *in rem* and *in personam* in the same libel is a matter to be determined by each district court for itself,<sup>21</sup> and in most of them the practice is sanctioned where the party is entitled to the double remedy for the same wrong.<sup>22</sup> In some districts, however, no joinder of proceedings *in rem* and *in personam* is permitted except as authorized in the admiralty rules.<sup>23</sup>

Rules 14 to 20 are not extended by analogy, but are confined to the cases expressly covered by them.<sup>24</sup> They apply only where a single interest is proceeded against, and do not prevent the joinder of a suit *in personam* against one interest with a proceeding *in rem* against an entirely different thing or interest.<sup>25</sup>

18. See Admiralty Rules.

Petitory and Possessory Suits. — Rule twenty-two prescribing the procedure in petitory and possessory suits requires a joinder of proceedings *in rem* and *in personam*. *Kynoch v. S. C. Ives*, Newb. Adm. 205, 14 Fed. Cas. No. 7,958.

19. *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. ed. 727.

Salvage. — Under rule nineteen, a salvor is given an alternative remedy *in rem* against the property saved or *in personam* against the persons liable, but the two remedies cannot be joined in the same suit. *The Sabine*, 101 U. S. 384. See also *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. ed. 727.

Seaman's Wages. — Rule thirteen prevents a seaman from joining the ship and owner in the same suit for wages. *The Ethel*, 66 Fed. 340, 13 C. C. A. 504; *The Sloop Merchant*, Abb. Adm. 1, 17 Fed. Cas. No. 9,434.

20. *Heney v. The Josie*, 59 Fed. 782; *The Zenobia*, Abb. Adm. 48, 30 Fed. Cas. No. 18,208. See *The S. L. Watson*, 118 Fed. 945; *The Cheapside* (1904), Prob. Div. 339. But see the *Alida*, 12 Fed. 343.

21. *The Planet Venus*, 113 Fed. 387; *The J. F. Warner*, 22 Fed. 342; *The Zenobia*, Abb. Adm. 48, 30 Fed. Cas. No. 18,208.

Under rule 46 district courts have power to establish the practice of joining proceedings *in rem* and *in personam* where not inconsistent with other admiralty rules. *The Clan Graham*, 153 Fed. 977; *The Planet Venus*, 113 Fed. 387; *The City of Carlisle*, 39 Fed. 807,

5 L. R. A. 52; *The Monte A*, 12 Fed. 331.

22. *The Clan Graham*, 153 Fed. 977; *The Thomas P. Sheldon*, 113 Fed. 779; *The Eliza Lines*, 61 Fed. 308; *The City of Carlisle*, 39 Fed. 807, 5 L. R. A. 52; *The Director*, 26 Fed. 708, 36 Fed. 335; *The J. F. Warner*, 22 Fed. 342; *The Monte A*, 12 Fed. 331; *The Clatsop Chief*, 8 Fed. 163; *The Merchant*, Abb. Adm. 1, 17 Fed. Cas. No. 9,434.

The ship and a stevedore both liable for the same tort may be joined as defendants. *The Clan Graham*, 153 Fed. 977.

23. *The General Sedgwick*, 29 Fed. 606; *The Alida*, 12 Fed. 343; *Dean v. Bates*, 2 Woodb. & M. 37, 7 Fed. Cas. No. 3,704; *Citizens' Bank v. Nantucket S. Co.*, 2 Story 16, 5 Fed. Cas. No. 2,730. And see *The Ethel*, 66 Fed. 340, 13 C. C. A. 504, where the court says: "It is well settled that proceedings *in rem* and *in personam* cannot be joined in the same libel except in cases specified in the admiralty rules."

24. *Joice v. Canal Boats*, 32 Fed. 553. See also *The No. K. 1*, 150 Fed. 111, 80 C. C. A. 65; *The Clan Graham*, 153 Fed. 977.

25. *The No. K. 1*, 150 Fed. 111, 80 C. C. A. 65, where the court after noticing the provisions of these rules, says: "But all of these provisions manifestly refer to single interests. The master, freight, and owner mentioned are the master, freight, and owner of the particular individual ship proceeded against. The rules point out how such

**b. Contracts of Affreightment.**—Suits based upon contracts of affreightment<sup>26</sup> or charter party<sup>27</sup> are not covered by the admiralty rules and may therefore join proceedings *in rem* and *in personam*.

**c. Against Ship and Owner.**—The ship and its owner cannot be joined in those cases covered by rules twelve to nineteen,<sup>28</sup> but these rules do not apply to a suit against a ship and the owners of other ships,<sup>29</sup> nor to other classes of cases than those expressly named.<sup>30</sup>

**d. Against Ship and Master.**—The ship and master may be joined as defendants in those cases in which the rules sanction such practice<sup>31</sup> or do not expressly forbid it,<sup>32</sup> and in other cases not covered by the rules if the causes of action are such as properly may be joined.<sup>33</sup>

interest shall be proceeded against, and require a choice of one mode or another. There is nothing to preclude a similar choice of procedure if another interest is involved in the same controversy. Thus, if a libellant is injured by the independent, but concurrent, negligence of ship A, B, and C, there is nothing in the rules which forbids his proceeding against all three offenders in the same suit; and if, under rule 15, he proceeds against ship A *in rem*, there is no apparent reason why he may not proceed against the owner alone of ship B, and against ship C and her master." A contrary dictum in *The Young America*, 1 Brown Adm. 462, 30 Fed. Cas. No. 18,178 is disapproved. See also *Joice v. Canal Boats*, 32 Fed. 553; *The Doris Eckhoff*, 32 Fed. 555.

26. *The J. F. Warner*, 22 Fed. 342; *The Monte A*, 12 Fed. 331.

The ship and her charterers may be joined as defendants in a suit for breach of contract of affreightment. *The Planet Venus*, 113 Fed. 387; *The Alert*, 40 Fed. 836.

The cargo and its consignees may be joined in a libel for freight. *Vaughan v. 630 Casks of Sherry Wine*, 7 Ben. 507, 28 Fed. Cas. No. 16,900, affirmed in 14 Blatchf. 517, 22 Fed. Cas. No. 12,918.

27. *The Monte A*, 12 Fed. 331; *Draper v. O. C. Clary*, 7 Fed. Cas. No. 4,071.

A charterer may join a suit against the owner for possession of the cargo, the delivery of which was rendered impossible by the unseaworthiness of the vessel, with a suit against the owner and vessel for breach of warranty of seaworthiness. *The Director*, 36 Fed. 335, affirming 26 Fed. 708. The court below said: "In a suit for a breach of a charter-party or contract of af-

freightment, whether brought against the master, owner, or vessel, there is no substantial difference, either in allegation, proof, or decree. The liability in either case grows out of the same facts, and the relief sought and obtainable is the same. The only difference is in the enforcement of the decree, and that is merely a difference in degree; the enforcement of the one given in the suit *in rem* being, in the nature of things, limited to the sale of the vessel proceeded against, while the one in the suit *in personam* may be enforced by an execution against the property of the defendant generally. This being so, every argument founded on convenience and economy is in favor of their joinder in one suit."

28. *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. ed. 727.

In collision cases the ship and its owner cannot be joined by reason of rule 15 (Mayor etc. of New York v. White, 59 Fed. 617; *The Clatsop Chief*, 8 Fed. 163; *The Zodiac*, 5 Fed. 223; *Ward v. Ogdensburgh*, 5 McLean 622, 29 Fed. Cas. No. 17,158), unless the owner is also master. *The Richard Doane*, 2 Ben. 111, 20 Fed. Cas. No. 11,765.

29. *The No. K. 1*, 150 Fed. 111, 80 C. C. A. 65; *Joice v. Canal-Boats*, 32 Fed. 553 (a collision case).

30. *The Director*, 26 Fed. 703; *The City of Carlisle*, 39 Fed. 807, 5 L. R. A. 52. But see *Dean v. Bates*, 2 Woodb. & M. 87, 7 Fed. Cas. No. 3,704.

In suits for materials and repairs the vessel and owner may be joined. *Aitcheson v. Endless Chain Dredge*, 40 Fed. 253.

31. See Adm. Rules 14, 15.

32. See *supra*, II, F, 3, a.

33. *The Zenobia*, Abb. Adm. 48, 30 Fed. Cas. No. 18,208, breach of contract of affreightment. See *The Falls*



e. *Necessity of Joinder*. — Even where a joinder is proper the court, in its discretion, may permit the filing of two suits for the same wrong, one *in personam* and one *in rem*, where it protects the persons interested from a double liability.<sup>34</sup>

4. *By Single Libellant*. — a. *Against One Defendant*. — A person having several causes of action against one defendant arising out of the same transaction may join them all in one libel.<sup>35</sup> But unrelated causes of action *in personam* cannot be joined,<sup>36</sup> especially where the defendant is liable in different capacities.<sup>37</sup>

b. *Against Several Persons or Things*. — Claims or causes of action against several persons or things may be joined, if a joinder is not forbidden by the admiralty rules, where they arise out of the same transaction or relate to the same subject-matter, and the respective rights of the parties are not thereby prejudiced.<sup>38</sup> But if they are separate and distinct and arise out of unrelated transactions they must be made the subjects of separate suits.<sup>39</sup>

of *Keltie*, 114 Fed. 357, and *infra*, II, F.

"Where the facts of the case establish a liability of the master and give the libellant a lien on the vessel as well for the amount of his claim, it is proper and expedient that the proceeding against him and the vessel be joined in one libel." The *City of Carlisle*, 39 Fed. 807, 5 L. E. A. 52.

34. *LaNormandie*, 58 Fed. 427, 7 C. C. A. 285, affirming 40 Fed. 590, holding that the trial court could proceed in such manner where it suspended the entry of a decree in one case contingently upon the ability to obtain satisfaction in the other.

35. *Fretz v. Bull*, 12 How. (U. S.) 466, 13 L. ed. 1068; *The Prussia*, 100 Fed. 484; *Card v. Hine*, 39 Fed. 818 (for breach of charter party and to recover advances of money); *Cobb v. Howard*, 5 Fed. Cas. No. 2,925. See *The Steamer Oler*, 2 Hughes 12, 14, 18 Fed. Cas. No. 10,485.

*Implied and Express Lien*. — A cause of action upon an express lien given by contract may be united with one upon a lien implied by law where the same transaction is the basis of both. *The Brig Hunter*, 1 Ware 249, 12 Fed. Cas. No. 6,904.

An administrator of two decedents killed in the same collision may join claims for their death in one libel. *The S. S. Oregon*, 42 Fed. 78.

36. *Pratt v. Thomas*, 1 Ware 427, 19 Fed. Cas. No. 11,377 (for wages and tort). But see *Treadwell v. Joseph*, 1 Sumn. 390, 24 Fed. Cas. No. 14,157; *Pettingill v. Dinsmore*, 2 Ware 208, 19 Fed. Cas. No. 11,045; *Orne v. Townsend*, 4 Mason 541, 18 Fed. Cas. No.

10,583; *Cobb v. Howard*, 5 Fed. Cas. No. 2,925.

A seaman cannot join a cause of action against the master for damages for mistreatment with one for the fine imposed by statute upon the master for such misconduct where the fine is recoverable by any person suing therefor. *Knowlton v. Boss*, 1 Spr. 163, 14 Fed. Cas. No. 7,901, distinguishing the case of a penalty of double wages for short provisions, in which case the penalty is recoverable only by the seaman himself and is "a kind of statute extension of his original contract."

37. *Pratt v. Thomas*, 1 Ware 437, 19 Fed. Cas. No. 11,377, the master being liable for wages merely in his representative capacity cannot be sued for wages and for his personal tort in the same libel.

38. *The Dauntless*, 7 Fed. 366, against ship and cargo. See *supra*, II, E, 6; II, F, 3.

A seaman may join a claim against the mate and master for a joint tort with a claim against the master for wages where the testimony in support of the claims and the defense will be largely the same because the conduct relied upon as a justification of the tort is also urged as a ground for defeating the claim for wages. *Borden v. Hiern*, *Blatchf. & H. Adm.* 293, 3 Fed. Cas. No. 1,655.

39. *Heney v. The Josie*, 59 Fed. 782; *Roberts v. Skotfield*, 3 Ware 184, 20 Fed. Cas. No. 11,917. An action of trespass against one not in possession cannot be joined with an action *in rem* for possession against another party. *The Marguerita*, 29 Fed. 324. A



**5. By Several Libelants.** — a. *Generally.* — Several persons whose rights are separate and distinct may join in one suit, their respective causes of action arising out of the same transaction.<sup>40</sup> Where others have been partially<sup>41</sup> or wholly<sup>42</sup> subrogated to a maritime claim, the respective rights of action may all be joined in one libel. And where the court may compel a joinder by different parties of their separate claims of the same nature, a libelant may include another claim against the same defendant but peculiar to himself.<sup>43</sup>

b. *Contracts of Affreightment and Charter Parties.* — Where the individual rights of several persons arising from contracts of affreightment or a charter party are infringed by the same act or conduct, their separate causes of action may be joined in one suit.<sup>44</sup>

cause of action for an assault by the master upon a seaman cannot be joined with one against the vessel for wages. *The Falls of Keltie*, 114 Fed. 357.

Separate and distinct trespasses by several persons, charged not jointly but severally, cannot be joined in the same libel. *Thomas v. Lane*, 2 Sumn. 1, 23 Fed. Cas. No. 13,902.

40. *American Ins. Co. v. Johnson*, Blatchf. & H. 9, 1 Fed. Cas. No. 303, which was a libel in personam by several insurers who had been subrogated to the rights of the owners of the cargo. The court in holding that the interests of the libelants need not be joint, says "The canon law permitted several actions to be joined in the same libel. (2 Browne's Civ. Law, ed. 1799 79.) And our own courts sustain libels uniting the most dissimilar interests. In *The Amiable Nancy*, the libel was filed by the owners of the vessel, the master, the supercargo and a mariner, for trespass to the vessel, and for an assault and battery on some of the libelants. Damages were awarded by this Court for each of these causes of action, and its decision was sustained, on appeal, by the Circuit Court and by the Supreme Court. (1 Paine's C. C. R. 111; 3 Wheat 546.) The practice of the Court of Chancery permits suitors who have a like interest in the subject-matter to unite in a bill, though they are not to participate with each other in the recovery. (*Lloyd v. Loaring*, 6 Ves. 773; *Adair v. The New River Co.*, 11 Ves. 429; *Good v. Blewitt*, 13 Ves. 397; Mitf. Pl. Amer. ed. 1816, 135, et seq.) There is a manifest fitness and convenience in allowing parties in admiralty suits to join as libelants, whose interests rest upon a cause of action common to all, though as between themselves their interests are separate and distinct, and I find no rule or prin-

ciple of the civil law interdicting such junction.

41. *Fretz v. Bull*, 12 How. (U.S.) 46, 13 L. ed. 1068; *The Anchoria*, 9 Fed. 840.

42. *American Ins. Co. v. Johnson*, Blatchf. & H. 9, 1 Fed. Cas. No. 303, a libel in personam by several insurers who had been subrogated to the rights of the owners of the cargo.

43. *The Merchant*, 1 Abb. Adm., 17 Fed. Cas. No. 9,434, holding that seamen who may be compelled to join their claims for wages in one libel against the vessel, may unite other individual demands constituting a lien on the vessel.

44. *The Baracoa*, 44 Fed. 102.

Several shippers may join in the same libel for damages to cargo shipped by each individually, where the causes of action arise out of the same acts of the defendant. *The Queen of the Pacific*, 61 Fed. 213; *Sun Mut. Ins. Co. v. Miss. Valley Trans. Co.*, 14 Fed. 699.

In *Rich v. Lambert*, 12 How. (U.S.) 347, 13 L. ed. 1017, the court says: "The joining of several owners of cargo conveyed in the same ship in a libel in rem for damages done to the goods in the course of shipment and the consolidation of libels filed separately by the respective owners for like damage is allowed by the proceedings of the court for its convenience and the saving of time and expense to the parties. It is a proceeding deserving of commendation and encouragement in all cases where it can be done without complicating too much the proceedings and thereby prejudicing the rights of the parties. In cases where the several claims against the ship are founded upon a common injury and loss, the questions involved depending upon the same general rules of law, and the same evidence equally applicable to

c. *Collision*.—All persons injured in a collision may join their causes of action in one suit,<sup>45</sup> but such joinder is not required.<sup>46</sup>

d. *Suits for Wages*.—Although the statute directs seamen suing *in rem* for wages to join the claims of other seamen against the same vessel,<sup>47</sup> the court cannot compel such action; its power is limited to the consolidation of separate suits and refusing to allow costs for more than one suit.<sup>48</sup>

A seaman having an additional though dissimilar claim may join with one having a claim merely for wages.<sup>49</sup>

A joinder, while proper, is not required in suits *in personam* for wages.<sup>50</sup>

6. *In Rem*.—Where the same person has several causes of action against a vessel or other maritime property he may join them all in one suit.<sup>51</sup> Distinct causes of action belonging to different parties may also be joined in one proceeding *in rem*, if they are of the same nature or arise out of the same transaction,<sup>52</sup> or are of such a nature that the court could compel a consolidation;<sup>53</sup> and it has been said

all of them, it is fit and proper that the proceedings should be joint, either by allowing the parties to unite in the libel, or by an order for consolidation, if separate suits have been instituted. The defence will usually be the same in all the cases; but, if otherwise, the parties will not be prejudiced, as they may avail themselves in the answers of any defence existing against either of the several owners. For, although the proceeding assumes the form of a joint suit, it is in reality a mere joinder of distinct causes of action by distinct parties, arising out of a common injury, and which are heard and determined, so far as the merits are concerned, the same as in the case of separate libels for each cause of action. The same decree, also, is entered as in the case of separate suits."

Passengers may join in one libel *in rem* their several claims for unwholesome and insufficient supply of food on the same voyage. The Oregon, 133 Fed. 609, 68 C. C. A. 603.

45. Passengers and seamen injured in the same collision may join in a libel by the owner of the injured vessel. The Queen, 40 Fed. 694.

46. Steamer City of Paris, 1 Ben. 529, 5 Fed. Cas. No. 2,766, so interpreting The Commander-in-Chief, 1 Wall. (U. S.) 43, 17 L. ed. 609.

47. Nelson v. The Hercules, 4 Law Rep. 22, 17 Fed. Cas. No. 10,108.

In a libel for double wages for short allowance of bread, all the crew may unite. The Bark Childe Harold, Olc. Adm. 275, 5 Fed. Cas. No. 2,676.

48. On a libel by one seaman, the only one of the crew in port, for his wages, respondent asked that the rest of the crew be made parties. The court held that its power was limited to consolidating suits already filed that it could not make parties. Nelson v. The Hercules, 4 Law Rep. 22, 17 Fed. Cas. No. 10,108. But see Collins v. Hathaway, Olc. Adm. 176, 6 Fed. Cas. No. 3,014.

49. The Merchant, Abb. Adm. 1, 17 Fed. Cas. No. 3,434, allowing a seaman to unite claim for wages and money advanced in same libel with claim of another seaman for wages.

50. Collins v. Hathaway, Olc. Adm. 176, 6 Fed. Cas. No. 3,014. See also Oliver v. Alexander, 6 Pet. (U. S.) 143, 8 L. ed. 349.

51. The Prussia, 100 Fed. 484. See The Guiding Star, 1 Fed. 347.

In a libel against a fishing vessel by one of the crew, he may properly join his claim for an accounting for his share of the fish caught, and his claim for a share of the bounty paid to fishing vessels. The Lucy Anne, 3 Ware 253, 15 Fed. Cas. No. 8,596.

52. See The Prussia, 100 Fed. 484; The Anchoria, 9 Fed. 840. Compare The Oregon, 42 Fed. 78, and *infra*, II, L.

Materialmen may join their several claims in one suit against the vessel. The Hull of a New Ship, 2 Ware 203, 12 Fed. Cas. No. 6,859. See also The Childe Harold, Olc. Adm. 275, 5 Fed. Cas. No. 2,676.

53. The Sloop Merchant, Abb. Adm.

that all causes of action against the same ship may be joined in libel,<sup>54</sup> although there are decisions to the contrary.<sup>55</sup> All the grounds of forfeiture may be joined in the same libel of information.<sup>56</sup>

7. Objection to misjoinder if not timely is waived,<sup>57</sup> and cannot be raised on appeal.<sup>58</sup>

8. Effect of Misjoinder. — A misjoinder does not necessitate the dismissal of the libel, but an amendment eliminatng one of the causes of action may be permitted,<sup>59</sup> or the court may dismiss it as to one cause of action and retain it as to the other.<sup>60</sup>

1, 17 Fed. Cas. No. 9,434. See *infra*, II, M.

54. The Prinz Georg, 19 Fed. 653, (affirmed in 23 Fed. 906). This was a libel *in rem* by numerous steerage passengers to recover the penalty for failing to furnish proper provisions and to recover damages therefor. The court says, "The suit is a proceeding *in rem*, and the numerous libelants assert distinct claims, each for himself. Can such claims be joined in one suit? I think, upon principle as well as authority, the question must be answered in the affirmative. Where a thing is defendant and several persons are asserting rights in it, distinct, but before the same tribunal, the proceedings are, for certain purposes, necessarily to be considered together, *i. e.*, whenever it is necessary to rank the claims or to proportion the proceeds. This would happen whenever the proceeds should be insufficient to pay all the claims in full. Again, when, as in this case, the claims rest upon a charge of voluntary withholding of provisions, etc., the cases necessarily involve a common question, viz., whether an adequate supply of provisions was originally laden on board. The case is therefore analogous to cases of salvage or collision in this respect, and for this reason the joinder would be permissible. But I think the joinder is allowed even in cases which are in their origin distinct, and have no connection save that they are asserted against a common *res*. When there is a suit *in rem*, it is a prerequisite of jurisdiction that there should be a warrant and a seizure. In these cases there must be either the expense of 60 seizures, or there must be a joinder that one seizure may arrest for all the claims. Therefore the joinder is allowed. The difficulties of answering and defending are not enhanced, and the expense is reduced."

55. Seamen claiming wages cannot join a libel *in rem*, by the holder of a bottomry bond. *Jaurekhe v. The S. G. Troop*, 13 Fed. Cas. No. 7,231.

An information against a ship cannot join a count charging the violation of statute justifying seizure and a count claiming the ship as a prize, the two proceedings being very different in their nature. *The Dimon*, 2 Gall. 306, 7 Fed. Cas. No. 3,917.

56. *The Haytian Republic*, 57 Fed. 508, reversed on other grounds, 154 U. S. 118, 14 Sup. Ct. 992.

57. *Pratt v. Thomas*, 1 Ware 427, 437, 19 Fed. Cas. No. 11,377. See *infra*, 11, G, 20, d. Compare *supra*, II, E, 6, c.

An objection that the libel improperly joins proceedings *in personam* and *in rem* comes too late on the argument. It should be made by exception to the libel before answer. *The City of Carlisle*, 39 Fed. 807, 5 L. R. A. 52.

By allowing a suit to be tried without exception, a misjoinder therein is waived. *Merrit, etc. Wrecking Co. v. Chubb*, 113 Fed. 173, 51 C. C. A. 119.

58. *The Willamette*, 72 Fed. 79, 18 C. C. A. 373, 31 L. R. A. 720.

59. *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. ed. 727; *Newell v. Norton*, 3 Wall. (U. S.) 257, 18 L. ed. 271; *Roberts v. Skofeld*, 3 Ware 184, 20 Fed. Cas. No. 11,917.

Where proceedings *in rem* and *in personam* have been improperly joined, the libellant may be compelled to elect which remedy he will pursue. *Newell v. Norton*, 3 Wall. (U. S.) 257, 18 L. ed. 271. See *Danace v. The Magnolia*, 37 Fed. 367.

But an amendment to correct the misjoinder is not necessary, the court may disregard the claim *in personam* as surplusage. *The Falls of Keltie*, 114 Fed. 357.

60. *The Thomas P. Sheldon*, 113 Fed. 779.



G. PLEADING. — 1. Generally. — Admiralty pleading is based upon the civil law,<sup>61</sup> and does not adhere to the technical strictness of the common law.<sup>62</sup> The rules are extremely elastic and so moulded as to most conveniently and speedily work out the justice of the case.<sup>63</sup> While there is a resemblance to equity pleading in this respect<sup>64</sup> there is less adherence to formal requirements than is required even in equity.<sup>65</sup>

But notwithstanding the liberality and latitude which is allowed, this should be restrained within proper limits and not so exercised as

A party cannot complain of misjoinder where the court either on exceptions or on the final hearing dismisses the suit as to one cause of action. *The S. L. Watson*, 118 Fed. 945, 55 C. C. A. 439.

61. See *supra*, II, A, and *Mauro v. Almeida*, 10 Wheat. (U. S.) 437, 6 L. ed. 369. In prize causes especially is this true. *The Schooner Adeline*, 9 Cranch (U. S.) 244, 284, 3 L. ed. 719.

62. *Dupont v. Vance*, 19 How. (U. S.) 162, 173, 15 L. ed. 584; *Penhallow v. Doane's Admr's.*, 3 Dall. (U. S.) 54, 79, 1 L. ed. 507; *Davis v. Adams*, 102 Fed. 520, 42 C. C. A. 493; *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 Fed. 180, 193, 36 C. C. A. 135; *The Anaces*, 93 Fed. 240, 34 C. C. A. 558; *Hays v. Pittsburgh G. & B. Pack. Co.*, 33 Fed. 552; *The Pilot*, 1 Biss. 159, 19 Fed. Cas. No. 11,168; *The Steamer Navarro*, Olc. Adm. 127, 17 Fed. Cas. No. 10,059; *Dexter v. Munroe*, 2 Spr. 39, 7 Fed. Cas. No. 3,863; *The Brig Aldebaran*, Olc. Adm. 130, 1 Fed. Cas. No. 150.

The strictness of averment necessary at common law is not required in admiralty. *The Palmyra*, 12 Wheat. (U. S.) 1, 13, 6 L. ed. 531; *Peru v. The North American*, 19 Fed. Cas. No. 11,017a; *Jenks v. Lewis*, 1 Ware 51, 13 Fed. Cas. No. 7,280; *Brown v. The Cadmus*, 2 Paine 564, 4 Fed. Cas. No. 1,997 (averment of non-payment).

Courts of admiralty "give the most favorable interpretation to pleadings, in order, if possible, to support them." *The Martha*, 1 Blatchf. & H. Adm. 151, 165, 16 Fed. Cas. No. 9,144.

"The rules of pleading in admiralty are exceedingly simple and free from technical requirements. It is incumbent upon the libellant to propound with distinctness the substantive facts on which he relies; to pray, either specially or generally, for the relief appropriate to them, and to ask for

such process of the court as is suited to the action, whether in *rem* or in *personam*. It is incumbent on the respondent to answer distinctly each substantive fact alleged in the libel, either admitting, or denying, or declaring his ignorance thereof, and to allege such other facts as he relies upon as a defense, either in part or in whole, to the case made by the libel." *Dupont v. Vance*, 19 How. (U. S.) 162, 15 L. ed. 584.

63. *Neall v. Curran*, 93 Fed. 831. See *Davis v. Adams*, 102 Fed. 520, 42 C. C. A. 493; *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 Fed. 180, 193, 36 C. C. A. 135; *Graham v. Oregon R. & Nav. Co.*, 134 Fed. 692 (quoting with approval *Benedict's Admiralty* [3rd ed.] § 483); *Harrison v. Hughes*, 119 Fed. 997; *The Cambridge*, 2 Low. 21, 4 Fed. Cas. No. 2,334.

While the rules of pleadings govern in admiralty courts as in all other courts of justice, they are administered in view of the true office of pleading, which is to ascertain precisely the points of difference between the parties on the merits of the case, and with a disregard for technicalities. *Card v. Hines*, 35 Fed. 598.

Forms of procedure are important, but a court of admiralty will not follow them merely for their own sake when by so doing injustice will be done to a party. Eight Hundred and Forty-One Tons of Iron Ore, 15 Fed. 615, *per Benedict, J.*

64. See *supra*, II, A; and *Davis v. Adams*, 102 Fed. 520, 42 C. C. A. 493.

65. See *The Alexandra*, 104 Fed. 904; *Richmond v. New Bedford Cop. Co.*, 2 Low. 315, 20 Fed. Cas. No. 11,800. "There is no doubt that the rules of pleading in admiralty are more liberal than at law or in equity." *Neall v. Curran*, 93 Fed. 831. Compare *The Eliza Lines*, 61 Fed. 309, 322.

to prejudice the rights of the parties.<sup>66</sup> The substantial rules of pleading essential to orderly and effective procedure should be followed.<sup>67</sup>

**2. Conformity With Rules.**—Pleadings must conform to the admiralty rules, and the court of its own motion may insist upon this although a party may have waived his right to do so by failing to file exceptions.<sup>68</sup>

**3. Caption and Title.**—The form of the caption and title of pleadings in admiralty depend largely upon the character of the particular pleading in question and the nature of the suit.<sup>69</sup>

**4. Conclusion.**—Many pleadings in admiralty conclude with a prayer to the court, the form and contents of which will be hereinafter noticed.<sup>70</sup>

**5. Signing.**—Pleadings should be signed by the proctor of the party on whose behalf they are filed, and in the case of the libel, by the party himself.<sup>71</sup>

**6. Verification.**—*a. Generally.*—The necessity for verifying pleadings in admiralty is dependent largely upon rules of court,<sup>72</sup> the practice in the absence of any rule being to verify the answer but not the libel.<sup>73</sup> Besides the rules of the supreme court, there are, or

66. *Harrison v. Hughes*, 119 Fed. 997.

67. *Card v. Hines*, 35 Fed. 598. See *The Alexandra*, 104 Fed. 904; *Hays v. Pittsburgh, G. & B. Packet Co.*, 33 Fed. 552; *Jenks v. Lewis*, 1 Ware 51, 13 Fed. Cas. No. 7,280; *The Bark Havre*, 1 Ben. 295, 11 Fed. Cas. No. 6,232; *The Schooner Boston*, 1 Sumn. 328, 3 Fed. Cas. No. 1,673; *Pratt v. Thomas*, 1 Ware 427, 19 Fed. Cas. No. 11,377; *Star v. The White Cloud*, 22 Fed. Cas. No. 13,306.

"Although pleadings in admiralty are liberally construed, and the courts look to the substantial right and facts disclosed more than to the form of the statement, still there are certain fundamental rules instituted for the promotion of the ends of justice which must be observed." *The Kendal*, 36 Fed. 237. Compare *Penhallon v. Doane's Adms.* 3 Dall. (U. S.) 54, 79, 1 L. ed. 507.

In *McKinlay v. Morrish*, 21 How. (U. S.) 343, 16 L. ed. 100, the court warns the profession "that the irregularities of pleading in admiralty, now too frequently occurring, have attracted our attention, and will be treated hereafter according to the rules and practice for pleadings and proofs in admiralty cases."

"In the system of pleading in the admiralty the rules of the common law courts, so far as they are technical, are relaxed, but so far as they are founded

upon justice between the parties, are unabated." *The Corozal*, 19 Fed. 655.

68. *The Bark Havre*, 1 Ben. 295, 11 Fed. Cas. No. 6,232. See also *McKinlay v. Morrish*, 21 How. (U. S.) 343, 16 L. ed. 100; *The George Taulane*, 22 Fed. 799; *Star v. The White Cloud*, 22 Fed. Cas. No. 13,306; *Pratt v. Thomas*, 1 Ware 427, 19 Fed. Cas. No. 11,377. Compare *The Isis*, 8 Prob. Div. (Eng.) 227.

69. See succeeding sections dealing with particular pleadings.

70. See *infra*, II, G, 14, b, (IV.).

71. See *infra*, II, G, 14, b, (III.).

72. *The J. R. Hoyle*, 4 Biss. 234, 13 Fed. Cas. No. 7,558. See Rule 7.

As prerequisite to issuance of process. See *infra*, II, H, 2, c, (III.).

Claim.—See *infra*, II, J, 5, b.

The answer is required to be verified by Adm. Rule 27. See also Rule 26; *The Commander-in-Chief*, 1 Wall. (U. S.) 43, 17 L. ed. 609 (answer of claimant in suit *in rem*). But by Rule 48 such verification is unnecessary unless required by the court, where the value in dispute does not exceed fifty dollars exclusive of costs.

73. *The J. R. Hoyle*, 4 Biss. 234, 13 Fed. Cas. No. 7,557, quoting from *Coffin v. Jenkins*, 3 Story 108, 5 Fed. Cas. No. 2,948, a statement by Judge Story: "The libel (in this case) is sworn to but not the answer. The reverse is the usual and proper practice, although there is no objection to the

have been, additional rules in various districts governing the necessity for verification.<sup>74</sup>

Answers to interrogatories must be verified.<sup>75</sup>

b. *By Whom Made.*—Verification of pleadings should be by the party himself,<sup>76</sup> although under some circumstances it may be permitted to be made by his proctor,<sup>77</sup> or authorized agent.<sup>78</sup>

A rule of the district court may regulate this matter.<sup>79</sup>

c. *Who May Take.*—What officers may take an affidavit of verification is determined by general statutes,<sup>80</sup> and is elsewhere discussed.<sup>81</sup>

d. *Form.*—No particular form is necessary unless required by rule of court, but a substantial verification is sufficient.<sup>82</sup>

When verification by an attorney in fact is permissible his authority need not appear from the affidavit,<sup>83</sup>

libel being sworn to if the libellant chooses." See also *Gammell v. Skinner*, 2 Gall. 45, 9 Fed. Cas. No. 5,210. But see *Hutson v. Jordan*, 1 Ware 385, 391, 12 Fed. Cas. No. 6,959; *Jay v. Almy*, 1 Woodb. & M. 262, 267, 13 Fed. Cas. No. 7,236 ("each party in admiralty has the right, if he chooses, to the answer under oath of the other; and if not so answering when requested, he may take the fact *pro confesso*").

74. See *The Marion*, 79 Fed. 104; *The Mary Jane, Blatchf. & H.* 390, 16 Fed. Cas. No. 9,215; *Martin v. Walker*, Abb. Adm. 579, 16 Fed. Cas. No. 9,170; *The J. R. Hoyle*, 4 Biss. 234, 13 Fed. Cas. No. 7,557; *The Infanta*, Abb. Adm. 263, 13 Fed. Cas. No. 7,030; *Hutson v. Jordan*, 1 Ware 385, 391, 12 Fed. Cas. No. 6,959; *The Tug E. W. Gorgas*, 10 Ben. 460, 8 Fed. Cas. No. 4,585; *The Brig Aldebaran*, Ole. Adm. 130, 1 Fed. Cas. No. 150.

75. See *infra*, II, G, 19, g, (II.).

76. See *The Oregon*, 116 Fed. 482, 53 C. C. A. 650.

77. Numerous Parties Absent From Jurisdiction.—In *The Oregon*, 133 Fed. 609, 68 C. C. A. 603, a joint suit by passengers, it appeared that one hundred and fifty-five of them had signed and separately verified the libel, and that the proctor, under order of court, had signed and verified it for one hundred and forty-five others absent from the state. The court says: "We do not think this practice should be encouraged, but under the circumstances of this case we cannot say that the court was in error in making the order."

78. See *Martin v. Walker*, Abb. Adm. 579, 16 Fed. Cas. No. 9,170; and *infra*, II, J, 5, b.

79. *Martin v. Walker*, Abb. Adm. 579, 16 Fed. Cas. No. 9,170, the oath must be made by the party himself unless the libellant is absent from the United States or resides out of the district and more than one hundred miles from the city of New York, in which case it may be made by an attorney in fact or proctor.

80. See *The Tug E. W. Gorgas*, 10 Ben. 460, 8 Fed. Cas. No. 8,545.

81. See the title "Verification."

82. *Pratt v. Thomas*, 1 Ware 427, 19 Fed. Cas. No. 11,377, holding sufficient an affidavit by libellant "that the facts set forth in his libel are to the best of his belief true." See *The Tug E. W. Gorgas*, 10 Ben. 460, 8 Fed. Cas. No. 8,545. *Compare In re Knickerbocker Steamboat Co.*, 139 Fed. 713.

The "oath of calumny" is no longer necessary, but a general verification is sufficient. *Pratt v. Thomas*, 1 Ware 427, 19 Fed. Cas. No. 11,377.

*Form of Verification by Proctor.*—In *The Oregon*, 116 Fed. 482, 53 C. C. A. 650, the verification stated "that the libellant in this cause is absent from Nome, and at Teller, Alaska, and is unable to be present at Nome, his duties requiring his constant personal attention in Teller; that deponent is authorized to act for him herein, and that the foregoing libel is true, according to his information and belief; that the source of deponent's knowledge is information derived from letters written by the libellant and plaintiff."

For matters pertaining to the form of a verification generally, see the title "Verification."

83. *Martin v. Walker*, Abb. Adm. 579, 16 Fed. Cas. No. 9,170. But see *infra*, II, J, 5, b.



but if it is questioned it must be otherwise shown."<sup>84</sup>

e. *Objection for Lack of.*—Objection to the lack of a verification may be taken by motion to set aside the proceedings to the taking of which is essential.<sup>85</sup> Only those parties for whose benefit the verification is required may complain of its absence.<sup>86</sup>

7. *Articulate Propounding.*—The various allegations of fact in the libel should be made in distinct articles,<sup>87</sup> and the answer should reply to such averments in separate articles numbered to correspond.<sup>88</sup> Distinct grounds of defense should be averred in distinct articles,<sup>89</sup> and new matter should not be blended in the same article with a denial or response to a particular article or allegation of the libel, but should be stated in a separate article of the answer.<sup>90</sup>

8. *Particularity Required.*—Greater particularity in the statement of facts is permitted and required in admiralty pleading than at the common law, the rule in this respect being more like that in equity.<sup>91</sup> But mere matters of evidence need not be pleaded.<sup>92</sup>

9. *Accuracy in Pleading.*—Substantial accuracy in pleading should be observed,<sup>93</sup> although there is no technical rule of variance in admiralty.<sup>94</sup>

84. *Martin v. Walker*, Abb. Adm. 579, 16 Fed. Cas. No. 9,170.

85. See *Nelson v. Bell*, 17 Fed. Cas. No. 10,101a. Compare *Essler v. Worth*, 8 Fed. Cas. No. 4,533a.

86. An intervening libellant cannot object to the lack of verification upon the original libel since the verification is required for the benefit of the claimant or respondent. *Coffin v. Jenkins*, 3 Story 108, 5 Fed. Cas. No. 2,948.

87. Adm. Rule 23.

A libel should state the facts "in distinct articles, each propounding, or as the admiralty phrase is, articulating some material allegation, capable of a distinct answer and proof, if controverted." *The Schooner Boston*, 1 Sumn. 328, 3 Fed. Cas. No. 1,673.

Where several parties with distinct cause of action join in the same libel because their rights arise out of the same act of the defendant, the libel should state the claim or interest of each libellant in a separate article so that the respondents may answer thereto as the facts justify. *Sun Mut. Ins. Co. v. Mississippi Val. Trans. Co.*, 14 Fed. 699.

A libel charging distinct acts of injury should propound them in distinct articles with reasonable certainty of time and place. *Treadwell v. Joseph*, 1 Sumn. 390, 24 Fed. Cas. No. 14,157; *Pettingill v. Dinmore*, 2 Ware 208, 19 Fed. Cas. No. 11,045; *Orne v. Town-*

*send*, 4 Mason 541, 18 Fed. Cas. No. 10,583.

88. Adm. Rule 27. See *The Whistler*, 13 Fed. 295.

89. *The Crusader*, 1 Ware 437, 6 Fed. Cas. No. 3,456.

90. *The Whistler*, 13 Fed. 295; *The California*, 1 Sawy. 463, 4 Fed. Cas. No. 2,312 ("such an article is sometimes called a defensive allegation, and sometimes a peremptory or dilatory exception, as the case may be, and is analogous to a plea in bar or to the jurisdiction at common law").

91. See *infra*, II, G, 14, d; II, G, 17, c; and also *Mott v. Frost*, 45 Fed. 897; *Card v. Hines*, 35 Fed. 598; *Holmes v. Oregon & C. R. Co.*, 6 Sawy. 262, 5 Fed. 75. See the title "Equity Pleading."

"Every pleading, whether the petition or answer, ought to be so framed as that if the evidence was taken before an examiner, the pleadings would enable him to elicit all the facts of the case." *The Clans Thomesen*, 32 L. J. Adm. N. S. (Eng.) 106, *per Dr. Lushington*.

92. *Whitlock v. The Barque Thales*, 20 How. Pr. (N. Y.) 447, *per Betts*, D. J. See *infra*, II, G, 14, d, (I.).

93. *The Stephen Morgan*, 94 U. S. 599, 24 L. ed. 266.

94. *The Syracuse*, 12 Wall. (U. S.) 167, 20 L. ed. 382. See fully *infra*, II, U, 6.

**10. Surplusage, Irrelevance, Impertinence and Scandal.**—Exceptions may be taken to any libel, allegation or answer, for surplusage, irrelevance, impertinence, or scandal.<sup>95</sup> And such matter may on motion be stricken out.<sup>96</sup> But the necessity for filing a new or amended libel may be dispensed with by the court's disregarding as surplusage matter improperly inserted in a pleading.<sup>97</sup>

**11. Judicial Notice.**—In determining the sufficiency of the averments of a pleading the court will exercise the function of judicial notice,<sup>98</sup> and matters judicially known need not be averred.<sup>99</sup> Such matters may be called to the court's attention by averments in the exceptions.<sup>1</sup>

**12. Construction of Pleadings.**—The rule of the common law that pleadings are to be construed most strongly against the pleader does not prevail in admiralty.<sup>2</sup>

**13. Objection to Defects.**—a. *How Made.*—Defects or omissions in pleadings should be taken advantage of by exception.<sup>3</sup> A motion to strike out is also allowed in case objectionable matter has been incorporated in a pleading;<sup>4</sup> or where proceedings have been taken upon an insufficient pleading, a motion to dismiss them may be made.<sup>5</sup> A motion to dismiss a libel for amendable defects has been designated improper practice.<sup>6</sup>

b. *Waiver.*—Defects and omissions in pleadings which are not juris-

95. Adm. Rule 36; *Holmes v. Oregon & C. R. Co.*, 6 Sawy. 262, 5 Fed. 75, (holding the libel unobjectionable for impertinence. "In admiralty particularity in pleading is not generally considered a fault, but the reverse"); *The Pioneer*, 1 Dedy 58, 19 Fed. Cas. No. 11,176.

In Answer.—See *infra*, II, G, 17, f.

96. *Havemeyers & Elder Sug. Ref. Co. v. Compania Trans. Espanola*, 43 Fed. 90; *The Gustavia*, Blatchf. & H. Adm. 189, 11 Fed. Cas. No. 5,876.

97. *The Falls of Keltie*, 114 Fed. 879, 883, 903 n; *id.*, Vol. 1, p. 275. may be disregarded as surplusage.

98. *Dunwoody v. The Campbell*, 106 Fed. 542, 45 C. C. A. 464; and see fully *ENCYCLOPAEDIA OF EVIDENCE*, Vol. 7, pp. 879, 883, 903n; *id.*, Vol. 1, p. 275.

99. See *Lands v. A Cargo of 227 Tons of Coal*, 4 Fed. 478; and *ENCYCLOPAEDIA OF EVIDENCE*, Vol. 7, p. 1033.

1. *The Seminole*, 42 Fed. 924.

2. *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 Fed. 180, 193, 36 C. C. A. 135. See also *The Martha*, 1 Blatchf. & H. Adm. 151, 165, 16 Fed. Cas. No. 9,144, and *supra*, II, G, 1. But see *The Bark Olbers*, 3 Ben. 148, 18 Fed. Cas. No. 10,477.

3. See *infra*, II, G, 20.

Objection to mere defects of form should be taken by special exceptions. *White v. The Cynthia*, 29 Fed. Cas. No. 17,546a.

4. See *supra*, II, G, 10; and *infra*, II, G, 17, f; II, G, 25.

5. See *supra*, II, G, 6, e; and *infra*, II, G, 25. But see *Essler v. Worth*, 8 Fed. Cas. No. 4,533a.

6. *The J. R. Hoyle*, 4 Biss. 234, 13 Fed. Cas. No. 7,557, where the court says with reference to exceptions, "If these are sustained, the court would allow the libelants to amend. But if the motion to dismiss is sustained, the cause is out of court, and no amendment can be made. Admiralty courts are very liberal in allowing amendments; and the indulgence of motions to dismiss would hardly be consistent with that liberality."

The right to have a motion to dismiss determined upon the allegations of the libel, rather than upon the terms of a charter party, is waived where the charter party is, without objection, presented to the court upon the hearing of the motion and commented upon by counsel, and moreover is referred to in the answers to the interrogatories. *The Serapis*, 36 Fed. 707.

dictional may be waived by failure to make a proper or timely objection.<sup>7</sup>

**14. The Libel.**—*a. Generally.*—The first pleading in an admiralty suit is the libel,<sup>8</sup> a name derived from the civil law.<sup>9</sup>

*b. Form.*—*(I.) Generally.*—While the admiralty rules should be observed,<sup>10</sup> no particular form for a libel is absolutely essential, at least to invoke the action of the court as a court of admiralty,<sup>11</sup> but if the pleading is an evident attempt to state a maritime cause of action, amendments both in form and substance may be allowed to conform to the admiralty practice.<sup>12</sup>

A prescribed form need not be strictly adhered to.<sup>13</sup>

**Caption.**—The libel should be addressed either to the court or to the judge thereof,<sup>14</sup> and should name or describe the persons or things who are parties.<sup>15</sup>

**(II.) Designating Nature of Suit.**—All libels in instance causes

7. See *infra*, II, G, 20, d.

8. The Atlas, 93 U. S. 302, 316, 23 L. ed. 863; Card v. Hines, 35 Fed. 598; Boon v. The Big Hornet, Crabbe 426, 3 Fed. Cas. No. 1,640; American Ins. Co. v. Johnson, Blatchf. & H. 9, 1 Fed. Cas. No. 303.

The word libel does not, however, refer exclusively to admiralty proceedings, since it may relate to seizures on land which are triable by jury and conducted according to the common law. United States v. The Betsy, 4 Cranch (U. S.) 443, 451, 2 L. ed. 673. See The United States v. One Case of Silk, 4 Ben. 526, 540, 27 Fed. Cas. No. 15,925; and *infra*, II, 14, G.

In England the practice is different. "There the first step taken in a cause is to enter the action and take out a citation or a warrant of arrest, and the libel is filed on the return of the process." Hutson v. Jordan, 1 Ware 385, 390, 12 Fed. Cas. No. 6,959.

9. American Ins. Co. v. Johnson, 1 Blatchf. & H. 9, 1 Fed. Cas. No. 303.

10. See *supra*, II, G, 2.

11. See American Ins. Co. v. Johnson, 1 Blatchf. & H. 9, 1 Fed. Cas. No. 303.

Where a marshal claiming the right to possession of a vessel filed an affidavit setting forth the facts, an objection that it was not a libel was answered by the court thus: "This objection is founded in a mistaken idea of the nature and form of a libel in admiralty. There is no form prescribed by law. The party may adopt his own form and use his own language, provided he make his complaint or claim intelligible to the court. But to

all intents this is a libel. The suffering party sets forth his complaint and prays to the court to issue process of restoration." The James Gorham, 7 Law. Rep. 135, 13 Fed. Cas. No. 7,537.

12. Comings v. The Ida Stockdale, 6 Fed. Cas. No. 3,052.

13. In England the rules and orders in admiralty provide numerous forms; but a slavish adherence to them is not required, though the pleader must endeavor to state the case in as succinct a form as possible. The Isis, 8 Prob. Div. (Eng.) 227.

**14. Addressing to Court or Judge.**—"It is immaterial whether a libel be addressed to the judge by name, superadding his office, or whether it be addressed to the district court. Either will be sufficient and one may be as proper as the other. The Joseph Gorham, 13 Fed. Cas. No. 7,537.

15. The usual form is as follows: "To the District Court of the United States for the — District of —," or, "To the Honorable —, Judge of the District Court of the United States of America, — District of —." The libel of, etc. (following with the names and descriptions of the persons and things parties to the suit) in a cause of — (stating nature of suit) civil and maritime, alleges as follows, etc.: See United States v. The Brig Neurea, 19 How. (U. S.) 92, 15 L. ed. 531.

**Initials of Libellant.**—The fact that only the initials of the Christian name of the libellant are given is immaterial, being non-prejudicial to the defendant. Hardy v. Moore, 4 Fed. 843.



should state the nature of the cause.<sup>16</sup> The fact, however, that the nature of the suit is not correctly designated in the libel does not prevent the court from granting the relief to which the averments of the libel entitle the libellant.<sup>17</sup>

(III.) *Signing*.—The libel should be signed by the libellant as well as by his proctor.<sup>18</sup>

(IV.) *Prayer*.—The libel should conclude with a prayer for process and such relief as the court is competent to give.<sup>19</sup> A prayer for general relief should be included to cover any deficiencies or omissions in the special prayer.<sup>20</sup>

c. *Essential Averments*.—(I.) *Generally*.—The facts constituting the cause of action must be averred in the libel.<sup>21</sup>

Where process of garnishment is desired there should be an aver-

16. Adm. Rule 23; *The Propeller Commerce*, 1 Black (U. S.) 574, 581, 17 L. ed. 107.

17. *Adams v. Bark Island City and Cargo*, 1 Cliff. 210, 1 Fed. Cas. No. 55, in which the libel was designated as "a case of contract civil and maritime and of extra services," was treated as a libel for salvage, the averments showing a service of that nature.

18. *Hardy v. Moore*, 4 Fed. 843, holding the signature of the proctors insufficient, but that the defect being curable by amendment, did not in the absence of objection render the process void and would be overlooked after judgment where the libel was properly verified.

19. Adm. Rules 22 and 23; *Dupont v. Vance*, 19 How. (U. S.) 162, 15 L. ed. 584. See *Reed v. Hussey, Blatchf. & H.* Adm. 525, 20 Fed. Cas. No. 11,646, and *infra*, II, H.

If relief in personam is desired the prayer should be appropriate to a proceeding in personam. *The Lowlands*, 147 Fed. 986.

The omission from the prayer of the name of a respondent whose name appears in the body of the libel is immaterial where the libellant asks for a decree conformably to the case made by him, since under such circumstances it is not essential that he should pray for a decree specially against each of the respondents by name. "At most the error is merely formal and can be rectified by the court at the hearing, if important to give consistency to the minutes or to render the ultimate act of the court formally correct." *Nevitt v. Clark, Ole. Adm.* 316, 18 Fed. Cas. No. 10,138.

In Suits In Forma Pauperis.—See *Donovan v. Salem & P. Nav. Co.*, 134

Fed. 316; *The Our Friend*, 131 Fed. 395.

20. See *Penhallow v. Doane's Admr.*, 3 Dall. (U. S.) 54, 1 L. ed. 507.

"If a libellant propounds with distinctness the substantive facts upon which he relies, and prays either specially or generally, for appropriate relief (even if there is some inaccuracy in his statement of subordinate facts or of the legal effect of the facts propounded), the court may award any relief which the law applicable to the case warrants." *The Gazelle*, 128 U. S. 474, 487, 9 Sup. Ct. 139, 32 L. ed. 496.

"Under the prayer for general relief it is competent for the court to pass such decree as may be required by the proof in the record, although not fully and precisely stated in the libel." *Sonsmith v. The J. P. Donaldson*, 21 Fed. 671, decreeing general average although it was not prayed for. But in *Wilson v. Graham*, 4 Wash. 53, 30 Fed. Cas. No. 17,804, Washington, J. says: "Where a specific relief is asked for, even although there be a prayer for general relief (which there is not in this case), the court cannot grant a relief which is inconsistent with, or entirely different from that which is asked for."

21. Adm. Rule 23; *Dupont v. Vance*, 19 How. (U. S.) 162, 15 L. ed. 584; *Dunwoody v. The Campbell*, 106 Fed. 542, 45 C. C. A. 464 (holding insufficient a libel for demurrage); *The Anaces*, 93 Fed. 240, 34 C. C. A. 558; *The Conde Wifredo*, 77 Fed. 324, 23 C. C. A. 187; *McWilliams v. The Steam Tug Vim*, 2 Fed. 874; *The H. P. Baldwin*, 2 Abb. 257, 12 Fed. Cas. No. 6,811. See *infra*, II, G, 8.

ment as to the persons in whose hands the defendant has credits and effects.<sup>22</sup>

(II.) Occupation and Residence of Parties.—Under the admiralty rules a libel *in personam* must state the names, occupations, and places of

“The rules of pleading in admiralty do not require all the technical precision and accuracy which is necessary in the practice of the courts of common law. But they require that the cause of action should be plainly and explicitly set forth, not in any particular and sacramental formula, but in clear and intelligible language, so that the adverse party may understand what is the precise charge which he is required to answer, and make up an issue directly upon the charge.” *Jenks v. Lewis*, 1 Ware 51, 13 Fed. Cas. No. 7,280.

In a libel by a seaman against a vessel for personal injuries received during the course of his employment on the vessel, the fact of his employment must be distinctly averred as must also the facts showing that the injury was due to the negligent act of some person for whom the ship is responsible. *The Conde Wifredo*, 77 Fed. 324, 23 C. C. A. 187.

Corporate capacity must be alleged in a libel by a corporation. *Sun Mut. Ins. Co. v. Mississippi etc. Transp. Co.*, 14 Fed. 699.

Capacity As Common Carrier.—Where liability as a common carrier is relied upon, the libel if *in personam* must allege that defendant was a common carrier, but *in rem* such averment is unnecessary. *Seller v. The Pacific*, Deady 17, 1 Ore. 409, 21 Fed. Cas. No. 12,644.

Demurrage.—*Dunwoody v. The Campbell*, 106 Fed. 542, 45 C. C. A. 464, insufficient to show liability of vessel.

Ownership.—Where a cause of action *in personam* is based upon ownership, the libel must allege this fact. *The Corsair*, 148 U. S. 335, 12 Sup. Ct. 949, 36 L. ed. 727; *Thorp v. Hammond*, 12 Wall. (U. S.) 408, 20 L. ed. 419 (holding a general averment sufficient to charge the respondent either as a general or special owner). But see *The Ville de Paris*, 3 Ben. 276, 28 Fed. Cas. No. 16,942.

In a suit based upon contract the libel must set forth the making of a valid contract and the terms and con-

ditions thereof. *The Albion*, 123 Fed. 189.

Breach of implied warranty of seaworthiness must be set up if relied upon and cannot be proved under an averment of negligence. *McKinlay v. Morrish*, 21 How. (U. S.) 343, 16 L. ed. 100.

Special damages must be alleged or they cannot be recovered. *Harrison v. Hughes*, 119 Fed. 997; *The Itasca*, 117 Fed. 885. But the court is not bound by the averment as to the amount of damage, but may make an award in excess thereof (*The Graces*, 2 W. Rob. [Eng.] 294), or allow an amendment to conform to the proof. *Olivari v. T. M. Co.*, 37 Fed. 894; and *infra*, II, G, 21, c, (II.), (B.).

The property to be attached need not be specified in the libel. *Manro v. Almeida*, 10 Wheat. (U. S.) 473, 6 L. ed. 369.

Wrong Theory.—Although a libel proceeds upon the wrong theory if it sets out the facts, and the real issues are met by the answer and the evidence, the court will award the relief to which the libellant is entitled. *Keyser & Co. v. Jurvelius*, 122 Fed. 218, 58 C. C. A. 664.

Lien.—A libel *in rem* must state facts giving rise to a maritime lien. *Farmlee v. The Propeller Charles Mears*, Newb. Adm. 197, 18 Fed. Cas. No. 10,766. See *supra*, II, C, 3, c.

In a prize cause a claim for salvage need not be averred but is sufficiently covered by the regular prize allegation. *The Schooner Adeline*, 9 Cranch (U. S.) 244, 284, 3 L. ed. 719.

In a suit for wrongful death based upon a state statute limiting the time within which the suit can be commenced, libellant must allege compliance with this provision of the statute unless such fact otherwise sufficiently appears. *Stern v. La Compagnie Gen. Trans.*, 116 Fed. 996.

Excuse for apparent laches should be pleaded. *Hall v. Hudson*, 2 Spr. 65, 11 Fed. Cas. No. 5,935.

<sup>22</sup> See *infra*, II, H, 2, c, (IV.).

residence of the parties.<sup>23</sup> This rule does not apply to libels *in rem*.<sup>24</sup> But in a proceeding instituted to limit liability to the value of the ship, the residence of the libelant should be stated regardless of the admiralty rules and of the question whether the proceeding is *in rem* or *in personam*.<sup>25</sup>

(III.) Jurisdictional Facts.—Facts necessary to give the court jurisdiction must be averred,<sup>26</sup> including the facts necessary to show that the cause of action is maritime in its nature.<sup>27</sup>

A libel *in rem* must aver that the *res* is within the district,<sup>28</sup> or proper division thereof.<sup>29</sup>

Maritime Employment of Vessel.—Where jurisdiction is dependent upon the maritime character or employment of the vessel when the cause of action accrued, this must appear from the averments of the libel.<sup>30</sup>

23. Adm. Rule 23; *The Propeller Commerce*, 1 Black (U. S.) 574, 581, 17 L. ed. 107.

Where a seaman sues in the name of William Henry but in the capacity of cook and steward, although the shipping articles show that William Henderson was cook and steward the presumption in the absence of evidence is that the libelant is the person who executed the articles. *Henry v. Curry*, Abb. Adm. 433, 11 Fed. Cas. No. 6,381.

24. *Coffin v. Jenkins*, 3 Story 108, 5 Fed. Cas. No. 2,948.

25. "There is a good reason why residence of the libelant should be stated in all cases when it is sought to invoke the rule of the maritime law in regard to the limitation of a ship owner's liability. That reason is, that the action of the court may depend upon the residence of the parties making the application." *The Steamship John Bramall*, 10 Ben. 495, 13 Fed. Cas. No. 7,334.

26. *Dunwody v. The Campbell*, 106 Fed. 542, 45 C. C. A. 664. See *supra*, I, B.

There is no distinction with respect to the jurisdictional facts necessary to be alleged, between cases connected with navigation on lakes and on the seaboard. *The propeller Charles Mears*, Newb. Adm. 197, 18 Fed. Cas. No. 10,766; *The Illinois*, Brown Adm. 497, 13 Fed. Cas. No. 7,004.

In all cases of seizure, the fact and place of seizure being jurisdictional must be averred. *United States v. One Raft of Timber*, 13 Fed. 796; *The Washington*, 4 Blatchf. 101, 29 Fed. Cas. No. 17,221; *The Fideliter*, 1 Sawy. 153, 8 Fed. Cas. No. 4,755; Adm. Rule 22.

The nationality of the vessel proceeded against should be stated in a libel *in rem* for wages. But such an averment is not indispensable where the libelant alleges that he is a citizen of the United States. *The Falls of Keltie*, 114 Fed. 357.

In proceedings before a consular court in a foreign country, the essential jurisdictional facts, such as the American character of the vessel, must be alleged. *The Steamer Spark v. Lee Choi Chum*, 1 Sawy. 713, 22 Fed. Cas. No. 13,206.

27. *Jones v. Coal Barges*, 3 Wall. Jr. 53, 13 Fed. Cas. No. 7,458; *Boon v. The Brig Hornet*, Crabbe 426, 3 Fed. Cas. No. 1,640. See *Florence Cotton Oil Co. v. Alabama Tow-Boat Co.*, 128 Fed. 915, 63 C. C. A. 641; *Lands v. A Cargo of Coal*, 4 Fed. 478.

Tort.—The place where it occurred must be averred in such manner as to show it was committed on navigable waters. *Thomas v. Lane*, 2 Sumn. 1, 23 Fed. Cas. No. 13,902.

28. Adm. Rule 23; *The Propeller Commerce*, 1 Black (U. S.) 574, 581, 17 L. ed. 107; *The George Taulane*, 22 Fed. 799.

The fact that the *res* is not within the district when the libel is filed does not avoid the effect of an averment in compliance with rule 23, that the property is in the district, if thereafter it is seized or arrested in the district. *The Queen of the Pacific*, 61 Fed. 213, 94 Fed. 180, 36 C. C. A. 135; *St. Paul F. & M. Ins. Co. v. Lake Superior*, 21 Fed. Cas. No. 12,244.

29. See the *L. B. X.*, 88 Fed. 290.

30. *The Propeller Charles Mears*, Newb. Adm. 197, 18 Fed. Cas. No. 10,766.



(IV.) **Interest of Libelant.** — The interest of the libelant in the subject-matter of the suit must be alleged with certainty and definiteness.<sup>31</sup>

(V.) **Anticipating Defense.** — Purely defensive matter need not be anticipated in the libel.<sup>32</sup>

(VI.) Where one party sues in behalf of others, the libel should specifically state for whom he is suing.<sup>33</sup> But it seems that such an averment is not essential,<sup>34</sup> especially in those cases where by reason of his relation to the owner or the subject-matter of the suit the libelant may sue in his own name though others are entitled to a part or all of the recovery.<sup>35</sup>

The authority of the libelant to sue on behalf of others should appear in the pleading or proof.<sup>36</sup>

(VII.) **Suits on Contract.** — If a contract is in writing it is better practice, although not necessary, to set out a copy of it either in the libel or as an exhibit thereto.<sup>37</sup> If not required to be in writing a contract may be pleaded according to its supposed legal effect

*People v. Steamer America*, 34 Cal. 676, holding that a complaint for wharfage which did not allege that the steamer was engaged in commerce and navigation, did not show a maritime cause of action. See also *Boon v. The Brig Hornet*, Crabbe 426, 3 Fed. Cas. No. 1,640.

But in *The Illinois*, Brown Adm. 497, 13 Fed. Cas. No. 7,004, it was held sufficient merely to describe a vessel "as the ship, bark, sloop, schooner, steamboat, steamer, barge, or as the case may be, giving her name, without further specification. These terms seem always to have been considered sufficient to denote the maritime character of the subject. . . . If the fact be different, it must be taken advantage of by way of special allegation and cannot be by way of demurrer."

31. *Minturn v. Alexandre*, 5 Fed. 117 ("the rules of pleading require not the averment of the appearance or probability merely of a right or title, but the averment with reasonable certainty of the actual existence of a right or title"); *Bradshaw v. The Sylph*, 3 Fed. Cas. No. 1,791 (libel for possession of a vessel). See also *Sun Mut. Ins. Co. v. Mississippi Val. Transp. Co.*, 14 Fed. 699. But see *The Ville de Paris*, 3 Ben. 276, 28 Fed. Cas. No. 16,942.

32. *The Cargo of Brig Aurora v. United States*, 7 Cranch (U. S.) 382, 3 L. ed. 378; *Motte v. Frost*, 45 Fed. 897 (holding that a tender was a matter to be set up by way of defense and need not be mentioned in the libel).

**Negating Exceptions.** — A libel for a forfeiture is not required to negative exceptions appearing in a separate proviso of the statute, such exceptions being a matter of defense. *Two Hundred Chests of Tea*, 9 Wheat. (U. S.) 430, 6 L. ed. 128; *The Margaret*, 9 Wheat. (U. S.) 421, 6 L. ed. 125; *United States v. The Little Charles*, 1 Brock. 347, 26 Fed. Cas. No. 15,612.

33. *Robson v. The Huntress*, 2 Wall. Jr. 59, 20 Fed. Cas. No. 11,971 (s. c., below, 12 Fed. Cas. No. 6,912), where the statement in the caption of a libel for salvage by the British consul that he was suing "for all others interested," was deemed not sufficiently specific. See also *The Schooner Boston*, 1 Sumn. 328, 3 Fed. Cas. No. 1,673.

34. See *The Camanche*, 8 Wall. (U. S.) 448, 476, 19 L. ed. 397.

35. See *supra*, II, E, 4, a. "Manifestly, where the prosecution is instituted by one or more parties for themselves and others not named, it would be more regular that it should be so averred in the libel, but as there can be only one prosecution for the same collision, it is not perceived that the omission of that averment can operate to the prejudice of the claimant." *The Commander in Chief*, 1 Wall. (U. S.) 43, 52, 17 L. ed. 609. See also *The Anchoria*, 9 Fed. 840; *The Kalamazoo*, 9 Eng. L. & Eq. 557.

36. *The Anchoria*, 9 Fed. 840.

37. See *infra*, II, G, 14, f, and *The Torgorm*, 46 Fed. 202.

and meaning and without averring whether it is written or oral.<sup>38</sup>

d. *Certainty and Particularity.* — (I.) Generally. — The facts should be clearly and positively stated and not left to inference or be averred by way of recital or reference.<sup>39</sup> The statement should be full and complete,<sup>40</sup> and should embody all the particulars essential to a correct understanding of the claim or cause of action.<sup>41</sup>

38. *Dennis v. Slyfield*, 117 Fed. 474, 54 C. C. A. 520. See *Cobb v. Howard*, 5 Fed. Cas. No. 2,925.

39. *The H. P. Baldwin*, 2 Abb. 257, 12 Fed. Cas. No. 6,811. See also *The Anaces*, 93 Fed. 240, 34 C. C. A. 558; *Minturn v. Alexandre*, 5 Fed. 117; *The Zenobia*, Abb. Adm. 48, 30 Fed. Cas. No. 18,208; *Jenks v. Lewis*, 1 Ware 51, 13 Fed. Cas. No. 7,280; *The Schooner Boston*, 1 Sumn. 328, 3 Fed. Cas. No. 1,673.

"The libel should be narrative, species, clear, direct, certain, not general nor alternative." *Dunl. Adm. Prac.* 116, 118, quoting: "The declaration must allege all the circumstances necessary for the support of the action, and contain a full, regular and methodical statement of the injury which the plaintiff has sustained, with the time and place and other circumstances, with such precision, certainty, and clearness that the defendant, knowing what he is called upon to answer, may be able to plead a direct and unequivocal plea; that there may be a complete finding of the issue, and that the court, consistently with the rules of law, may give a certain and distinct judgment." *The Conde Wifredo*, 77 Fed. 324, 23 C. C. A. 187.

Negligence need not be charged in terms where the facts showing it are averred. *The Pilot*, 1 Biss. 159, 19 Fed. Cas. No. 11,168. See *infra*, II, G, 14, d, (III.).

40. *Quinn v. The Steam Boat Transport*, 1 Ben. 86, 20 Fed. Cas. No. 11,516. See also *The Mexican Prince*, 70 Fed. 246.

*Particularity Not a Fault.* — "In admiralty particularity in pleading is not generally a fault, but the reverse. The rule is that the pleader must state all the essential particulars of the alleged tort or misconduct, with the circumstances of time and place." *Holmes v. Oregon & C. R. Co.*, 6 Sawy. 262, 5 Fed. 75.

Objection for lack of particularity must be timely and cannot be raised on appeal for the first time. The

*Quickstep*, 9 Wall. (U. S.) 665, 19 L. ed. 767. See *infra*, II, G, 20, d, (II.).

41. *Adm. Rule* 23. See *Mott v. Frost*, 45 Fed. 897. "The object of all the pleadings in admiralty is the clear exposition of the case of the pleader. He must avoid obscurity, and must make his statements so plain that the other side can understand just what he claims. As there is no such device in admiralty as was adopted in common-law pleading, which enables the parties to strip away all other statements, and come to a single issue, such plain and distinct statement of facts is absolutely required. A good illustration of this is the pleading in cases of salvage and collision. All the material facts must be clearly stated; everything done must be set forth. The question turns upon the conduct of the parties, and everything causing or contributing to the result must be known by the court."

The true course even in the case of a summary petition, like the present (libel by seamen for wages), and a *fortiori* in formal proceedings, is to allege the material facts with as much exactness and attention to times and circumstances, as in a formal declaration at law. *Story, J.*, in *Orne v. Townsend*, 4 Mason 541, 18 Fed. Cas. No. 10,583.

*Narrative.* — "Each party in language of his own choosing tells his own story as nearly in narrative form as is consistent with brevity and perspicuity so that his antagonist as well as the court can be in possession of his case." *Card v. Hines*, 35 Fed. 598.

*Ownership.* — A general averment of ownership is sufficient to charge the person sued either as a general or special owner. *Thorp v. Hammond*, 12 Wall. (U. S.) 408, 20 L. ed. 419.

*Demurrage.* — The particulars of alleged demurrage must be stated. *The Cargo of the Joseph W. Brooks*, 122 Fed. 881.

*Damages — Particular Items of.* — A libel for breach of a contract to tow a barge for a whole season which merely

**Evidence.**—It is unnecessary, however, to set out the mere evidence upon which the allegations rest.<sup>42</sup>

In England while a general averment may be allowable in some cases to avoid prolixity, the adverse party may be entitled, upon motion, to a statement of the particulars.<sup>43</sup>

(II.) **Lack of Necessary Knowledge.**—Lack of the requisite particularity may be excused where a libellant has not sufficient means of knowledge or information to comply with the rule,<sup>44</sup> but this fact should be stated in the libel.<sup>45</sup>

(III.) **Conclusions.**—The ultimate facts and not the pleader's mere conclusions must be averred.<sup>46</sup>

**Negligence.**—A mere averment of negligence is not sufficient, being a conclusion;<sup>47</sup> the particulars must be set out,<sup>48</sup>

claimed damages in a gross amount was held indefinite and uncertain. "In view of a somewhat unreasonable character of the agreement, it is thought that the libel should point out the manner in which the alleged damages arose with sufficient distinctness to enable the respondent to meet the claim at the trial." *The Oscoda*, 66 Fed. 347. But such an averment is sufficient for fixing the amount of bail. *Peru v. The North America*, 19 Fed. Cas. No. 11,017a.

In a libel for assault and battery every circumstance of aggravation attending the same need not be minutely described, but separate and distinct assaults must be separately and distinctly alleged, and so a general or systematic course of ill-treatment, if relied upon in aggravation of damages or as an independent wrong, must be averred in a separate article of the libel. *Pettingill v. Densmore*, 2 Ware 208, 19 Fed. Cas. No. 11,045.

42. *Whitlock v. The Barque Thales*, 20 How. Pr. (N. Y.) 447 (*per* Betts, D. J.). See also *Mott v. Frost*, 45 Fed. 897. And see *United States v. The Brig Neurea*, 19 How. (U. S.) 92, 15 L. ed. 531; *The Western Metropolis*, 2 Ben. 212, 29 Fed. Cas. No. 17,438; *United States v. The Parnytha Davis*, 1 Cliff. 532, 27 Fed. Cas. No. 16,003.

A writing which is merely evidence in support of the cause of action and not the basis thereof need not be set out. *Chamberlain v. The Torgorm*, 46 Fed. 202. See *infra*, II, G, 14, f.

43. *The Rory*, 7 Prob. Div. (Eng.) 117, *distinguishing* or *disapproving* *The Freedom*, L. R. 2 Adm. & Ecc. (Eng.) 346. See also *The N. P. Nielsen*, 34 L. T. N. S. (Eng.) 588; *The Wetterhorn*, 34 L. T. N. S. (Eng.) 587; *The*

*Isis*, 8 Prob. Div. (Eng.) 227. See *George v. Watts*, 30 L. T. N. S. (Eng.) 60.

44. *Quinn v. The Transport*, 1 Ben. 86, 20 Fed. Cas. No. 11,516; *The Mary Jane Vaughan*, 16 Fed. Cas. No. 9,216; *The George V. Watts*, 30 L. T. N. S. (Eng.) 60. Compare *infra*, II, G, 17, e, (II.).

45. *M'Williams v. The Steam Tug Vim*, 2 Fed. 874.

46. *The Anaces*, 93 Fed. 240, 34 C. C. A. 558; *Jacobson v. Dalles R. & A. Nav. Co.*, 93 Fed. 975. See *Dunwody v. The Campbell*, 106 Fed. 542, 45 C. C. A. 464.

**Employment.**—An averment that, "the libellant was engaged in the service of such steamship, on board, in the work of loading said vessel" is a mere conclusion. The facts with respect to the employment of the libellant in the service of the ship should be set out. *The Conde Wifredo*, 77 Fed. 324, 23 C. C. A. 187.

47. *Jacobson v. Dalles R. & A. Nav. Co.*, 93 Fed. 975.

48. *The Clement*, 2 Curt. (U. S.) 363.

*M'Williams v. The Steam Tug Vim*, 2 Fed. 874. This was a suit for collision in which the only specific charge of negligence was in not seeing the other vessel seasonably. This averment, though perhaps equivalent to the ordinary averment of not keeping a good lookout, was held not a sufficiently definite and detailed statement of the facts, there being nothing to show how or why this fault caused the collision. See *The Anaces*, 93 Fed. 240, 34 C. C. A. 558.

But in *The Freedom*, L. R. 2 Adm. & Ecc. 346, Sir Robert Phillimore holds that the libellant is not bound to set



provided they are within the knowledge of the libellant.<sup>49</sup>

Performance may be averred generally without stating the particular acts constituting the same.<sup>50</sup>

(IV.) Collision.—A libel for injuries caused by collision must set forth every fact and circumstance tending to show where the fault, if any, lay,<sup>51</sup> and the nature and extent of the injury.<sup>52</sup> Faults not pleaded, however, may be proved.<sup>53</sup>

If the injury is to property the interest of the libellant therein must be clearly stated.<sup>54</sup>

c. *Answer as Curing Defects and Omissions in Libel.*—Although the libel fails to allege essential facts,<sup>55</sup> or is lacking in the requisite cer-

out the particular cause or character of the negligence, these being matters within the knowledge of the defendant. But see *The Rory*, 7 Prob. Div. (Eng.) 117.

49. The libellant is not bound to furnish particulars which are not within his knowledge. *George v. Watts*, 30 L. T. N. S. (Eng.) 60.

50. *Dennis v. Slyfield*, 117 Fed. 474, 54 C. C. A. 520, holding sufficient an averment by libellants "that they have at all times performed all that was required of them under the foregoing" contract.

51. *The Clement*, 2 Curt. 363, 5 Fed. Cas. No. 2,879; *Poole v. The Washington*, 19 Fed. Cas. No. 11,271; *The M. M. Hamilton*, 1 Hask. 498, 17 Fed. Cas. No. 9,685; *The H. P. Baldwin*, 2 Abb. 257, 12 Fed. Cas. No. 6,811 (holding insufficient a general allegation that the ship "was so carelessly, negligently, unskillfully, and recklessly navigated that" etc.).

The libellant should not confine himself to a bare statement of his cause of action, but the libel should contain a full and frank narrative of the material circumstances attending the accident. *Quinn v. The Transport*, 1 Ben. 86, 20 Fed. Cas. No. 11,516.

"The pleading under this rule (Adm. Rule 23) requires a plain statement of the movements of the two vessels as they approached each other, their courses, and the mode in which they were sailed or handled, and the circumstances of wind and tide where these have any bearing on the case, as they generally have, and also a distinct statement of the acts of negligence or faults of navigation which are claimed to have caused or contributed to the disaster, and such a statement of the circumstances of the collision, that the

connection between the alleged faults and the collision, as cause and effect, can be plainly understood." *M'Williams v. The Steam Tug Vim*, 2 Fed. 874.

52. *The Anchoria*, 9 Fed. 840.

53. *The Cambridge*, 2 Low. 21, 4 Fed. Cas. No. 2,334. See also *The Syracuse*, 12 Wall. (U. S.) 167, 173, 20 L. ed. 382, and *infra*, II, U, 6, a. But see *The Clement*, 2 Curt. 363, 367, 5 Fed. Cas. No. 2,879.

Although not pleaded, if a particular fault is fully litigated at the trial without objection the libel will be regarded as amended to conform to the proof. *The Maryland*, 19 Fed. 551.

But a fault not pleaded and not litigated at the hearing cannot be put forward at the close of the case in support of the cause of action. *The Werdenfels*, 150 Fed. 400.

54. There must be a definite and unequivocal averment by the libellant that he has an interest in the thing damaged, by reason of a special or general right of property therein, and that by its loss or injury he has sustained damage. *The Minturn v. Alexandre*, 5 Fed. 117. See *supra*, II, G, 14, c, (IV.).

55. *The Clement*, 2 Curt. 363, 5 Fed. Cas. No. 2,879.

Although a libel by a shipper claims damages for non-delivery of cargo, if the answer sets up a necessary jettison the court may upon the facts contained in both pleadings find the case a proper one for general average and render a decree for the contributory share due from the vessel. *Dupont v. Vance*, 19 How. (U. S.) 162, 15 L. ed. 584, followed in *The Rapid Transit*, 52 Fed. 320.

tainty and particularity,<sup>56</sup> these defects and omissions may be supplied by the averments of the answer.<sup>57</sup> And though a fact is not sufficiently averred in a libel, if it is put in issue by the answer and fully litigated at the trial, the defect is cured.

f. *Exhibits*. — While it is not absolutely necessary to attach as an exhibit a copy of the contract or bond which is the basis of the suit, it is better practice to do so<sup>58</sup> if the writing is within the possession or control of the libellant.<sup>59</sup> But mere matters of evidence to sustain the cause of action need not be attached as exhibits, although they be written instruments.<sup>60</sup>

g. *Libel of Information*. — While a libel of information to enforce a penalty or for forfeiture must be particular and certain in its averments of the material circumstances which constitute the offense,<sup>61</sup> it is not governed by the strict rules that prevail in regard to indictments or criminal informations at common law.<sup>62</sup> Those facts and only those essential to the cause of action under the particular statute

56. *The Anaces*, 93 Fed. 240, 34 C. C. A. 558.

Where the failure to furnish a competent winchman was the negligence claimed, an allegation that the master had substituted for the regular winchman an ordinary laborer without experience or skill, was held sufficient to raise the issue of the master's failure to exercise proper care in ascertaining the qualifications of a fellow servant, there being no exception to the libel and the answer averring the workman's competency. *The Anaces*, 93 Fed. 240, 34 C. C. A. 558.

57. *Brown v. The Cadmus*, 2 Paine 564, 4 Fed. Cas. No. 1,997, reversing a decree against the libellant for his refusal to amend under such circumstances. See also *The Maryland*, 19 Fed. 551.

58. *Card v. Hines*, 33 Fed. 189. See *Florence Cotton Oil Co. v. Alabama Tow-Boat Co.*, 128 Fed. 915, 63 C. C. A. 641; *The Anchoria*, 9 Fed. 840.

Where a contract of affreightment, which is the basis of the suit, is in writing, the libel should so state and the written contract should be annexed thereto, or an excuse given for not doing so. *Sun Mutual Ins. Co. v. Mississippi Val. Transp. Co.*, 4 McCrary 636.

59. *Chamberlain v. The Torgorm*, 46 Fed. 202, holding that in a suit for refusal to give a proper bill of lading or redeliver the goods the libel was not defective for failing to attach a copy of the bill of lading alleged to

have been tendered and refused. See also *Pratt v. Thomas*, 1 Ware 427, 19 Fed. Cas. No. 11,377.

60. *Chamberlain v. The Torgorm*, 46 Fed. 202.

In a suit for wages, while it is usual to annex an account stating the time of service, rate and amount of wages and the credits for advances during the voyage, it is not necessary to do so. *Pratt v. Thomas*, 1 Ware 427, 19 Fed. Cas. No. 11,377.

61. *The Brig Caroline v. United States*, 7 Cranch (U. S.) 496, 3 L. ed. 417; *United States v. The Little Charles*, 1 Brock. 347, 26 Fed. Cas. No. 15,612; *The Schooner Betsey*, 1 Mason 354, 3 Fed. Cas. No. 1,365.

*Information or Libel of Information*. — Both these terms are used to designate the first pleading in cases of seizure and forfeiture. *The United States v. One Case of Silk*, 4 Ben. 526, 540, 27 Fed. Cas. No. 15,925.

62. *Oakes v. United States*, 174 U. S. 778, 790, 19 Sup. Ct. 864, 43 L. ed. 1169; *The Samuel*, 1 Wheat. (U. S.) 9, 4 L. ed. 23; *American Ins. Co. v. Johnson, Blatchf. & H.* 9, 1 Fed. Cas. No. 303.

"Technical niceties of the common law, as to informations, which are unimportant in themselves, and stand only on precedents, are not regarded in admiralty informations; the material inquiry in the latter cases being, whether the offense is so set forth, as clearly to bring it within the statute upon which the information is founded." *The Merino*, 9 Wheat. (U. S.) 391, 401, 6 L. ed. 118.

must be averred.<sup>63</sup> The libel must disclose the statute relied upon.<sup>64</sup> It is usually sufficient to follow the language of the statute in describing the offense.<sup>65</sup>

In libels upon seizures for breach of the federal laws, the fact and place of seizure and the district where the property is at the time of the filing of the libel must be averred.<sup>66</sup> If the libel is for a forfeiture, the rules provide that it shall contain an averment that the facts stated are contrary to the form of the statute,<sup>67</sup> but the courts hold

**A Civil and Not a Criminal Proceeding.**—A libel *in rem* to enforce a forfeiture is a civil and not a criminal proceeding. *United States v. The Three Friends*, 166 U. S. 1, 49, 17 Sup. Ct. 495, 41 L. ed. 897; *Friedenstein v. United States*, 125 U. S. 224, 231, 8 Sup. Ct. 838, 31 L. ed. 736.

63. *The Schooner Betsey*, 1 Mason 354, 3 Fed. Cas. No. 1,365. See *The Schooner Anne*, 7 Cranch (U. S.) 570, 3 L. ed. 442; *The Schooner Hoppet*, 7 Cranch (U. S.) 389, 3 L. ed. 380; *The Pope Catlin*, 31 Fed. 408; *United States v. The Little Charles*, 1 Brock. 347, 26 Fed. Cas. No. 15,612; Adm. Rule 22.

**Overcrowding Passenger Steamer.**—A libel for the penalty for overcrowding a passenger steamer under an act making it unlawful to take a greater number of passengers than is stated in the certificate of inspection and entitling any person to sue, need not aver that libellant was a passenger or the informer, nor need it state the names of the passengers. *The Laura M. Starin*, 11 Fed. 177; *Pollock v. The Sea Bird*, 3 Fed. 573. See *United States v. The Brig Neurea*, 19 How. (U. S.) 92, 15 L. ed. 531.

The time and place of the importation and the vessel in which it was made need not be averred in a libel for unloading goods without a permit, especially where it is alleged that these facts are unknown. *Locke v. United States*, 7 Cranch (U. S.) 338, 3 L. ed. 364. But see *United States v. The Parynthia Davis*, 1 Cliff. 532, 27 Fed. Cas. No. 16,003 ("correct pleading requires that time and place should be specifically alleged").

64. *The Scotia*, 39 Fed. 429; *The Nancy*, 1 Gall. 66, 17 Fed. Cas. No. 10,008.

65. *United States v. The Brig Neurea*, 19 How. (U. S.) 92, 15 L. ed. 531; *United States v. Gooding*, 12 Wheat. (U. S.) 460, 6 L. ed. 693; *The*

*Samuel*, 1 Wheat. (U. S.) 9, 4 L. ed. 23.

"There may be some exceptions to this rule where the terms of the statute are so general as naturally to call for more distinct specifications." *The Palmyra*, 12 Wheat. (U. S.) 13, 6 L. ed. 531. See *United States v. The Brig Neurea*, 19 How. (U. S.) 92, 15 L. ed. 531; *United States v. Gooding*, 12 Wheat. (U. S.) 460, 470, 6 L. ed. 693; *The Luminary*, 8 Wheat. (U. S.) 407, 416, 5 L. ed. 647 (dissenting opinion by Johnson, J.).

"Where there are no technical words or phrases employed in the prohibition of the statute, it is sufficient, as a general rule, to bring the case within the words of the act of congress on which the information is founded." *United States v. The Parynthia Davis*, 1 Cliff. 532, 27 Fed. Cas. No. 16,003, an information alleging a trade other than that for which the vessel is licensed need not allege the trade which the vessel was following when seized.

A mere general reference to the provisions of the statute and charging a violation thereof is not sufficient, but there must be a substantial statement of the offense. *The Schooner Hoppet*, 7 Cranch (U. S.) 389, 3 L. ed. 380; *The Nancy*, 1 Gall. 66, 17 Fed. Cas. No. 10,008.

**Negativling Exceptions.**—See *supra*, II, G, 14, c, (V.) note.

66. Adm. Rule 22. See also *The Brig Ann*, 9 Cranch (U. S.) 289, 3 L. ed. 734; *United States v. One Raft of Timber*, 13 Fed. 796; *The Washington*, 4 Blatchf. 101, 29 Fed. Cas. No. 17,221; *The Tug Oconto*, 5 Biss. 460, 18 Fed. Cas. No. 10,421; *The Fideliter*, 1 Sawy. 153, 8 Fed. Cas. No. 4,755; *Boon v. The Hornet*, *Crabbe* (U. S.) 426, 3 Fed. Cas. No. 1,640. See *The Schooner Betsey*, 1 Mason 354, 3 Fed. Cas. No. 1,365.

67. Adm. Rule 22.



such an allegation unnecessary the words of the statute being used.<sup>68</sup>

A conviction upon a prosecution and indictment for the offense is not an essential prerequisite to the libel *in rem* and need not be averred.<sup>69</sup>

**15. Demurrer.**—Technically speaking a demurrer is unknown to the admiralty practice, although the courts sometimes use the term,<sup>70</sup> but exceptions answer the same purpose.<sup>71</sup>

**16. Pleas.**—Technically there are no pleas in admiralty,<sup>72</sup> and where admiralty courts speak of the necessity or propriety of raising certain objections by "plea"<sup>73</sup> they mean exceptions in the nature of a plea,<sup>74</sup> or averments of the same effect in the answer.<sup>75</sup>

**17. Answer.**—a. *Generally.*—Matters of defense on the part of the defendant or claimant are embodied in an answer,<sup>76</sup> made by the party himself or his agent specially authorized.<sup>77</sup>

Except in case of a default the merits of the controversy cannot be inquired into until after an answer has been filed,<sup>78</sup> unless an arbitration has been agreed upon.<sup>79</sup> The answer may, however, incorpo-

68. *The Idaho*, 29 Fed. 187, following *The Merino*, 9 Wheat. (U. S.) 391, 401, 6 L. ed. 118, and *The Samuel*, 1 Wheat. (U. S.) 9, 14, 4 L. ed. 23, decided prior to the adoption of the rules. But see *The Nancy*, 1 Gall. 66, 17 Fed. Cas. No. 10,008; *Cross v. United States*, 1 Gall. 26, 30, 6 Fed. Cas. No. 3,434.

69. *United States v. The Three Friends*, 166 U. S. 1, 49, 17 Sup. Ct. 495, 41 L. ed. 897; *The Palmyra*, 12 Wheat. (U. S.) 1, 14, 6 L. ed. 531; *United States v. The Steamship The Queen*, 4 Ben. 237, 27 Fed. Cas. No. 16,107.

The conviction of the master for overcrowding a steamer is not an essential allegation in a libel against the vessel for the penalty. *The Scotia*, 39 Fed. 429.

70. See *Fairgrieve v. Maine Ins. Co.*, 94 Fed. 686, 37 C. C. A. 190; *Card v. Hines*, 35 Fed. 598. But see *Dennis v. Slyfield*, 117 Fed. 474, 54 C. C. A. 520; *The August Belmont*, 153 Fed. 639.

71. See *infra*, II, G, 20; and *The J. R. Hoyle*, 4 Biss. 234, 240, 13 Fed. Cas. No. 7,557.

72. See *Fairgrieve v. Marine Ins. Co.*, 94 Fed. 686, 37 C. C. A. 190.

73. See *supra*, II, E, 6, c; and *The August Belmont*, 153 Fed. 639; *Card v. Hines*, 35 Fed. 598; *Reed v. Hussey*, Blatchf. & H. 525, 20 Fed. Cas. No. 11,646; *The Grace Darling*, 2 Hask. 278, 10 Fed. Cas. No. 5,651.

74. See *Certain Logs of Mahogany*, 2 Sumn. 589, 5 Fed. Cas. No. 2,559

(where Story, J., says that a dilatory plea or a plea in abatement is known in admiralty as a dilatory or declinatory exception); *The Edward*, Blatchf. & H. 286, 8 Fed. Cas. No. 4,289; *The California*, 1 Sawy. 463, 7 Fed. Cas. No. 2,312; and *infra*, II, G, 20.

75. *The Camanche*, 8 Wall. (U. S.) 448, 476, 19 L. ed. 397. See *infra*, II, G, 17, a. But see *The August Belmont*, 153 Fed. 639.

76. *Card v. Hines*, 35 Fed. 598. See also *The Steamer Spark v. Lee Choi Chum*, 1 Sawy. 713, 22 Fed. Cas. No. 13,206.

**Special Defenses.**—See *infra*, II, T. 77. *Todd v. The Bark Tulchen*, 2 Fed. 600.

78. *Burr v. The St. Thomas*, 4 Fed. Cas. No. 2,194a, on a libel by a co-owner for a sale of a ship, respondent cannot by motion and affidavits ask leave to use the vessel upon giving security to libellant.

But in a suit for seaman's wages it was held that there could "be no objection to hearing the defense without an answer," inasmuch as the rules of the supreme court were not intended to change the rules of the district courts as to seaman's wages. *Barron v. Locke*, 7 Leg. Int. 203, 2 Fed. Cas. No. 1,054.

79. A reference to arbitrators by order of court pursuant to agreement of the parties suspends the necessity for answering until the order is set aside. *The Nineveh*, 1 Low. 400, 18 Fed. Cas. No. 10,276.

rate matters which could properly have been the subject of exceptions or a plea,<sup>80</sup> except where the filing of an answer to the merits would be a waiver.<sup>81</sup> But in such case its averments in this particular must be the same as though a formal plea had been employed.<sup>82</sup>

b. *To Amended or Supplemental Libel.*—Amendments<sup>83</sup> to the libel and supplemental libels<sup>84</sup> must be answered.

c. *Form, Certainty, and Particularity.*—(I.) *Generally.*—While technical formality in an answer is not insisted upon<sup>85</sup> it should conform to the rules.<sup>86</sup> It should reply distinctly to each material fact stated in the libel, either admitting, denying or declaring ignorance of them, and allege all such facts as are relied upon as a defense in whole or in part.<sup>87</sup> Legal conclusions, however,<sup>88</sup> and merely narrative statements in the libel which do not constitute a part of the gravamen of the suit need not be denied.<sup>89</sup>

A general or conjunctive denial is insufficient.<sup>90</sup>

80. See *The Camanche*, 8 Wall. (U. S.) 448, 476, 19 L. ed. 397; *Reed v. Hussey, Blatchf. & H.* 525, 20 Fed. Cas. No. 11,646; *The California*, 1 Sawy. 463, 4 Fed. Cas. No. 2,312; *The Steamer Spark v. Lee Choi Chum*, 1 Sawy. 713, 22 Fed. Cas. No. 13,206.

"A party may set up a single fact in an exceptive allegation or he may unite the whole, answering as to all the facts, in an answer. Ben. Adm. § 368. The usual course is to set up all matters so relied upon in an answer. The exceptive allegations are in effect a special answer. It is immaterial what name is given to them." *The Haytian Republic*, 57 Fed. 508. But see *The Steamer Spark v. Lee Choi Chum*, 1 Sawy. 713, 22 Fed. Cas. No. 13,206.

Embracing a plea to the jurisdiction of the subject-matter in an answer to the merits is proper practice. *The Lindrup*, 70 Fed. 718. But see *The August Belmont*, 153 Fed. 639.

A judgment overruling exceptions to a libel which on its face is not subject to the objection raised, is not a bar to the right to raise the same objection in the answer by setting out additional facts. *Card v. Hines*, 35 Fed. 598.

81. See *The City of Carlisle*, 39 Fed. 807, 5 L. R. A. 52; *The Grace Darling*, 2 Hask. 278, 10 Fed. Cas. No. 5,651; and *infra*, II, G, 20, d.

82. *Reed v. Hussey, Blatchf. & H.* 525, 20 Fed. Cas. No. 11,646.

83. Adm. Rule 51.

84. *Taber v. Jenny*, 1 Spr. 315, 23 Fed. Cas. No. 13,720. See *Waring v. Clarke*, 5 How. (U. S.) 441, 12 L. ed.

226; *Thomas v. Gray, Blatchf. & H.* Adm. 493, 23 Fed. Cas. No. 13,898.

85. *The Navarro, Olc. Adm.* 127, 17 Fed. Cas. No. 10,059; *The Brig Aldebaran, Olc. Adm.* 130, 1 Fed. Cas. No. 150. See *supra*, II, A; II, G, 1.

If the facts constituting negligence are stated, there need be no formal charge of fault. *The Pilot*, 1 Biss. 159, 19 Fed. Cas. No. 11,168.

86. See *supra*, II, G, 2.

*Propounding Articulately.*—See *supra*, II, G, 7; and *The Commander-in-Chief*, 1 Wall. (U. S.) 43, 17 L. ed. 609.

87. *Dupont v. Vance*, 19 How. (U. S.) 162, 171, 15 L. ed. 584; *Card v. Hines*, 35 Fed. 598; *The Propeller Sun*, 1 Biss. 373, 23 Fed. Cas. No. 13,612; *Orne v. Townsend*, 4 Mason 541, 18 Fed. Cas. No. 10,583; *The Schooner Boston*, 1 Sumn. 328, 3 Fed. Cas. No. 1,673. See *The Dictator*, 30 Fed. 699.

*Answer of Claimants.*—*The Commander-in-Chief*, 1 Wall. (U. S.) 43, 17 L. ed. 609.

An answer which attempts to justify the act complained of must clearly admit the act. *Treadwell v. Joseph*, 1 Sumn. 390, 24 Fed. Cas. No. 14,157.

A substantial admission of the facts stated in the libel, though loose and informal as a pleading, is sufficient. *The Brig Aldebaran, Olc. Adm.* 130, 1 Fed. Cas. No. 150.

88. *The Gustavia, Blatchf. & H.* 189, 11 Fed. Cas. No. 5,876, whether materials furnished were necessities.

89. *The Brig Aldebaran, Olc. Adm.* 130, 1 Fed. Cas. No. 150.

90. *Virginia Home Ins. Co. v. Sundberg*, 54 Fed. 389, in which the fifth

(II.) New matter in the answer should be averred with such certainty and particularity that every material fact appears, and that the court and adverse party may be advised as to the precise nature of the issues and the proof required.<sup>91</sup> Thus misconduct of the libellant, when relied upon as a defense, must be averred with reasonable certainty as to time, place and circumstances.<sup>92</sup> But the respondent cannot be compelled to include in his answer averments as to matters which it does not appear that he intends to rely upon and which should come more properly from the libellant.<sup>93</sup>

**Anticipating Defenses.**—If the libel unnecessarily anticipates a defense, a denial of its averments is equivalent to affirmative allegations to the contrary.<sup>94</sup>

Where inconsistent statements are made in an answer, the one most unfavorable to the respondent will be taken as expressing his intention.<sup>95</sup>

article of the answer after specifically and separately denying some of the averments of the fourth article of the libel, concluded as follows: "He denies the other allegations of the fourth article, as therein alleged, and refers to the allegations of the eighth article of the answer." The latter article was "a narrative of events in some respects like the libellant's, in some differing therefrom," and was conjunctive.

91. *Orne v. Townsend*, 4 Mason 541, 18 Fed. Cas. No. 10,583; *The Bark Havre*, 1 Ben. 295, 11 Fed. Cas. No. 6,232. See also *The Commander-in-Chief*, 1 Wall. (U. S.) 43, 17 L. ed. 609; *Card v. Hines*, 35 Fed. 598; *Adm. Rule 27*.

An answer must state sufficient details to enable an examiner, if the case were referred to him, to elicit all the facts. *The Claus Thomesen*, 32 L. J. *Adm. (N. S.)* 106.

An averment that libellant "had full notice and knowledge of and participated in the prosecution" of a former action should be amended by striking out the word "notice" if mere knowledge is meant, or by specifying the kind of notice if some form of notice is intended to be averred. *Virginia Home Ins. Co. v. Sundberg*, 54 Fed. 389.

Mutual understanding or agreement held not sufficiently averred. *Anderson v. Pacific Coast Co.*, 107 Fed. 973, 47 C. C. A. 106, *affirming* 99 Fed. 109.

**Collision.**—*Virginia Home Ins. Co. v. Sundberg*, 54 Fed. 389; *The Bark Havre*, 1 Ben. 295, 11 Fed. Cas. No. 6,232.

A plea of non-joinder must name the

persons who are claimed to be necessary parties. *Card v. Hines*, 35 Fed. 598.

**Excepted Accidents and Perils.**—An answer merely alleging that a short delivery was due to exceptional accidents and perils and to causes for which defendants by the terms of the bill of lading were not responsible, is insufficient. *The Hakon Adelsteen*, 43 L. J. *Adm. N. S. (Eng.)* 9.

A release is sufficiently pleaded by simply alleging it without stating its date, when it was given, or its consideration. *The Western Metropolis*, 2 Ben. 212, 29 Fed. Cas. No. 17,438.

**Small Claims.**—Rule 48 provides that rule 27 shall not apply to claims not involving more than fifty dollars, unless the court shall order otherwise.

**Furnishing Particulars.**—In England where an answer does not contain sufficient particulars the defendant or respondent may be compelled on motion to furnish the same. *The Hakon Adelsteen*, 43 L. J. *Adm. N. S. (Eng.)* 9.

92. *The Alexandra*, 104 Fed. 904 (misconduct of salvor); *Pettingill v. Dinsmore*, 2 Ware 208, 19 Fed. Cas. No. 11,045 (suit against master for assault and battery); *Macomber v. Thompson*, 1 Sumn. 384, 16 Fed. Cas. No. 8,919 (suit for seaman's wages); *Orne v. Townsend*, 4 Mason 541, 18 Fed. Cas. No. 10,583 (same); *The Pioneer*, 1 Dedy 58, 19 Fed. Cas. No. 11,176.

93. *Virginia Home Ins. Co. v. Sundberg*, 54 Fed. 389.

94. *Burrill v. Crossman*, 69 Fed. 747, 16 C. C. A. 381.

95. *The Olbers*, 3 Ben. 148, 18 Fed. Cas. No. 10,477.



**d. Filing.**—(I.) **Generally.**—An answer must be filed within the required time on penalty of having the libel taken *pro confesso*,<sup>96</sup> although a default may in the discretion of the court and upon payment of costs be set aside at any time before the final hearing and decree.<sup>97</sup>

(II.) **Right To File After Exceptions Overruled.**—Where the plea sets up no matters of defense and is in substance a demurrer to the libel, it is discretionary with the court whether to allow the filing of an answer.<sup>98</sup>

**e. Failure or Refusal To Deny.**—(I.) **Generally.**—Material facts alleged in the libel and not denied are taken as admitted, subject to the power of the court to allow an amendment.<sup>99</sup> And even where an amendment has been made, the failure of the original answer to deny a material fact may be regarded a circumstance against the respondent.<sup>1</sup> But one defendant cannot bind his co-defendant by his admissions of the averments of the libel.<sup>2</sup>

(II.) **For Lack of Knowledge.**—A denial or confession is not required where the respondent has not sufficient knowledge of the fact alleged.<sup>3</sup>

(III.) **Privilege.**—The respondent may refuse to answer an allegation of the libel where his answer would subject him to a penalty, forfeiture, or criminal liability.<sup>4</sup>

**f. Insufficiency and Impertinence or Irrelevancy.**—(I.) **Generally.**—Insufficiency as applied to an answer is a technical term meaning the failure to reply fully and explicitly to all the material averments of the libel.<sup>5</sup>

96. See Adm. Rule 29; *Todd v. The Bark Tulchen*, 2 Fed. 600; and *infra*, II, I.

An answer is not filed till bail is perfected, where defendant has been arrested, within the meaning of a rule requiring a replication within four days after the filing of the answer. *Thomas v. Gray*, Blatchf. & H. Adm. 493, 23 Fed. Cas. No. 13,898.

97. Adm. Rule 29. See *infra*, II, I, 3, d.

98. *The Seagull*, Chase 145, 21 Fed. Cas. No. 12,578, rendering a decree for the libellant upon the overruling of the plea for the reasons that when the case was heard there was no suggestion that the facts stated in the libel were untrue, and that the fault of the ship had already been fully considered and determined in another case.

99. *Montgomery v. Henry*, 1 Dall. (U. S.) 49, 1 L. ed. 32; *The William Harris*, 1 Ware 367, 29 Fed. Cas. No. 17,695. *Contra*, *The Dictator*, 30 Fed. 699. See also *Clarke v. The Brig Dodge Healy*, 4 Wash. C. C. 651, 5 Fed. Cas. No. 2,849.

"Where there is silence or evasion in answers in relation to a particular

fact supposed to be peculiarly within the knowledge of the responding party and which is alleged in the libel, that in such case it is within its discretion to take such fact *pro confesso*." *Campbell v. The Uncle Sam*, McAll. 77, 4 Fed. Cas. No. 2,372.

1. *The Steamboat Empire State*, 1 Ben. 57, 29 Fed. Cas. No. 17,586.

2. *The Volunteer*, 149 Fed. 723, 79 C. C. A. 429.

3. *Clarke v. The Brig Dodge Healy*, 4 Wash. C. C. 651, 5 Fed. Cas. No. 2,849.

"It seems that it is sufficient to say that he is 'ignorant' thereof—though I think it would be well to require him also to state what his belief about the matter is, as in answer in chancery." *The City of Salem*, 7 Sawy. 477, 10 Fed. 843.

4. Adm. Rule 31; *Pollock v. The Laura*, 5 Fed. 133; *The Propeller Sun*, 1 Biss. 373, 23 Fed. Cas. No. 13,612.

**Privilege Against Answering Interrogatories.**—See *infra*, II, G, 19, g, (III.), (B.).

5. *The Whistler*, 13 Fed. 295; *The Glencarne*, 7 Fed. 604; *The California*, 1 Sawy. 463, 4 Fed. Cas. No. 2,312.

Matter in an answer which is not responsive to the allegations or interrogatories of the libel or does not constitute a defense is impertinent or irrelevant.<sup>6</sup> So also the improper blending of new matter in the same article with a denial or other response to a particular article or allegation of the libel, is impertinence.<sup>7</sup> Impertinent or irrelevant averments may be stricken out on motion.<sup>8</sup>

(II.) Exceptions may be taken to the answer either for insufficiency or for impertinence and irrelevancy,<sup>10</sup> but an exception for one does not reach the other.<sup>11</sup> Such exceptions should be timely.<sup>12</sup>

**18. Replication.**—By virtue of rule 51 a replication to new matter set up in the answer is not permissible unless allowed or directed by the court upon proper cause shown, but such new matter is deemed denied,<sup>13</sup> and evidence is admissible upon the issues so raised.<sup>14</sup> But the libellant may amend<sup>15</sup> or supplement<sup>16</sup> his libel so as to confess and avoid, may explain, or add to, new matter set forth in the answer. He is not, however, required to make such an amendment.<sup>17</sup>

In England a replication is allowed.<sup>18</sup>

6. The Whistler, 13 Fed. 295; The Glenearne, 7 Fed. 604; The Pioneer, 1 Deady 58, 19 Fed. Cas. No. 11,176; The California, 1 Sawy. 463; 4 Fed. Cas. No. 2,312.

7. The Whistler, 13 Fed. 295; The California, 1 Sawy. 463; 4 Fed. Cas. No. 2,312.

8. The Gustavia, Blatchf. & H. 189, 11 Fed. Cas. No. 5,876. See Pollock v. The Steamboat Laura, 5 Fed. 133, and *supra*, II, G, 10; II, G, 13.

9. The Propeller Sun, 1 Biss. 373, 23 Fed. Cas. No. 13,612; The Elizabeth Frith, Blatchf. & H. Adm. 195, 8 Fed. Cas. No. 4,361. See *infra*, II, G, 20.

10. The Whistler, 13 Fed. 295; Pollock v. The Steamboat Laura, 5 Fed. 133; The Pioneer, 1 Deady 58, 19 Fed. Cas. No. 11,176; The California, 1 Sawy. 463, 4 Fed. Cas. No. 2,312. See *infra*, II, G, 20.

Affirmative equitable relief asked for in an answer as a defense to the libel cannot be granted because of lack of jurisdiction, and such matter is impertinent or irrelevant and subject to exception as such. Meyer v. Pacific Mail S. S. Co., 58 Fed. 923.

11. The Whistler, 13 Fed. 295; The Glenearne, 7 Fed. 604; The California, 1 Sawy. 463, 4 Fed. Cas. No. 2,312.

12. See *infra*, II, G, 20, d.

Before Testimony.—An exception for insufficiency should be made before the testimony is taken. The Rocket,

1 Biss. 354, 20 Fed. Cas. No. 11,975.

13. Moore v. The Robilant, 42 Fed. 162. See Bailey v. Sundberg, 44 Fed. 807; Card v. Hines, 35 Fed. 598.

Prior to the enactment of rule 51 the practice was not the same in all districts, though in case of a sworn answer a replication was usually required. The Mary Jane, Blatchf. & H. 390, 400n, 16 Fed. Cas. No. 9,215. See Card v. Hines, 35 Fed. 598; Thomas v. Lane, 2 Sumn. 1, 3, 23 Fed. Cas. No. 13,902; Thomas v. Gray, Blatchf. & H. Adm. 493, 23 Fed. Cas. No. 13,898; Taber v. Jenny, 1 Spr. 315, 23 Fed. Cas. No. 13,720; The Sarah Ann, 2 Sumn. 206, 21 Fed. Cas. No. 12,342; The Infanta, Abb. Adm. 263, 13 Fed. Cas. No. 7,030; Gladding v. Constant, 1 Spr. 73, 10 Fed. Cas. No. 5,468; Coffin v. Jenkins, 3 Story 108, 5 Fed. Cas. No. 2,948.

14. Moore v. The Robilant, 42 Fed. 162.

15. Rule 51; The Mexican Prince, 70 Fed. 246; Bailey v. Sundberg, 44 Fed. 807.

16. Taber v. Jenny, 1 Spr. 315, 23 Fed. Cas. No. 13,720; Gladding v. Constant, 1 Spr. 73, 10 Fed. Cas. No. 5,468.

Answer to Supplemental Libel.—See *supra*, II, G, 17, b.

17. The Mexican Prince, 70 Fed. 246.

18. The Bothnia, Lush. (Eng.) 52, 29 L. J. Adm. 65; The Aurora, 1 W. Rob. (Eng.) 322.

19. Interrogatories.—a. *Generally*.—Either the libellant<sup>19</sup> or the defendant<sup>20</sup> may with his pleading propound interrogatories to his adversary. The admiralty practice in this respect is substantially the same as that in equity,<sup>21</sup> and is taken from the civil law.<sup>22</sup>

The garnishee in a case of foreign attachment may be compelled to answer interrogatories as to the debts, credits or effects of the defendant in his hands.<sup>23</sup>

b. *To Corporation Party's Officers*.—Because of the necessities of the case where a corporation is a party, its officers may be interrogated directly or compelled to answer interrogatories addressed to the corporation.<sup>24</sup> And in such case the questions may seek to elicit the information of the officer derived from others by virtue of his official capacity as well as his personal knowledge.<sup>25</sup>

c. *Subject-Matter and Scope*.—The interrogatories must relate to the subject-matter of the libel or answer,<sup>26</sup> and must be confined to issuable matter.<sup>27</sup> They cannot ask for the production or inspection of documents,<sup>28</sup> since only the adverse party's oath can be required in response thereto,<sup>29</sup> nor can they unduly pry into the adverse party's case.<sup>30</sup> But the fact that they require the disclosure of the business affairs of others is not a valid objection,<sup>31</sup> nor the fact that they concern matters which may not be within the personal knowledge of the party interrogated.<sup>32</sup>

No precise rule can be laid down which will determine exactly what questions may be propounded in a particular case,<sup>33</sup> but in general

19. Adm. Rule 23; *The David Pratt*, 1 Ware 495, 7 Fed. Cas. No. 3,597; *The Biola*, 34 L. T. N. S. (Eng.) 185.

20. Adm. Rule 32; *The Baker Palmer*, 172 Fed. 154; *The Australia*, 3 Ware 240, 2 Fed. Cas. No. 667.

21. *The Edwin Baxter*, 32 Fed. 296; *Gammell v. Skinner*, 2 Gall. 45, 9 Fed. Cas. No. 5,210. See also *Bock v. International Nav. Co.*, 124 Fed. 711; *The Mary*, L. R. 2 Adm. & Ecc. (Eng.) 319; *Bolekow v. Fisher*, 10 Q. B. Div. (Eng.) 161.

For the practice in equity, see titles "Answer in Equity" and "Bill in Equity."

22. See note to *Hutson v. Jordan*, 1 Ware 385, 395, 12 Fed. Cas. No. 6,959.

23. Adm. Rule 37; *Shorey v. Rennell*, 1 Spr. 418, 22 Fed. Cas. No. 12,807.

When Filed.—See *infra*, II, G, 19, e.

24. *Bock v. International Nav. Co.*, 124 Fed. 711.

25. *Bock v. International Nav. Co.*, 124 Fed. 711.

26. Rules 23, 32; *The Edwin Baxter*, 32 Fed. 296.

"Interrogatories ought to be such as tend bona fide to support the cause of the plaintiff and to favor a complete inquiry into the truth of the issue

which the court has to decide." Sir Robert Phillimore, in *The Mary*, L. R. 2 Adm. & Ecc. (Eng.) 319. See *The Murillo*, 28 L. T. N. S. (Eng.) 374.

27. *Bock v. International Nav. Co.*, 124 Fed. 711; *Havermeyers & Elder Sug. Ref. Co. v. Compania Trans. Espanola*, 43 Fed. 90.

28. *Havermeyers & Elder Sug. Ref. Co. v. Compania Trans. Espanola*, 43 Fed. 90. But see *The Minnehaha*, L. R. 3 Adm. & Ecc. (Eng.) 148.

29. *Havermeyers & Elder Sugar Ref. Co. v. Compania Trans. Espanola*, 43 Fed. 90.

30. *Bock v. International Nav. Co.*, 124 Fed. 711; *Havermeyers & Elder Sug. Ref. Co. v. Compania Trans. Espanola*, 43 Fed. 90. See *The Murillo*, 28 L. T. N. S. (Eng.) 374.

31. *Dana & Co. v. Cosmopolitan Ship Co.*, 131 Fed. 153.

32. See *supra*, II, G, 19, b; *infra*, II, G, 19, g, (I.).

33. "The extent to which the process of interrogation may properly be carried will necessarily vary according to the circumstances of each case, and must be regulated, when it is in dispute, by the court in its discretion. The purposes for which it is allowed



interrogatories in admiralty are subject to the same limitations as interrogatories in equity.<sup>34</sup>

d. *In Answer.* — Where the libel as filed is not sufficiently specific,<sup>35</sup> or is evasive,<sup>36</sup> interrogatories in the answer calling for specific allegations are proper. But they may also be propounded where the averments of the libel are not open to exception for insufficiency.<sup>37</sup>

e. *When and How Filed.* — Interrogatories must be propounded at the close of the libel<sup>38</sup> or answer,<sup>39</sup> except in the case of interrogatories to a garnishee, which may be annexed to the libel or filed after the garnishee has appeared.<sup>40</sup> Where new matter is set up in the answer, if the libelant desires to propound interrogatories covering the same he must incorporate them in an amendment to his libel.<sup>41</sup>

f. *Motion to Strike Out.* — Interrogatories which are too vague or otherwise improper may be stricken out upon motion.<sup>42</sup>

g. *Answers.* — (I.) *Generally.* — The party interrogated is bound to answer, not only as to his personal knowledge, but according to his

. . . are to be kept in view; and it is also to be remembered that the matters regarding which interrogatories may be put are, by the language of rule 32, only the matters alleged in the libel or set up in defense by the answer, and that interrogatories are not to be used for such purposes merely as those of finding out in advance what the adversary's evidence will be, or who his witnesses are, or of obtaining the production of letters or documents not in issue, or of cross-examining the adverse party regarding the truth of the allegations made in his pleadings. . . . It is, however, not necessarily an objection to an interrogatory, otherwise permissible under rule 32, that some of the purposes above referred to may be incidentally accomplished by it. Interrogatories in admiralty are not to be confined within the limits allowed to interrogatories under the practice of the Massachusetts courts. The system of pleading in admiralty differs radically in character from that of the state courts, and the language of rule 32 makes it clear that the interrogating party is not confined, as in those courts, to matters material to the case he sets up in his own pleadings." The Baker Palmer, 172 Fed. 154.

34. See the title "Equity;" and *supra*, II, G, 19, a.

35. The Baker Palmer, 172 Fed. 154.

Where a libel is filed by one on behalf of others, the defendant or claim-

ant may by interrogatories compel the disclosure of the persons on whose behalf the suit is brought and the capacity in which each claims and the particular damage which he is claiming. The Baker Palmer, 172 Fed. 154.

36. The Mexican Prince, 70 Fed. 246.

37. The defendant is entitled by interrogatories to compel the libellant to amplify the allegations for the purpose of dispensing with the taking of proofs regarding them, or for the purpose of bringing distinctly before the court the points relied on in defense, or for the purpose of obtaining evidence in support of the defense from the personal answers of his adversary. The Baker Palmer, 172 Fed. 154.

38. Rule 23; The Edwin Baxter, 32 Fed. 296; Scobel v. Giles, 19 Fed. 224.

In England the practice is different. See The Minnehaha, L. R. 3 Adm. & Ecc. 148; The Biola, 34 L. T. N. S. 185. Interrogatories to the defendant may be allowed before the filing of the petition. The Murillo, 28 L. T. N. S. 374. But see *Bolckow v. Fisher*, 10 Q. B. Div. (Eng.) 161.

39. Adm. Rule 32; Scobel v. Giles. 19 Fed. 224.

40. See *Shorey v. Rennell*, 1 Spr. 418, 22 Fed. Cas. No. 12,807; *Benedict's Adm.* (3rd ed.) § 459.

41. The Edwin Baxter, 32 Fed. 296, which practice is permissible by virtue of rule 51.

42. The Radnorshire, 5 Prob. Div. (Eng.) 172; The Biola, 34 L. T. N. S. (Eng.) 185.

information and belief,<sup>43</sup> and may be compelled to inform himself as to the knowledge of his servants or agents acquired as an incident of their employment.<sup>44</sup> It is immaterial whether answers are made as a part of a pleading or separately.<sup>45</sup>

(II.) **Verification.**—Answers to interrogatories must be made under oath.<sup>46</sup> The verification, however, is not required to conform exactly to the usual form if it contains all the necessary averments.<sup>47</sup>

(III.) **Failure or Refusal to Answer.**—(A.) **GENERALLY.**—The averments to which the interrogatories relate will be taken *pro confesso* in case of a failure or refusal to answer.<sup>48</sup> If the party is ignorant of the matter covered by any interrogatories he may so state in his answer.<sup>49</sup>

(B.) **PRIVILEGE.**—A party cannot be compelled to answer any interrogatory if by so doing he will be exposed to prosecution or punishment for crime, or to a penalty or forfeiture.<sup>50</sup> Interrogatories may, however, be allowed to be put subject to the right of the interrogated party to refuse to answer on the ground of privilege.<sup>51</sup> Such refusal must be under oath.<sup>52</sup>

(IV.) **Use and Effect.**—Answers to interrogatories are not strictly evidence, but are rather an amplification of the pleadings.<sup>53</sup> Whether they are evidence for the party making them, the courts are not agreed.<sup>54</sup>

43. *Bock v. International Nav. Co.*, 124 Fed. 711; *The Minnehaha*, L. R. 3 Adm. & Ecc. 148.

44. *Bolckow v. Fisher*, 10 Q. B. Div. (Eng.) 161.

45. *The Serapis*, 37 Fed. 436.

46. Adm. Rules 27, 32. See *The David Pratt*, 1 Ware 495, 7 Fed. Cas. No. 3,597.

47. *In re Knickerbocker Steamboat Co.*, 139 Fed. 713.

48. *The David Pratt*, 1 Ware 495, 7 Fed. Cas. No. 3,597.

49. *The Mary*, L. R. 2 Adm. Ecc. 319.

Where the claimant in its answer alleged fraud on the part of the libellant and the libellant thereupon by interrogatories demanded the particulars, answers to the interrogatories denying any knowledge or information as to the particulars and averring the claimant's expectation of proving its allegations by cross-examination of the libellant's witnesses and from an examination of the libellant's books, were held sufficient. *The Washtenaw*, 163 Fed. 372.

50. Adm. Rules 31, 32. See *Dana & Co. v. Cosmopolitan Ship Co.*, 131 Fed. 158; *The Mary*, L. R. 2 Adm. & Ecc. 319.

51. *The Mary*, L. R. 2 Adm. & Ecc. 319.

52. *The Mary*, L. R. 2 Adm. & Ecc. 319.

53. "Such answers . . . are not strictly evidence in the cause, in any different sense than that in which the pleadings are evidence. *Andrews v. Wall*, 3 How. 568, 11 L. ed. 729. Though sworn to, they are not a 'deposition' for which costs can be taxed under Rev. St. § 824. Such answers to interrogatories are designed rather as compulsory amplifications of the pleadings on the specific subjects propounded in the interrogatories, so as to dispense with the taking of proofs, or evidence proper, on the fact that may be admitted. When the interrogatories are propounded by the libel, the replies usually make part of the answer itself. *Dunl. Adm. Pr.* 201. It is immaterial whether they are answered as a part of a pleading or separately. As evidence, they stand like the pleadings only. They are parts of the record, and may, like the pleadings, be referred to by either party." *The Serapis*, 37 Fed. 436.

54. *Bock v. International Nav. Co.*, 124 Fed. 711, citing and discussing the authorities, but not deciding the question. See also *The Australia*, 3 Ware 240, 2 Fed. Cas. No. 667, and note to *Hutson v. Jordan*, 1 Ware 385, 401, 12 Fed. Cas. No. 6,959.

**20. Exceptions.**—*a. Generally.*—The proper method of questioning or objecting to defects and irregularities in admiralty pleadings and proceedings is by exceptions<sup>55</sup> which perform the functions of demurrers,<sup>56</sup> pleas,<sup>57</sup> motions to make more definite and certain,<sup>58</sup> or to dismiss for apparent defects.<sup>59</sup>

*b. To and for What Taken.*—Exceptions may be taken to any pleading,<sup>60</sup> to interrogatories or answers thereto,<sup>61</sup> or to the report on a matter which has been referred.<sup>62</sup> They may be taken for defects or irregularities apparent on the face of the pleading which would be the subject of demurrer at law.<sup>63</sup>

Defects of form should be objected to by special exceptions.<sup>64</sup>

Matters not appearing upon the face of the pleading may be averred by exceptive allegations.<sup>65</sup>

The facts which would properly constitute the subject of a plea in abatement,<sup>66</sup> or a plea in bar,<sup>67</sup> may be pleaded in exceptions. If in abatement, they are called dilatory or declinatory exceptions;<sup>68</sup> if in

55. Benedict's Adm. (3d ed.), § 466. See also *The Prindiville*, Brown Adm. 485, 19 Fed. Cas. No. 11,435. But see *Fairgrieve v. Marine Ins. Co.*, 94 Fed. 686, 37 C. C. A. 190; *Dennis v. Slyfield*, 117 Fed. 474, 54 C. C. A. 520.

56. *Steamboat Transport*, 1 Ben. 86, 20 Fed. Cas. No. 11,516. See *Card v. Hines*, 35 Fed. 598, and *supra*, II, G, 15. But see *Dennis v. Slyfield*, 117 Fed. 474, 54 C. C. A. 520; *The August Belmont*, 153 Fed. 639.

Exceptions to the libel because not showing capacity of the libellant to sue, or jurisdiction of the court, are in the nature of special demurrers at common law. *Holmes v. Oregon & C. R. Co.*, 6 Sawy. (U. S.) 262, 5 Fed. 75.

57. See *supra*, II, G, 16; and *Card v. Hines*, 35 Fed. 598. But see *The August Belmont*, 153 Fed. 639.

58. *The Intrepid*, 42 Fed. 185; *Quinn v. The Transport*, 1 Ben. 86, 20 Fed. Cas. No. 11,516.

59. *The J. B. Hoyle*, 4 Biss. 234, 12 Fed. Cas. No. 7,557.

60. See *supra*, II, G, 14; II, G, 17; *infra*, II, J.

*To Amended Pleading.*—See *Dennis v. Slyfield*, 117 Fed. 474, 54 C. C. A. 520; *The Corozal*, 19 Fed. 655.

*For Misjoinder and Non-Joiner.*—See *supra*, II, E, 6, c; II, F, 7.

*For Incapacity To Sue or Defend.*—See *supra*, II, E, 2; and *The Prindiville*, Brown Adm. 485, 19 Fed. Cas. No. 11,435.

*For Indefiniteness and Uncertainty.* *The Intrepid*, 42 Fed. 185 (they must be taken in good faith).

*For Surplusage, Irrelevancy, Imper-*

*tinence or Scandal.*—See Adm. Rule 36, and *supra*, II, G, 10; II, G, 17, f, (II.).

*For Lack of Jurisdiction of Subject-Matter.*—*The Seminole*, 42 Fed. 924; *The Sea Gull*, Chase 145, 21 Fed. Cas. No. 12,578; *Knight v. The Attila*, Crabbe 326, 14 Fed. Cas. No. 7,881. See *Cohan v. The Rolling Wave*, 6 Fed. Cas. No. 2,959a, and *supra*, I, B, 11. But see *Lamds v. A Cargo of Coal*, 4 Fed. 478.

61. See *supra*, II, G, 19 and Rule 28.

62. See *infra*, II, U. 8.

63. *Steamer Spark v. Lee Choi Chum*, 1 Sawy. 713, 22 Fed. Cas. No. 13,206. See also *supra*, II, G, 20a. But see *Dennis v. Slyfield*, 117 Fed. 474, 54 C. C. A. 520; *The August Belmont*, 153 Fed. 639; *Knight v. Attila*, Crabbe 326, 14 Fed. Cas. No. 7,881.

64. *White v. The Cynthia*, 29 Fed. Cas. No. 17,546.

65. *The Haytian Republic*, 57 Fed. 508; *The Seminole*, 42 Fed. 924; *The Prindiville*, Brown Adm. 485, 19 Fed. Cas. No. 11,435. See the *Steamer Spark v. Lee Choi Chum*, 1 Sawy. 713, 22 Fed. Cas. No. 13,206.

66. *The Haytian Republic*, 57 Fed. 508; *The Prindiville*, Brown Adm. 485, 19 Fed. Cas. No. 11,435. See *Card v. Hines*, 35 Fed. 598; *The Prince Albert*, 5 Ben. 386, 19 Fed. Cas. No. 11,426; *Certain Logs of Mahogany*, 2 Sumn. 589, 5 Fed. Cas. No. 2,559.

67. *The Seminole*, 42 Fed. 924. See *Knight v. The Attila*, Crabbe 326, 14 Fed. Cas. No. 7,881.

68. *Furniss v. Brig Magoun*, Olc. Adm. 55, 9 Fed. Cas. No. 5,163. *Cer-*



bar, peremptory exceptions, with which may go exceptive allegations.<sup>69</sup>

c. *By Whom Taken*.—Exceptions can only be taken by a party to the suit entitled to raise the objection made in them.<sup>70</sup>

d. *Necessity and Time of Taking*.—(I.) Generally. — Many irregularities if not seasonably and properly excepted to are waived so far as the parties themselves are concerned,<sup>71</sup> although the court of its own motion has power to compel them to conform to the rules.<sup>72</sup>

It is a general principle that irregularities of procedure known to the party concerned must be objected to at the first legal opportunity.<sup>73</sup>

The defects or omissions in the libel may be waived by failure to except to them before taking some further step in the case.<sup>74</sup>

Dilatory exceptions to the libel should be made before an answer to the merits is filed.<sup>75</sup>

The premature commencement of the suit cannot be excepted to after the cause of action has matured and other proceedings on the merits have been taken.<sup>76</sup>

(II.) Lack of certainty and particularity should be excepted to,<sup>77</sup> it cannot be made the basis of a collateral motion.<sup>78</sup> And the exceptions

tain Logs of Mahogany, 2 Sumn. 589, 5 Fed. Cas. No. 2,559.

69. The Seminole, 42 Fed. 924; Certain Logs of Mahogany, 2 Sumn. 589, 5 Fed. Cas. No. 2,559.

70. See Coffin v. Jenkins, 3 Story 108, 5 Fed. Cas. No. 2,948.

Exceptions to a libel in rem can be filed only by the intervening claimant. Florence Cotton Oil Co. v. Alabama Tow-Boat Co., 128 Fed. 915, 63 C. C. A. 641. See Steamer Spark v. Lee Choi Chum, 1 Sawy. 713, 22 Fed. Cas. No. 13,206.

71. See Pioneer S. S. Co. v. McCann, 170 Fed. 873, 96 C. C. A. 49.

Misjoinder of Causes.—See *supra*, II, F, 7; and Merritt, etc. Co. v. Chubb, 113 Fed. 173, 51 C. C. A. 119.

Improper Amendment.—The Detroit, Brown's Adm. 141, 7 Fed. Cas. No. 3,832.

72. The Bark Havre, 1 Ben. 295, 11 Fed. Cas. No. 6,232.

73. The Infanta, Abb. Adm. 327, 329, 13 Fed. Cas. No. 7,031, *per* Betts, J.

74. The Assunta (1902), L. R. Prob. Div. 150, by moving for security for costs an irregularity in describing the plaintiff was waived. See The Crusader, 1 Ware 437, 6 Fed. Cas. No. 3,456.

Failure to aver ownership in a libel by a consignee for non-delivery cannot be complained of at the trial where no exceptions to the libel were

taken and the answer avers delivery. The Ville de Paris, 3 Ben. 276, 28 Fed. Cas. No. 16,942.

75. The Grace Darling, 2 Hask. 278, 9 Fed. Cas. No. 5,651. See Cohan v. The Rolling Wave, 6 Fed. Cas. No. 2,959a; The Martha, Blatchf. & H. Adm. 151, 167, 16 Fed. Cas. No. 9,144.

After a hearing upon the merits it is too late to except to prior irregularities in the proceedings. The Edward, Blatchf. & H. Adm. 286, 8 Fed. Cas. No. 4,289.

The pendency of another action for the same cause of action. Certain Logs of Mahogany, 2 Sumn. 589, 5 Fed. Cas. No. 2,559.

Right To Claim and Defend.—The Prindiville, Brown Adm. 485, 19 Fed. Cas. No. 11,435.

Defect of Parties.—See *supra*, II, E, 6, c, (I.); and Disney v. Furness, Withy & Co., 79 Fed. 810.

76. Premature Commencement of Suit.—Granon v. Hartshorne, Blatchf. & H. Adm. 454, 10 Fed. Cas. No. 5,689; Furness v. Brig Magoun, Ole. Adm. 55, 9 Fed. Cas. No. 5,163; The Edward, Blatchf. & H. Adm. 286, 8 Fed. Cas. No. 4,289. But see *supra*, II, D, 2.

77. The Anaces, 93 Fed. 240, 34 C. C. A. 558. See *supra*, II, G, 8.

78. Essler v. Worth, 8 Fed. Cas. No. 4,533a, motion to dismiss attachment. Compare Nelson v. Bell, 17 Fed. Cas. No. 10,101a.

should be filed before the testimony has been taken or they are waived.<sup>79</sup>

(III.) Lack of jurisdiction of the subject-matter may be questioned at any stage of the proceedings.<sup>80</sup> But a general appearance or answer to the merits waives lack of jurisdiction over the person or thing, so far as dependent upon irregularity or illegality of service or seizure.<sup>81</sup> It has been held, however, that jurisdiction of the *res* which is actually outside the territorial jurisdiction of the court cannot be acquired by consent<sup>82</sup> or general appearance by a claimant.<sup>83</sup>

e. *Manner of Taking*. — (I.) Generally. — Exceptions may be in a separate pleading or they may be incorporated in the answer,<sup>84</sup> unless the ground of exceptions is of such a nature as to be thereby waived.<sup>85</sup> But a party must take all of his exceptions at one time.<sup>86</sup>

(II.) Form<sup>87</sup> and Contents. — Exceptions should state the particular grounds upon which they are taken,<sup>88</sup> in clear and perspicuous language.<sup>89</sup> An exception to one defect will not reach another and different defect.<sup>90</sup> But where counsel have argued an exception upon one ground as though it were upon another, the court may so consider it.<sup>91</sup>

Exceptions to the form of allegations in pleadings should briefly

79. *The Rocket*, 1 Biss. 354, 20 Fed. Cas. No. 11,975.

80. *United States v. One Raft of Timber*, 13 Fed. 796; *The Washington*, 4 Blatchf. 101, 29 Fed. Cas. No. 17,221; *The Fideliter*, 1 Sawy. 153, 8 Fed. Cas. No. 4,755. But see *The Crusader*, 1 Ware 437, 6 Fed. Cas. No. 3,456. See *supra*, I, B, 11.

81. *The Willamette*, 70 Fed. 874, 18 C. C. A. 366, 31 L. R. A. 715; *Jones v. The Richmond*, 13 Fed. Cas. No. 7,492 (*per Betts, J.*); *The Bee*, 1 Ware 322, 3 Fed. Cas. No. 1,219; *The Abby*, 1 Mason 360, 1 Fed. Cas. No. 14 (*per Story, J.*). See also the title "Jurisdiction;" and *Jones v. Andrews*, 10 Wall. (U. S.) 327, 19 L. ed. 935; *The Grace Darling*, 2 Hack. 278, 10 Fed. Cas. No. 5,651; *The Eliza Jane*, 1 Spr. 152, 8 Fed. Cas. No. 4,363. But see *infra*, II, K, 3, 1.

Where an appearance was made as claimant and a bond given for the release of the vessel, an answer to the merits, though containing an allegation that the vessel was not within the jurisdiction of the court, was held a waiver of the right to object. *St. Paul, F. & M. Ins. Co. v. The Lake Superior*, 21 Fed. Cas. No. 12,244.

But in *Manchester v. Hotchkiss*, 10 Am. L. Reg. (N. S.) 379, 16 Fed. Cas. No. 9,004, it was held that a plea to jurisdiction on the ground that the suit

was filed in the wrong district was not waived by accompanying it with an answer.

82. *The Hungaria*, 41 Fed. 109, *affirmed*, 42 Fed. 510.

83. *The Norma*, 32 Fed. 411.

84. See *supra*, II, G, 17a, and *White v. The Cynthia*, 29 Fed. Cas. No. 17,546a.

85. See *supra*, II, G, 17, a; II, G, 20, d; II, D, 3, h.

86. *Card v. Hines*, 35 Fed. 598.

87. Exceptions to the jurisdiction should conclude with a prayer that the libel be dismissed. *The Crusader*, 1 Ware 437, 6 Fed. Cas. No. 3,456.

88. *The Whistler*, 13 Fed. 295. See *Dennis v. Slyfield*, 117 Fed. 474, 54 O. C. A. 520.

89. Pleas and exceptions in admiralty practice must set forth the matter of defense in perspicuous and definite terms, but it is unnecessary that they should embody the formalities which obtain in common law pleas or even in those used in chancery. *The Schooner Navarro*, Ole. Adm. 127, 17 Fed. Cas. No. 10,059, holding that a plea of *res judicata* need not set out the details of the former action.

90. *The Whistler*, 13 Fed. 295. See *supra*, II, G, 17, f, (II.).

91. *The Glencarne*, 7 Fed. 604; *The California*, 1 Sawy. (U. S.) 463, 4 Fed. Cas. No. 2,312.

and clearly specify, by line and page, the parts excepted to.<sup>92</sup> An exception for failure to state a cause of suit or forfeiture must specify what necessary facts have been omitted.<sup>93</sup>

f. *Disposition of.*— Exceptions separately made are passed upon at a hearing for that purpose, and an order is made by the court in accordance with its determination.<sup>94</sup>

An application for leave to amend, however, dispenses with the necessity for a hearing.<sup>95</sup> When contained in the answer, if not insisted upon at the opening of the trial, they are waived.<sup>96</sup>

The failure to sustain any particular specification is fatal to exception to which such specification is attached.<sup>97</sup> An exception in the nature of a demurrer must be determined on the pleadings<sup>98</sup> and not on affidavits.<sup>99</sup>

If it amounts merely to a general demurrer it is not sustainable if the pleading as a whole states a cause of action or defense, though it does not exhibit in some parts that particularity which might be insisted upon.<sup>1</sup>

For the purpose of the hearing the averments of the pleading excepted to are deemed to be true.<sup>2</sup>

21. Amendments.— a. *Generally.*— The practice in admiralty as to amendments is very liberal,<sup>3</sup> and the court has a wide discretion as to the character of amendments that will be permitted and the cir-

92. Adm. Rule 41; The Dictator, 30 Fed. 699.

93. The Active, Deady 165, 1 Fed. Cas. No. 33. See Dennis v. Slyfield, 117 Fed. 474, 54 C. C. A. 520.

94. Benedict's Adm. (3d ed.), § 471. See Adm. Rules 28-30.

95. Town v. The Western Metropolis, 28 How. Pr. 283, 24 Fed. Cas. No. 14,114.

96. White v. The Cynthia, 29 Fed. Cas. No. 17,546a.

97. The Intrepid, 42 Fed. 185.

98. Eight Hundred and Forty-One Tons of Iron Ore, 15 Fed. 615.

99. Prince Steam Shipping Co. v. Lehman, 39 Fed. 704, 5 L. R. A. 464.

1. Dennis v. Slyfield, 117 Fed. 474, 54 C. C. A. 520, where the exception was on the ground that the libel did not set forth facts showing a breach of the alleged contract. One breach being specifically averred it was held the exception was improperly sustained. Lurton, J., says: "The exception is in fact a demurrer. It goes to the whole libel and is therefore bad if any breach is well pleaded. A demurrer is an entirety. It cannot be bad in part and good in part. If any part of the libel is good, the demurrer, improperly called an 'exception,' which challenges the particularity with which the breaches

have been alleged, is bad as going to the whole libel."

2. O'Connell v. One Thousand and Two Bales of Sisal Hemp, 75 Fed. 403.

3. Graham v. Oregon R. & Nav. Co., 134 Fed. 692; Davis v. Adams, 102 Fed. 520, 42 C. C. A. 493; The J. E. Trudeau, 54 Fed. 907, 4 C. C. A. 657; The City of New Orleans, 33 Fed. 683; The George Tulane, 22 Fed. 799; The J. R. Hoyle, 4 Biss. 234, 13 Fed. Cas. No. 7,557. See The Hamilton, 146 Fed. 724, 77 C. C. A. 150; U. S. Rev. Stat., § 954.

Amendments are very freely allowed in admiralty to avoid the effect of technical rules of pleading, both in the case of the libel and the answer. Card v. Hines, 35 Fed. 598.

"Courts of admiralty are little trammelled by a regard for mere technicalities, substantial justice without unnecessary delay or expense being the object which they keep in view. Accordingly they acknowledge no limits to their right to allow amendments when conducive to this end, in every stage of a cause, and not only in the court of original jurisdiction, but in all appellate courts, and not only in matters of form, but in matters of substance." The Meteor, 17 Fed. Cas. No. 9,498, per Betts, J.

Manifestly clerical mistakes in the



circumstances under which they may be made.<sup>4</sup> The matter is to some extent regulated by the admiralty rules<sup>5</sup> and the rules of the several district and appellate courts.<sup>6</sup>

The admiralty rules, however, are not intended to destroy the discretionary power of the court.<sup>7</sup> In exercising this discretion the court will consider the fault or knowledge of the amending party,<sup>8</sup> and the possible prejudice to the rights of his adversary.<sup>9</sup>

b. *Character of Amendments.* — (I.) *Generally.* — Amendments may be either as to matters of form,<sup>10</sup> or of substance.<sup>11</sup>

The omission of essential averments may be rectified by amendment,<sup>12</sup> as may the failure to allege essential jurisdictional facts.<sup>13</sup>

pleadings may be amended at any stage of the cause. *Cobb v. Howard*, 5 Fed. Cas. No. 2,925.

Unnecessary and impertinent allegations may be stricken out by amendment. *American Ins. Co. v. Johnson*, Blatchf. & H. Adm. 9, 1 Fed. Cas. No. 303.

4. *The Wildenfels*, 161 Fed. 864, 89 C. C. A. 58; *The Manhasset*, 19 Fed. 430; *United States v. 123 Casks of Distilled Spirits*, 1 Abb. 573, 27 Fed. Cas. No. 15,943; *Pettingill v. Dinsmore*, 2 Ware 208, 211, 19 Fed. Cas. No. 11,045; *Lamb v. Parkman*, 14 Fed. Cas. No. 8,019; *Brown v. The Brig Cadmus*, 2 Paine 564, 4 Fed. Cas. No. 1,997 (the exercise of this discretion will not be reviewed on appeal).

5. Adm. Rules 24, 51. See also Rules 42, 44, and *Graham v. Oregon R. & Nav. Co.*, 134 Fed. 692.

6. See rules of these courts. *The Montana*, 22 Fed. 730 (as to necessity of giving notice of intention to amend); *Lamb v. Parkman*, 14 Fed. Cas. No. 8,019; and *infra*, II, G, 21, f.

7. *The Corozal*, 19 Fed. 655.

8. See *O'Brien v. Miller*, 168 U. S. 287, 310, 18 Sup. Ct. 140, 42 L. ed. 469; *Brennan v. Hagan & Co.*, 147 Fed. 290; *Burrill v. Crossman*, 111 Fed. 192; *Lamb v. Parkman*, 14 Fed. Cas. No. 8,019.

Where the necessity for the amendment is due to the fault of the moving party and its allowance would necessitate delay and increased expense, the court may refuse to permit it. *Pettingill v. Dinsmore*, 2 Ware 208, 19 Fed. Cas. No. 11,045.

An amendment materially changing an averment which has been several times sworn to with a full knowledge of all the facts will not be allowed. *New Haven Steamboat Co. v. Mayor*, 36 Fed. 716, refusing to allow

an amendment increasing a claim for demurrage, after the decision and order of reference.

9. *O'Connell v. One Thousand and Two Bales of Sisal Hemp*, 75 Fed. 408; *The Alanson Sumner*, 28 Fed. 670; *The Corozal*, 19 Fed. 655. See also *The Thomas Melville*, 31 Fed. 486; *The Keystone*, 31 Fed. 412, and the following discussion.

10. Adm. Rule 24; *Graham v. Oregon R. & Nav. Co.*, 134 Fed. 692. See *The George Tulane*, 22 Fed. 799.

Amendments to correct formal defects apparent on the face of the pleadings or proceedings will be permitted to be made *instantly* upon objection at the hearing. *Nevitt v. Clarke*, Olc. Adm. 316, 18 Fed. Cas. No. 10,138.

A mistake in designating the nature of the suit, as "in a cause of contract" instead of "in a cause of collision," is a merely formal defect which may be corrected by amendment at any time before final decree. *The Steamer Oler*, 2 Hughes 12, 18 Fed. Cas. No. 10,485.

11. Adm. Rule 24; *Graham v. Oregon R. & Nav. Co.*, 134 Fed. 692; *The City of New Orleans*, 33 Fed. 683; *The George Tulane*, 22 Fed. 799; *The Meteor*, 17 Fed. Cas. No. 9,498, p. 184; *Lamb v. Parkman*, 14 Fed. Cas. No. 8,019. See *infra*, II, G, 21, d.

Changing Nature of Suit. — See *infra*, II, G, 21, d, (II).

Conforming Pleading and Proof. — See *infra*, II, G, 21, c, (II), (B).

12. *Bradshaw v. The Sylph*, 3 Fed. Cas. No. 1,791; *The Schooner Betsey*, 1 Mason 354, 3 Fed. Cas. No. 1,365.

Averment of the libellant's interest in the thing libeled may be inserted by amendment. *Bradshaw v. The Sylph*, 3 Fed. Cas. No. 1,791.

13. *Graham v. Oregon R. & Nav. Co.*, 134 Fed. 692. See *infra*, II, G, 21, d.

(II.) **As to Parties.**—New parties may be added or substituted, and parties improperly joined may be stricken out by amendment,<sup>14</sup> but this rule does not permit the substitution of one sole party for another,<sup>15</sup> or the improper joinder of proceedings *in rem* and *in personam*.<sup>16</sup>

The capacity in which a party sues<sup>17</sup> or is sued<sup>18</sup> may be changed, and a misnomer may be corrected<sup>19</sup> by amendment.

c. **At What Stages of Proceedings Allowable.**—(I.) **Generally.**—Amendments may be made at any stage of the proceedings before final decree.<sup>20</sup>

Where exceptions have been taken, an application for leave to amend dispenses with the necessity for a hearing on the exceptions.<sup>21</sup> But if they are sustained upon hearing, ordinarily permission to amend will be granted.<sup>22</sup>

(II.) **At and After Hearing.**—(A.) **GENERALLY.**—Amendments as to matters of substance should be allowed at<sup>23</sup> or after<sup>24</sup> the hearing only where the justice of the case requires it. Ordinarily such amendments should be allowed merely to conform the pleadings to the proof.<sup>25</sup> But it may be permitted even though further proof and a

14. The Commander-in-Chief, 1 Wall. (U. S.) 43, 17 L. ed. 609; Card v. Hines, 35 Fed. 598 (non-joinder); The George Tulane, 22 Fed. 799; Roberts v. Skofield, 3 Ware 184, 20 Fed. Cas. No. 11,917 (misjoinder). See also The Beaconsfield, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. ed. 993; Newell v. Norton, 3 Wall. (U. S.) 257, 18 L. ed. 271.

15. The Detroit, Brown Adm. 141, 7 Fed. Cas. No. 383, a libel by John K. Harrow cannot be amended to make it the libel of James P. Harrow, a different person. But see *supra*, II, C, 3, g; *infra*, II, G, 21, d, (II), (B); and The William F. McRae, 23 Fed. 557.

The claimant, who in his answer avers his ownership of the attached property, may, by amendment of the libel, be substituted as a defendant in place of another who has been sued as owner. Bowden v. Demwolf, 56 Fed. 846, holding the obligation of the sureties was not affected under the circumstances of the case.

16. The Corsair, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. ed. 727.

17. The Hamilton, 146 Fed. 724, 77 C. C. A. 150.

A libellant who sues for death by wrongful act in her official capacity as administrator may amend so as to sue individually as the widow and officially as the guardian of the children of the decedent, where the original libel contains all the facts as to parties

that were necessary to amend by. The Manhasset, 19 Fed. 430, on the ground that the *res* was the same and the tort and contract on which the claim was based was the same.

18. Douse v. Sargent, 48 Fed. 695, such an amendment does not present a new cause of action. See Nelson v. Barker, 3 McLean 379, 17 Fed. Cas. No. 10,101.

19. Nelson v. Barker, 3 McLean 379, 17 Fed. Cas. No. 10,101.

20. Adm. Rule 24; Graham v. Oregon R. & Nav. Co., 134 Fed. 692; The Manhasset, 19 Fed. 430; Pettingill v. Dinmore, 2 Ware 208, 211, 19 Fed. Cas. No. 11,045; Nelson v. Barker, 3 McLean 379, 17 Fed. Cas. No. 10,101.

On Appeal.—See *infra*, II, G, 21, f.

21. Town v. The Western Metropolis, 28 How. Pr. 283, 24 Fed. Cas. No. 14,114.

22. The J. R. Hoyle, 4 Biss. 234, 13 Fed. Cas. No. 7,557. See Gans v. Auchincloss, 168 Fed. 460; Adm. Rules 24, 42, 44, and *infra*, II, G, 21, d, (I).

23. The Habil, 100 Fed. 120, 123.

24. The Ask, 156 Fed. 678. See The Horace B. Parker, 74 Fed. 640, 20 C. C. A. 572.

25. The Ask, 156 Fed. 678. See *infra*, II, G, 21, c, (II), (B).

An amendment introducing a new and somewhat inconsistent ground of claim will not be allowed at the trial where no evidence upon it has been taken and the witnesses for the adverse

new hearing are necessary, there being no intentional suppression.<sup>26</sup>

(B.) CONFORMING PLEADINGS AND PROOF. — Amendments to conform the pleadings to the proof may be allowed at the hearing.<sup>27</sup>

A change in the cause of action may<sup>28</sup> or may not<sup>29</sup> be permitted, in the discretion of the court.

(III.) After Remanding of Case. — Amendments may be allowed after the case has been remanded by the appellate court.<sup>30</sup>

d. *Of Libel.* — (I.) Generally. — The libel may be amended in accordance with the rules hereinbefore discussed.<sup>31</sup>

An amendment may be made to correct jurisdictional defects<sup>32</sup> and improper joinder of causes,<sup>33</sup> and in reply to new matter set up in the answer.<sup>34</sup> An amendment for the latter purpose, however, must set forth some matter incompatible with the averments of the answer or avoiding their legal effect,<sup>35</sup> and should be timely.<sup>36</sup>

party are gone. The Keystone 31 Fed. 412.

26. *Davis v. Leslie*, Abb. Adm. 123, 7 Fed. Cas. No. 3,639. See *Smith v. Elmer E. Wood Transp. Co.*, 103 Fed. 685, 43 C. C. A. 347.

27. *The Minnetonka*, 146 Fed. 509, 77 C. C. A. 217 (allowing an amendment conforming the allegation as to the amount of damages to the proof); *Kelley Island Lime Co. v. City of Cleveland*, 144 Fed. 207; *Davis v. Adams*, 102 Fed. 520, 42 C. C. A. 493 (reviewing numerous cases); *The City of New Orleans*, 33 Fed. 683; *The Manhasset*, 19 Fed. 430. See *Pioneer S. S. Co. v. McCann*, 170 Fed. 873, 96 C. C. A. 49.

But statements in the answer deliberately made upon full information of the facts cannot be amended to conform to the evidence of the party's witnesses. *The Iola*, 13 Fed. Cas. No. 7,057. See also *The Mary C.*, 1 Hask. 474, 16 Fed. Cas. No. 9,201.

28. *The City of New Orleans*, 33 Fed. 683. See also *Davis v. Leslie*, Abb. Adm. 123, 7 Fed. Cas. No. 3,639.

29. *The Habil*, 100 Fed. 120, 123. See *The Ask*, 156 Fed. 678.

30. See *Garland v. Davis*, 4 How. (U. S.) 131, 11 L. ed. 907.

But where defendants have relied upon the form in which a particular matter was pleaded in their answer, through all the appellate courts, an amendment will not be permitted after the case has been remanded for a new trial, to relate this matter which has been regarded by the appellate courts as a settled issue. *Burrill v. Crossman*, 111 Fed. 192.

Directions to appellate court to allow

amendments. See *infra*, II, G, 21, f. 31. See *supra*, II, G, 21.

Failure of libellant to sign the libel may be corrected by amendment. *Hardy v. Moore*, 4 Fed. 843.

The prayer of the libel may be amended to ask for interest on the damages claimed, even after all the issues have been determined except the value of the vessel for the destruction of which the suit is brought. *The J. E. Trudeau*, 54 Fed. 907, 4 C. C. A. 657.

32. *The George Tulane*, 22 Fed. 799, failure to allege presence of *res* in the district.

Upon the sustaining of exceptions for lack of jurisdiction the court is not obliged to dismiss the libel but may grant leave to amend unless it appears that the objection cannot be obviated by amendment. *Graham v. Oregon R. & Nav. Co.* 134 Fed. 692.

Alias Monition — It is proper, if not necessary, that an alias monition be served upon parties who have not appeared under such circumstances. *In re Long Island, etc. Co.*, 5 Fed. 599.

33. *The San Rafael*, 141 Fed. 270.

Where a non-maritime cause of action has been improperly joined in the libel it may be eliminated by amendment. *United States v. The Queen*, 4 Ben. 237, 27 Fed. Cas. No. 16,107.

34. See *supra*, II, G, 18; *Rosenthal v. The Louisiana*, 37 Fed. 264.

35. *Burrill v. Crossman*, 65 Fed. 104, 111.

36. See *Burrill v. Crossman*, 65 Fed. 104, in which the application for leave to amend was not made until after two hearings upon exceptions to the answer with the understanding, upon the court's part, that the hearing was to



The fact that the *res* has been released on bail does not prevent the allowance of an amendment.<sup>37</sup> But the circumstances that the obligation of the sureties on the bond may be changed is sufficient to justify the refusal to allow an amendment.<sup>38</sup>

(II.) *Changing Nature of Suit.*—(A.) *INTRODUCING NEW CAUSE OF ACTION.*—The introducing, by amendment, of new counts<sup>39</sup> or causes of action<sup>40</sup> based upon the same transaction is permissible and is sanctioned by the federal statutes<sup>41</sup> and the admiralty rules,<sup>42</sup> which, however, are not intended to withdraw this matter from the discretion of the court.<sup>44</sup>

But an entirely new and distinct cause of action not connected with the one first sued upon cannot be amended into the libel.<sup>45</sup> The nature of the libellant's claim may be changed to accord with the legal rights arising from the facts.<sup>46</sup> Additional facts forming part of the same

be regarded as a trial, counsel admitting the correctness of the statement of facts in the answer. Brown, J., says: "The libellant's counsel claims an absolute right under the fifty-first rule of the supreme court in admiralty to amend the libel in order to confess, avoid and explain as above stated. Though such an amendment would undoubtedly be allowed if applied for at a proper time, no such right exists after the parties have proceeded to a hearing upon the pleadings."

37. The *Corozal*, 19 Fed. 655. See *infra*, II, K, 8, g, (II).

38. The *Iona*, 80 Fed. 933, 26 C. C. A. 261; The *Corozal*, 19 Fed. 655. See The *Oregon*, 158 U. S. 180, 15 Sup. Ct. 804, 39 L. ed. 943; The *Beaconsfield*, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. ed. 993; *Boden v. Demwolf*, 56 Fed. 846; and *infra*, II, K, 8, g, (II). But see *McCready v. The Brother Jonathan*, 15 Fed. Cas. No. 8,732a.

39. See *infra*, II, G, 21, d, (III).

40. United States *v.* 123 Casks of Distilled Spirits, 1 Abb. 573, 29 Fed. Cas. No. 15,943; The *Schooner Harmony*, 1 Gall. 123, 11 Fed. Cas. No. 6,081. But see The *Meteor*, 17 Fed. Cas. No. 9,498.

41. U. S. Rev. Stat. § 954, so interpreted in *In re Glass*, 119 Fed. 509; *Oliver v. Raymond*, 108 Fed. 927. See The *Meteor*, 17 Fed. Cas. No. 9,498.

42. Adm. Rule 24.

44. Admiralty Rule 24 Is Not an Arbitrary Rule.—"The meaning was not to abrogate or qualify the universal rule of pleading, as stated by Stephen in his work on Pleading, at page 75, that 'amendments are, however, always limited by due considera-

tion of the rights of the opposite party; and where, by the amendment, he would be prejudiced, it is not allowed.'" The *Corozal*, 19 Fed. 655.

45. United States *v.* 123 Casks of Distilled Spirits, 1 Abb. 573, 29 Fed. Cas. No. 15,943. But see The *Corozal*, 19 Fed. 655.

"A new *res* or subject of controversy cannot be introduced under such privilege of amendment." The *Meteor*, 17 Fed. Cas. No. 9,498, p. 185.

A libel cannot be amended so as to make a new and different case. The *North Carolina*, 15 Pet. (U. S.) 40, 10 L. ed. 653; The *John Jay*, 3 Blatchf. 67, 13 Fed. Cas. No. 7,352; The *Young America*, Brown Adm. 462, 30 Fed. Cas. No. 18,178. The rule is the same as in equity. *Hardin v. Boyd*, 113 U. S. 756, 5 Sup. Ct. 771, 28 L. ed. 1,141; *Shields v. Barrow*, 17 How. (U. S.) 130, 144, 15 L. ed. 158; *Savage v. Worsham*, 104 Fed. 183, 1 Daniel, Ch. Pr. 384.

In The *Iona*, 80 Fed. 933, 26 C. C. A. 261, the allowance by the trial court of an amendment after the steamship libeled had been released on a stipulation and adding a claim not germane to the claim set forth in the original libel, was held error.

On Appeal.—See *infra*, II, G, 21, f.

46. A libel claiming a lien under the general maritime law may be amended to claim one under a state statute on the same facts. The *Samuel Marshall*, 49 Fed. 754; *Hudson Coal Co. v. The Minnie R. Childs*, 1 N. J. L. J. 42, 12 Fed. Cas. No. 6,836.

Where a libel claims salvage, if the facts do not justify such an award but merely show a right to extra compensation as pilot, the libel may be amended

general transaction may be set up, although they change the nature<sup>47</sup> or amount<sup>48</sup> of the claim.

An amendment changing the capacity in which a party sues<sup>49</sup> or is sued<sup>50</sup> is not objectionable as changing the cause of action.

In exercising its discretion the court will consider the prejudicial effect on the rights of other parties,<sup>51</sup> whether the liability of sureties will be increased<sup>52</sup> or changed,<sup>53</sup> and whether the libellant would by such an amendment derive an advantage which he would not have in an original suit.<sup>54</sup> Where the particular acts of injury have been specified an amendment at the trial setting up a substantially new cause of damage will not be permitted.<sup>55</sup>

The claim of damages may be amended<sup>56</sup> by increasing the amount claimed,<sup>57</sup> or by adding new elements of damage.<sup>58</sup>

accordingly. *Dexter v. The Richmond*, 7 Fed. Cas. No. 3,865.

47. In a suit for non-delivery of goods where the answer sets up accidental destruction by fire prior to loading and an exemption from liability under such circumstances contained in the bill of lading, an amendment to the libel alleging breach of an agreement by respondent to have the goods insured until loaded is not inconsistent with the original libel. *Rosenthal v. The Louisiana*, 37 Fed. 264.

48. An insurance company which has been only partially subrogated to the rights of the assured at the time its libel is filed, but subsequent thereto pays the remainder of the loss, may include such additional claim in its libel by amendment. *Liverpool Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 462, 9 Sup. Ct. 469, 32 L. ed. 800.

49. See *The Manhasset*, 19 Fed. 430. In a proceeding to limit liability where a claim has been filed for the death of the decedent, which claim describes the claimant as both the widow and the representative of the decedent's estate, an amendment making the claim merely as widow is permissible. *The Hamilton*, 146 Fed. 724, 77 C. C. A. 150.

Where the claimant has not answered to the merits, leave to make such an amendment has been refused. *The Lowlands*, 147 Fed. 986. See *The General Sedgwick*, 29 Fed. 606; and *infra*, II, V.

50. *Douse v. Sargent*, 48 Fed. 695.

51. Where the rights of other parties would be prejudiced, an amendment changing the nature of the claim will not be allowed. *The Alanson Sumner*, 28 Fed. 670.

52. See *Newel v. Norton*, 3 Wall. (U. S.) 257, 266, 18 L. ed. 271; *The Corozal*, 19 Fed. 655. But see *The Schooner Harmony*, 1 Gall. 123, 11 Fed. Cas. No. 6,081, and *supra*, II, K, 8, g, (II.).

53. *The Corozal*, 19 Fed. 655.

54. *The Corozal*, 19 Fed. 655, as where the original libel is for mariner's wages only, thus dispensing with a stipulation for costs, while the amendment incorporates claims to which this exemption does not apply.

Where by reason of the statute of limitations the new cause of action could not be made the basis of an original suit, the court will not permit it to be added by amendment. *The Schooner Harmony*, 1 Gall. 123, 11 Fed. Cas. No. 6,081. See also *The Southwark*, 128 Fed. 149.

55. *New Cause of Damage*.—*The Thomas Melville*, 31 Fed. 486, holding that where the libel alleged negligence and specified the particular acts, such specification was in the nature of a bill of particulars, and an amendment at the trial setting out a different sort of negligence would not be permitted.

56. *The St. John*, 7 Blatchf. 220, 21 Fed. Cas. No. 12,224.

Indefiniteness or insufficiency in the averment of damages may be corrected by amendment. *Peru v. The North America*, 19 Fed. Cas. No. 11,017a.

57. *Olivair v. T. M. Co.*, 37 Fed. 894; *McCready v. The Brother Jonathan*, 15 Fed. Cas. No. 8,732a (tort action).

58. *The Charles Morgan*, 115 U. S. 69, 5 Sup. Ct. 1172, 29 L. ed. 316.

An additional element of special damage may be added by amendment, upon the hearing of exceptions to the re-

(B.) **PROCEEDINGS IN REM AND IN PERSONAM.**—Where the pleadings in a suit *in rem* show a personal liability of the claimant an amendment may be allowed changing the suit to one *in personam*,<sup>59</sup> if the case be one in which a joinder of the two sorts of proceedings would have been proper.<sup>60</sup> But in such case the appropriate process must be served.<sup>61</sup>

On sustaining exceptions to the improper joinder of proceedings *in rem* and *in personam*, an amendment changing the suit to one *in rem* may be allowed.<sup>62</sup>

(C.) **TORT AND CONTRACT.**—An amendment may be allowed changing the cause of action from one on tort to one on contract.<sup>63</sup> But leave to make such an amendment will be denied if the application is not timely.<sup>64</sup>

(III.) **Libel of Information**—An information or libel of information *in rem* may be amended both in matter of form and substance.<sup>65</sup> A new count constituting a new cause of action may be added by amendment.<sup>66</sup> But a substantially new and different charge cannot be so added.<sup>67</sup> And the appellate court in remanding a case may direct that an amendment of the information shall be allowed.<sup>68</sup>

e. **Claim and Answer.**—The claim<sup>69</sup> and answer may be amended,<sup>70</sup> but the rules with respect to the latter are stricter than those relating to libels.<sup>71</sup>

port of the commissioner, even though a new reference may thereby become necessary. *Harrison v. Hughes*, 119 Fed. 997.

59. *The Monte A*, 12 Fed. 331. See *The Zodiac*, 5 Fed. 220. But see *Kynoch v. The S. C. Ives*, Newb. Adm. 205, 14 Fed. Cas. No. 7,958; *The Young America*, Brown Adm. 462, 30 Fed. Cas. No. 18,178 and *infra*, II, V, 2, b.

60. Such procedure would not be proper in a case in which the joinder of proceedings *in rem* and *in personam* is not permissible. *The General Sedgwick*, 29 Fed. 606; *The Zodiac*, 5 Fed. 220 (a collision case). See *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. ed. 727.

61. *The Monte A*, 12 Fed. 331. But see *The Dictator* (1892), Prob. Div. 304.

62. *The San Rafael*, 141 Fed. 270. See *The Zenobia*, Abb. Adm. 48, 30 Fed. Cas. No. 18,208.

63. *Davis v. Adams*, 102 Fed. 520, 42 C. C. A. 493.

64. *The Wildenfels*, 161 Fed. 864, 89 C. C. A. 58, properly denied after the close of the testimony and the commencement of the argument.

65. *The Brig Caroline*, 7 Cranch 496, 3 L. ed. 417; *The Meteor*, 17 Fed. Cas. No. 9,498, p. 134.

Libels of information are civil pro-

ceedings within the meaning of U. S. Rev. St., § 954, allowing amendments. *Friedenstein v. United States*, 125 U. S. 224, 8 Sup. Ct. 838, 31 L. ed. 736.

Failure to disclose the statute relied upon may be corrected by amendment. *The Scotia*, 39 Fed. 429.

66. *The Schooner Harmony*, 1 Gall. 123, 11 Fed. Cas. No. 6,081; *United States v. One Hundred Twenty-Three Casks of Distilled Spirits*, 1 Abb. 573, 27 Fed. Cas. No. 15,943; *The Meteor*, 17 Fed. Cas. No. 9,498, p. 184.

Other grounds of forfeiture may be amended into an information for violation of the revenue laws. *The Haytian Republic*, 57 Fed. 508.

67. *United States v. One Hundred and Twenty-Three Casks of Distilled Spirits*, 1 Abb. 573, 27 Fed. Cas. No. 15,943.

68. *The Mary Ann*, 8 Wheat. (U. S.) 380, 5 L. ed. 641; *The Schooner Anne*, 7 Cranch (U. S.) 570, 3 L. ed. 442. See *infra*, II, G, 21, f.

69. The claim in a proceeding *in rem* cannot be amended after trial except, perhaps, upon urgent necessity. *The Prindville*, Brown Adm. 485, 19 Fed. Cas. No. 11,435.

70. *Virginia Home Ins. Co. v. Sundberg*, 54 Fed. 389.

71. **Rules Governing Leave to Amend Answer.**—“The first is, that leave is given to amend a sworn answer in re-



Admissions in the answer may be retracted by amendment<sup>72</sup> upon a proper showing,<sup>73</sup> but the court is not bound to allow such an amendment at<sup>74</sup> or after<sup>75</sup> the hearing.

An amendment setting up a new defense may be allowed in furtherance of justice,<sup>76</sup> but in the absence of surprise or mistake the respondent will not be allowed at the trial to set up by amendment an additional<sup>77</sup> or inconsistent defense;<sup>78</sup> and the same rules are applicable to amendments after the court has rendered its decision.<sup>79</sup>

f. *In Appellate Court.*—Inasmuch as on appeal the case proceeds *de novo*, amendments to the pleadings may be allowed in matters of substance as well as of form.<sup>80</sup> Admiralty rule twenty-four, although

spect to any matter of substance, with great caution; and where the amendment consists in a denial of a fact previously admitted, or in the allegation of new facts amounting to a new defense, not exhibited to the court of the first instance, I must require the grounds for the amendment, and the reasons why it has become necessary, and why its necessity was not earlier known, to be clearly and satisfactorily shown by affidavit.

"Second. Each of the proposed changes in the answer should be exhibited separately, with apt references to the original answer, so that it can be seen how the original answer will be affected by each; and so that each, when allowed, can be incorporated into the original answer, when taken into a new draft as an amended answer.

"Third. The respondent will not be allowed to require formal proof of written documents, the authenticity of which was admitted by the original answer, without an affidavit denying the signatures and explaining satisfactorily his former admission; nor to require the production of original papers, copies whereof were admitted by the original answer to 'be correct,' and were used on the trial in the district court, without showing that such originals are in the possession, or under the control of the libellant, and can be produced without causing delay, and that the production of such originals is material.

"Fourth. When an amendment seeks to withdraw an admission of a matter of fact, upon the ground that it was made because the respondent mistook the law, the court will permit it, with great caution, and only under extraordinary circumstances, if ever. See Daniell, Ch. Pr. 913.

"Fifth. The court will not allow a

defendant to recast his entire answer, after he has discovered from the opinion of the district court how it may successfully be done, so as to shift the burden of proof, or obtain, by skillful pleading other legal advantages. *Callo-way v. Dobson* (Case No. 2,325). Amendments in sworn answers in the appellate court should introduce new substantive facts, previously unknown, or correct substantial mistakes in matters of fact, and cannot be allowed on account of any mere defect of skill in drafting the original answer, in consequence of which the respondent's case was not presented on the record in the best possible manner, or so as to secure to him all possible legal advantages." *Lamb v. Parkham*, 14 Fed. Cas. No. 8,019.

72. *Kenah v. The John Markee*, 3 Fed. 45.

73. *Lamb v. Parkham*, 14 Fed. Cas. No. 8,019. See the *Montana*, 22 Fed. 730.

74. *The Mary C.*, 1 Hask. 474, 16 Fed. Cas. No. 9,201; *The Iola*, 13 Fed. Cas. No. 7,057.

75. *The Horace B. Parker*, 74 Fed. 640, 20 C. C. A. 572.

76. See *O'Brien v. Miller*, 168 U. S. 287, 18 Sup. Ct. 140, 42 L. ed. 469; *The Mabey & Cooper*, 14 Wall. (U. S.) 204, 20 L. ed. 881; *The Montana*, 22 Fed. 730; *Reppert v. Robinson*, Taney 492, 20 Fed. Cas. No. 11,703.

77. *Brennan v. Peter Hagan & Co.*, 147 Fed. 290.

78. *McCarthy v. Eggers*, 10 Ben. 688, 15 Fed. Cas. No. 8,681.

79. *The Bencliff*, 161 Fed. 909, 88 C. C. A. 514.

Counterclaim.—*The Leon*, 6 Prob. Div. (Eng.) 148.

80. *The Charles Morgan*, 115 U. S. 69, 5 Sup. Ct. 1172, 29 L. ed. 316; *The*

in terms applying only to district courts, extends also to the appellate court,<sup>81</sup> though not to the supreme court.<sup>82</sup> Such amendments, however, are allowed only in furtherance of justice<sup>83</sup> and must be confined to the original subject of controversy.<sup>84</sup> A new cause of action cannot be introduced,<sup>85</sup> though, it seems, a new defense may be.<sup>86</sup> But where the appeal is taken merely for delay, an amendment may be allowed to incorporate a claim for damages, in addition to costs occasioned thereby.<sup>87</sup>

Appellate jurisdiction cannot be conferred by amendment in the appellate court.<sup>88</sup> The appeal process cannot be amended to bring new parties into the appeal.<sup>89</sup>

The rules of the appellate court must be followed,<sup>90</sup> as where they require the intention to amend to be stated in the appeal.<sup>91</sup>

Marianna Flora, 11 Wheat. 1, 6 L. ed. 405; The Edward, 1 Wheat. 261, 4 L. ed. 86; The Morning Star, 14 Fed. 866; Warren v. Moody, 9 Fed. 673; The Morton, Brown Adm. 137, 17 Fed. Cas. No. 9,864; The Meteor, 17 Fed. Cas. No. 9,498, p. 184.

Libel of Information. — Anonymous, 1 Gall. 22, 1 Fed. Cas. No. 444.

81. The Charles Morgan, 115 U. S. 69, 5 Sup. Ct. 1172, 29 L. ed. 316.

82. Udall v. Steamship Ohio, 17 How. (U. S.) 17, 15 L. ed. 42; and *infra*, this section.

83. Reppert v. Robinson, Taney 492, 498, 20 Fed. Cas. No. 11,703. See also Lamb v. Parkman, 14 Fed. Cas. No. 8,019.

After the decision by the appellate court remanding the case with directions to enter a decree, an application to the appellate court for leave to amend was denied for lack of equity. The Horace B. Parker, 74 Fed. 640, 20 C. C. A. 572.

84. Houseman v. Schooner North Carolina, 15 Pet. (U. S.) 40, 10 L. ed. 653; The Iona, 80 Fed. 933, 26 C. C. A. 261.

In The Charles Morgan, 115 U. S. 69, 5 Sup. Ct. 1172, 29 L. ed. 316, it was held that the circuit court on appeal from the district court could, in its discretion, permit amendments to the libel bringing in a new claim for damages, provided that proper care is taken to avoid surprise and to confine the amendments to the original subject of

controversy so as not to allow matters outside of the general scope of the pleadings below to be brought in. The court, therefore, might permit an amendment so as to include a claim for damages growing out of the original cause of action and litigated in the court below, but rejected because not specified in the pleadings.

85. The J. E. Trudeau, 54 Fed. 907, 4 C. C. A. 657; The John Jay, 3 Blatchf. 67, 13 Fed. Cas. No. 7,352; The Schooner Harmony, 1 Gall. 123, 11 Fed. Cas. No. 6,081.

86. Reppert v. Robinson, Taney 492, 498, 20 Fed. Cas. No. 11,703. See The Montana, 22 Fed. 730.

87. Weaver v. Thomson, 1 Wall. Jr. 343, 29 Fed. Cas. No. 17,311.

88. Udall v. Steamship Ohio, 17 How. (U. S.) 17, 15 L. ed. 42.

89. Mason v. Ervine, 27 Fed. 240; The City of Lincoln, 19 Fed. 460.

90. The Thomas Melville, 34 Fed. 350, interpreting the rules of the circuit court of the southern district of New York. See The Charles Morgan, 115 U. S. 69, 76, 5 Sup. Ct. 1172, 29 L. ed. 316.

Where the rules provide that notice of a motion to amend must be served within fifteen days from the filing of the apostles, a notice served thirty-three days after the filing is too late. The Wildenfels, 161 Fed. 864, 89 C. C. A. 58.

91. The Montana, 22 Fed. 730.

In the supreme court<sup>92</sup> and in the circuit court of appeals,<sup>93</sup> the practice is not to allow substantial amendments to be made, but in a proper case to remand the case with directions that amendments be allowed.

g. *Necessity For.*—The evidence and decree should follow the allegations of the pleadings, and a variance must ordinarily be obviated by amendment.<sup>94</sup> But defects in the pleadings supplied by the evidence may under some circumstances be disregarded.<sup>95</sup> Thus where the case has been tried upon the merits without objections to the evidence or suggestion of surprise or desire to introduce further evidence, the pleadings will be deemed to be amended in accordance with the facts shown.<sup>96</sup>

h. *Application for Leave.*—Neither leave of court nor notice to the adverse party is necessary where an amendment is made before his appearance or the return of process.<sup>97</sup> But where he has taken some action in the case he is entitled to notice.<sup>98</sup>

How permission to amend should be applied for and by what evidence the application should be supported are matters to be determined by the court in the exercise of its discretion, in the absence of controlling rules.<sup>99</sup>

Ordinarily it is sought by motion supported by affidavits showing the nature and propriety of the proposed amendment.<sup>1</sup>

i. *When and How Made.*—The court may, in its order, limit the time within which an amendment must be filed.<sup>2</sup> But if no time is fixed therein, unnecessary delay does not justify striking out the amendment, the remedy being an application for a peremptory order.<sup>3</sup>

The form in which an amendment shall be incorporated into the record rests in the discretion of the court.<sup>4</sup> It may be made by filing either an entirely new pleading or merely a writing embodying the matter of the amendment.<sup>5</sup>

92. *The Mabey*, 10 Wall. (U. S.) 419, 19 L. ed. 963. See also *Udall v. Steamship Ohio*, 17 How. (U. S.) 17, 15 L. ed. 42.

Where the pleadings and evidence are insufficient to sustain a decree but the case appears to have merits, the appellate court in remanding the case may direct the trial court to permit amendments. *The Mary Ann*, 8 Wheat. (U. S.) 380, 5 L. ed. 641; *The Divina Pastora*, 4 Wheat. (U. S.) 52, 4 L. ed. 512; *The Schooner Adeline*, 9 Cranch (U. S.) 244, 3 L. ed. 719; *The Schooner Anne*, 7 Cranch (U. S.) 570, 3 L. ed. 442; *Davis v. Adams*, 102 Fed. 520, 42 C. C. A. 493.

93. *The Philadelphian*, 60 Fed. 423, 9 C. C. A. 54. See also *Smith v. Elmer E. Wood Transp. Co.*, 103 Fed. 685, 43 C. C. A. 347.

94. See *infra*, II, U, 6, a.

95. Where an answer is defective in failing to set forth the names of the persons alleged to be necessary parties and omitted from the libel, if the evi-

dence discloses the names of such persons this defect in the answer will be disregarded. *Card v. Hines*, 35 Fed. 598.

96. *The Maryland*, 19 Fed. 551.

97. *Thomas v. Gray*, Blatchf. & H. Adm. 493, 23 Fed. Cas. No. 13,898.

98. *The George Tulane*, 22 Fed. 799, notice of a motion to amend the libel is necessary after defendant has filed an answer and exceptions.

99. *Lamb v. Parkman*, 14 Fed. Cas. No. 8,019.

1. *Burrill v. Crossman*, 65 Fed. 104. See also *Lamb v. Parkman*, 14 Fed. Cas. No. 8,019, quoted *supra*, II, G, 21, e, note.

2. See *Harrison v. Hughes*, 119 Fed. 997, where the court allowed ten days.

3. *The Justyn*, 11 W. Rob. (Eng.) 44.

4. *Lamb v. Parkman*, 14 Fed. Cas. No. 8,019.

5. *Comings v. The Ida Stockdale*, 6 Fed. Cas. No. 3,052.



The amendment itself must not be broader than the leave granted.\*

j. *Terms.* — Terms may be imposed as a condition upon the allowance of amendments of substance,<sup>7</sup> unless made before the adverse party has taken any action in the case<sup>8</sup> or before special exceptions have been heard.<sup>9</sup> The rule is the same, although the defect amended is merely formal if special exceptions have been taken on that ground.<sup>10</sup>

Whether terms should be imposed is a matter resting in the court's discretion which is to be exercised in view of all the circumstances of the case, the rights of the parties and the admiralty rules.<sup>11</sup> The exercise of this discretion will not be reviewed on appeal.<sup>12</sup> Costs will not ordinarily be allowed on an amendment which does not prejudice the other party.<sup>13</sup>

k. *Exceptions to Amendments.* — An amended pleading may be excepted to.<sup>14</sup> And the failure to make a timely objection to an improper amendment is a waiver of the right to object.<sup>15</sup>

l. *Answer to Amendments.* — Amendments to the libel in matters of substance must be answered within the time prescribed.<sup>16</sup>

m. *Review on Appeal.* — The action of the trial court in allowing an improper amendment may be reversed on appeal.<sup>17</sup>

22. *Supplemental Pleadings.* — The terms "amendments" and "supplemental pleadings" are sometimes used as synonymous,<sup>18</sup> but the latter is more correctly applied to pleadings rendered proper or necessary by facts occurring subsequent to the filing of the original pleading.<sup>19</sup> But such facts essential to the cause of action cannot be supplied by a supplemental libel,<sup>20</sup> which, however, may be allowed to

6. *Dennis v. Slyfield*, 117 Fed. 474, 54 C. C. A. 520, holding that leave to amend to more specifically state breaches of an alleged contract is exceeded by an amended libel setting forth a different contract.

7. Adm. Rule. 24.

A denial of costs to amending party up to the time of amendment. *Douse v. Sargent*, 48 Fed. 695.

In the Appellate Court. — *The Morning Star*, 14 Fed. 86, imposing the costs below.

8. See *The George Tulane*, 22 Fed. 799.

9. *Town v. The W. Metropolis*, 28 How. Pr. 283, 24 Fed. Cas. No. 14,114.

10. Adm. Rule 24. See *Graham v. Oregon R. & Nav. Co.*, 134 Fed. 692; *The George Tulane*, 22 Fed. 799.

11. *The George Tulane*, 22 Fed. 799, imposing costs as a condition of amending a libel to state that the *res* was within the district. See *Hudson Coal Co. v. The Minnie R. Childs*, 1 N. J. L. J. 42, 12 Fed. Cas. No. 6,836.

12. *Brown v. The Brig Cadmus*, 2 Paine 564, 4 Fed. Cas. No. 1,997.

13. *Olsen v. The Schooner Edwin Post*, 6 Fed. 314.

Where formal defects which have not prejudiced the adverse party are amended, terms will not be imposed. *Olsen v. The Edwin Post*, 6 Fed. 314; *Thite v. The Cynthia*, 29 Fed. Cas. No. 17,546a.

14. See *Dennis v. Slyfield*, 117 Fed. 474, 54 C. C. A. 520; *The Corozal*, 19 Fed. 655; *The Prindville*, *Brown Adm.* 485, 19 Fed. Cas. No. 11,435.

15. *The Detroit*, *Brown Adm.* 141, 7 Fed. Cas. No. 3,832. See *Steamboat Belfast v. Boon & Co.*, 41 Ala. 50.

16. See rule 51, and *supra*, II, G, 17, b.

17. *The Iona*, 80 Fed. 933, 26 C. C. A. 261.

Review of Terms. — See *supra*, II, G, 21, j.

18. See *Thomas v. Gray*, *Blatchf. & H. Adm.* 493, 23 Fed. Cas. No. 13,898; *Dexter v. The Richmond*, 7 Fed. Cas. No. 3,865, and *supra*, II, G, 18.

19. See the title "Supplemental Pleading." But see *Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 462, 9 Sup. Ct. 469, 32 L. ed. 800.

20. *Henderson v. Three Hundred Tons of Iron Ore*, 38 Fed. 36 (supplemental cross-libel); *Eight Hundred and*

stand as an original libel and treated as of the date of the latter.<sup>21</sup>

Notice of the filing is not required where a supplemental libel is filed before the return of process and the appearance of the adverse party.<sup>22</sup>

**23. Counter-Claim, Recoupment and Set-Off.**—*a. Generally.*—There is no general doctrine of set-off recognized in admiralty.<sup>23</sup> The statutory set-off and the common-law principles governing it do not apply in such courts, which proceed rather upon equitable principles.<sup>24</sup>

The terms counter-claim, recoupment, and set-off are used indiscriminately by courts of admiralty as applying to the same thing,<sup>25</sup> and cover only those matters arising out of the same transaction set forth in the libel.<sup>26</sup>

An independent set-off or counter-claim cannot be pleaded in the answer as a defense.<sup>27</sup>

The rules in admiralty as to what are proper subjects of counter-claim are no broader than in equity or at law.<sup>28</sup> The cause of action must be between the same parties.<sup>29</sup> Those causes of action not prop-

Forty-One Tons of Iron Ore, 15 Fed. 615 (where Benedict, J., says, however, "the right of a libellant to supplement his libel as he sees fit, before the issue of the process, will not, I suppose, be denied").

21. *Henderson v. Three Hundred Tons of Iron Ore*, 38 Fed. 36; *Eight Hundred and Forty-One Tons of Iron Ore*, 15 Fed. 615.

22. *Thomas v. Gray, Blatchf. & H. Adm.* 493, 23 Fed. Cas. No. 13,898. See *Eight Hundred and Forty-One Tons of Iron Ore*, 15 Fed. 615.

23. *Hastorf v. Degnon-McLean Cont. Co.*, 128 Fed. 982; *The Frank Gilmore*, 73 Fed. 686; *Willard v. Dorr*, 3 Mason 161, 29 Fed. Cas. No. 17,680; *Snow v. Carruth*, 1 Spr. 324, 22 Fed. Cas. No. 13,144. See *O'Brien v. 1,614 Bags of Guano*, 48 Fed. 726.

The civil law in this respect has not been adopted by the admiralty. *The Steamboat Hudson, Ole. Adm.* 396, 12 Fed. Cas. No. 6,831.

24. *American Steel Barge Co. v. Chesapeake & O. Coal Agency Co.*, 115 Fed. 669, 53 C. C. A. 207, 116 Fed. 857; See also *The Wyandotte*, 136 Fed. 470; *The City of New Bedford*, 20 Fed. 57; *Willard v. Dorr*, 3 Mason 171, 29 Fed. Cas. No. 17,680.

25. See cases following, and *Hastorf v. Degnon-McLean Cont. Co.*, 128 Fed. 982.

26. *The Oceano*, 148 Fed. 131; *Kennedy v. Dodge*, 1 Ben. 311, 14 Fed. Cas. No. 7,701. See *McCaldin Bros. Co. v. Donald S. S. Co.*, 169 Fed. 992.

"Those usually allowed are where advances have been made upon the credit of the particular debt or demand for which the plaintiff sues, or which operate by way of diminished compensation for maritime services on account of imperfect performance, misconduct, or negligence, or as a restitution in value for damages sustained in consequence of gross violations of the contract." *Anderson v. Pacific Coast Co.*, 99 Fed. 109.

27. *Roney v. Chase, Talbot & Co.*, 160 Fed. 268; *Emery Co. v. Tweedie Trading Co.*, 143 Fed. 144; *Davidson v. Green*, 127 Fed. 999; *The Frank Gilmore*, 73 Fed. 686; *O'Brien v. 1,614 Bags of Guano*, 48 Fed. 726.

*Contra.*—*The C. B. Sanford*, 22 Fed. 863, holding that set-off in admiralty is derived from the civil and not the common law. And in *The City of New Bedford*, 20 Fed. 57, which was a libel for seaman's wages, the respondent was allowed to set-off the amount which he had been compelled to pay on attachment in satisfaction of a claim against the libellant for necessities. See also *The Cheapside* (1904), Prob. Div. (Eng.) 339.

28. "Unliquidated damages cannot be the subject of a set-off. To authorize a set-off the debts must be between the parties in their own right and must be of the same kind or quality and be clearly ascertained or liquidated. They must be certain and determinate debts." *The Zouave*, 29 Fed. 296.

29. *White v. The Banier*, 45 Fed.



erly cognizable in admiralty cannot be adjudicated by way of set-off or counter-claim, unless they form an integral part of a maritime transaction.<sup>30</sup> A counter-claim or set-off will not be adjudicated if not pleaded.<sup>31</sup> But if properly pleaded it may be proved to reduce or defeat libellant's claim.<sup>32</sup>

When a libel joins several distinct causes of action, a set-off or counter-claim applies only to that cause of action that is based upon the same transaction.<sup>33</sup>

b. *Where Damages Exceed Those Claimed in Libel.*—Although the damages on the counter-claim exceed those claimed by the libellant, the respondent may at his election plead it defensively and not make it the basis of a cross-libel.<sup>34</sup> In such case, however, affirmative relief cannot be decreed,<sup>35</sup> nor can a subsequent suit be maintained for the

773. See also *The Zouave*, 29 Fed. 296. But see *infra*, II, G, 24, b.

30. See *The Steamboat Hudson*, Ole. Adm. 396, 12 Fed. Cas. No. 6,831; *Bains v. The James and Catherine*, Baldw. 554, 2 Fed. Cas. No. 756. But see *The Cheapside* (1904), Prob. Div. (Eng.) 339.

A claim against the libellant which does not arise out of the contract upon which the suit is based, but is a distinct and independent demand over which admiralty has no jurisdiction, is not a proper set-off. *Dexter v. Munroe*, 2 Spr. 39, 7 Fed. Cas. No. 3,863.

In an action for wages by a pilot, the indebtedness of the libellant for a house is not a proper set-off unless the answer alleges that the pilot's services were rendered in consideration for the house. *The Two Brothers*, 4 Fed. 158.

31. *The New York*, 108 Fed. 102, 47 C. C. A. 232. See also *White v. The Ranier*, 45 Fed. 773.

On a libel in rem for collision by the owner of one of the vessels, if the claimant wishes to hold the other vessel liable for its alleged negligence he should plead his injuries in the answer or in a cross libel. *The Sapphire*, 18 Wall. (U. S.) 51, 21 L. ed. 814. See also *The North Star*, 106 U. S. 17, 27, 1 Sup. Ct. 41, 27 L. ed. 91.

32. *The Edward H. Blake*, 92 Fed. 202, 34 C. C. A. 297; *Davidson v. Green*, 127 Fed. 999; *Ebert v. The Schooner Reuben Dond*, 3 Fed. 520. See *Winsor v. Sampson*, 1 Spr. 548, 30 Fed. Cas. No. 17,883 (against libel for master's wages); *Marshall v. Crawford*, 4 Sawy. 37, 16 Fed. Cas. No. 9,126.

The court may inquire into all the breaches of any maritime contract which may be the subject of the action and all damages suffered thereby however peculiar they may be and what-

ever issues they involve. *Emery Co. v. Tweedie Trading Co.*, 143 Fed. 144. See also *The Electron*, 48 Fed. 689; *Union Steamship Co. v. Bow*, 10 Can. Exch. 403.

In a suit for freight money the damages to the cargo is a proper matter for recoupment (*The Kennedy v. Dodge*, 1 Ben. 311, 14 Fed. Cas. No. 7,701), as are damages for non-delivery of part of the goods. *Snow v. Carruth*, 1 Spr. 324, 22 Fed. Cas. No. 13,144.

In a suit for wages, damages or losses incurred by reason of libellant's negligent performance of his duties are a proper set-off, but not independent matters not connected with the services in question. *The Steamboat Hudson*, Ole. Adm. 396, 12 Fed. Cas. No. 6,831. See also *Bains v. The James and Catherine*, Baldw. 544, 2 Fed. Cas. No. 756. But see *The City of New Bedford*, 20 Fed. 57.

33. Where a pilot sues for wages for services performed at different places and under several contracts, a counter-claim for damages caused by his negligence on one occasion, applies only to the wages due under the contract under which he was then working. *The Tom Lysle*, 48 Fed. 690.

34. *Nichols v. Tremlett*, 1 Spr. 361, 10 Fed. Cas. No. 10,247.

35. *The Dove*, 91 U. S. 381, 383, 23 L. ed. 354; *Hawgood & Avery Transit Co. v. Dingman*, 94 Fed. 1011, 36 C. C. A. 627; *The Tom Lysle*, 48 Fed. 690 (where the answer was designated as "answer and cross-libel"); *The Nadia*, 18 Fed. 729; *Ebert v. The Schooner Reuben Dond*, 3 Fed. 529 (collision case); *Snow v. Carruth*, 1 Spr. 324, 22 Fed. Cas. No. 13,144; *The Kennedy v. Dodge*, 1 Ben. 311, 14 Fed. Cas. No. 7,701. See also *The Edward H. Blake*, 92 Fed. 202, 34 C. C. A. 297.



recovery of an excess of damages.<sup>36</sup> But the fact that the respondent has relied upon the misconduct of the libelant to defeat the cause of action and not to diminish the recovery does not estop him from afterwards making it the basis of an independent suit.<sup>37</sup>

24. **Cross-Libel.** — a. *Definition.* — A cross-libel is a libel brought by a defendant in the suit against the libelant or other defendants in the original suit or against both, touching matters in question in the original libel.<sup>38</sup>

b. *Subject-Matter of.* — The cross-libel recognized by admiralty rule 53 must arise out of the same cause of action as the libel.<sup>39</sup> The term "cause of action" is used, however, in such rule in a general sense, and means the same transaction, dispute or subject-matter which forms the basis of the libel.<sup>40</sup>

36. *The Ciampi Emilia*, 39 Fed. 126; *Snow v. Carruth*, 1 Spr. 324, 22 Fed. Cas. No. 13,144; *Nichols v. Tremlett*, 1 Spr. 361, 18 Fed. Cas. No. 10,247.

37. Thus where a shipper sued for freight alleges the negligent loss and non-delivery of part of the cargo to defeat the recovery of freight on that portion, but not as a counter-claim to diminish the amount of freight money due on the remainder of the cargo, he may afterwards file a cross-libel or a new suit asking for damages for the portion of the cargo negligently lost. *Nichols v. Tremlett*, 1 Spr. 361, 18 Fed. Cas. No. 10,247.

38. *The Dove*, 91 U. S. 381, 23 L. ed. 354.

Against Interveners. — See *The Eliza Lines*, 61 Fed. 308, 321.

39. *The C. B. Sanford*, 22 Fed. 863.

40. *Genthner v. Wiley*, 85 Fed. 797; *Vianello v. The Credit Lyonnais*, 15 Fed. 637. See *Kemp v. Brown*, 43 Fed. 391. See also *The Venezuela*, 173 Fed. 834. But see *Southwestern Transp. Co. v. Pittsburg Coal Co.*, 42 Fed. 920.

"New and distinct matters not included in the original bill or libel should not be embraced in the cross suit, as they cannot properly be examined in such a suit, for the reason that they constitute the proper subject-matter of a new original bill or libel. Matters auxiliary to the cause of action set forth in the original libel or bill may be included in the cross suit, and no others, as the cross suit is, in general, incidental to and dependent upon the original suit." *The Dove*, 91 U. S. 381, 385, 23 L. ed. 354.

Where the same contract provides for services of the libelants as stevedores and also for towage services, in a suit

for the money earned as stevedores a cross-bill may be filed for damages caused during the towage service. "A construction must be given to the rule sufficiently broad to allow all matters in dispute between the parties which must necessarily be considered in the determination of the original case, to be fully considered for all purposes, so that the rights of both parties may be protected and finally adjudicated in one suit. *Genthner v. Wiley*, 85 Fed. 797. The demand pleaded in the cross libel may be properly set up as a defense in the original suits. In so holding, I base my opinion, not alone upon the fact that the agreement for towage service is contained in the same written instrument which contains the agreement under which the libelants worked as stevedores, but also upon the fact that the contract is by its own terms founded upon the mutual promises of the respective parties as its consideration, and there is no other consideration to make the obligations of each party binding, except the sum of one dollar paid by each to the other, which, in effect, leaves the contract to rest entirely, as to consideration, upon the mutual promises of the parties. The agreement, therefore, of the libelants to supply tug boats to perform towage services is the consideration for the agreement of the cross libelant to employ the libelants and pay them for loading the vessels, and a demand for damages resulting from a breach of the contract to perform towage services is clearly a counter-claim arising out of the same cause of action for which the original libels were filed." *The Highland Light*, 88 Fed. 296.

In a suit for freight money, damages due to delay and deviation may

Rule 53 was intended to make a cross-libel in admiralty proper in the same class of cases in which a cross-suit for relief in equity can be maintained.<sup>41</sup> The cause of action must be between the same parties.<sup>42</sup> But where the party ultimately liable has been brought in by petition of the respondent, he may file a cross-libel based upon the transaction in question.<sup>43</sup> The claim must be a valid and subsisting cause of action,<sup>44</sup> and one which could also be made the subject of a counter-claim or set-off in admiralty.<sup>45</sup> But facts which would constitute a defense to the libel are not for that reason alone proper subjects for a cross-libel, since they may not arise out of the same transaction.<sup>46</sup> A cause of action not within the admiralty jurisdiction cannot be made the subject of a cross-libel.<sup>47</sup>

*c. Suits In Personam and In Rem.*—A cross-libel may be filed in a suit *in personam* as well as in a suit *in rem*.<sup>48</sup> And in a suit *in rem*, a cross-libel *in personam* may be filed.<sup>49</sup> But a cross-libel *in rem* against the original libellant's vessel cannot be entertained unless such vessel is within the territorial jurisdiction of the court.<sup>50</sup>

be set up in a cross-libel. *Nichols v. Tremlett*, 1 Spr. 361, 18 Fed. Cas. No. 10,247.

In a suit based on collision, a claim for salvage occasioned thereby is not a proper subject for a cross-libel since the two claims do not arise out of the same cause of action. *Cromwell v. The Schooner Theresa Wolf*, 4 Fed. 152.

In a suit for breach of charter party the claimant may file a cross-suit for freight and demurrage for wages of men whom the charterers should have furnished, and for the value of the vessel lost by reason of the charterers' alleged negligence. *The Giles Loring*, 48 Fed. 463, 467. Compare *McCaldin Bros. Co. v. Donald S. S. Co.*, 169 Fed. 992.

41. *Southwestern Transp. Co. v. Pittsburgh Coal Co.*, 43 Fed. 920. See *Bowker v. United States*, 186 U. S. 135, 139, 22 Sup. Ct. 802, 46 L. ed. 1090; *The Dove*, 91 U. S. 381, 385, 23 L. ed. 354.

42. *The Ping-on v. Blethen*, 11 Fed. 607. Compare *supra*, II, G, 23.

Where Suit Is Brought in Representative Capacity by Master.—See *Old Dominion S. S. Co. v. Kufahl*, 100 Fed. 331, and *supra*, II, E. 4, a. (II), (B).

43. *The George H. Parker*, 1 Flip 606, 10 Fed. Cas. No. 5,334.

44. Where detention and sale of the res has been needlessly permitted by failing to secure its release upon stipulation, damages therefor cannot be made the basis of a cross-suit. And in

the absence of malice, the arrest, detention and sale of property gives no right of action. *Henderson v. Three Hundred Tons of Iron Ore*, 38 Fed. 36.

Unnecessary cost of a bond, due to an excessive claim of damages in the libel, cannot be recovered by cross-libel, since it might have been avoided by a summary application to the court for leave to file a stipulation in the proper amount. *The Stelvio*, 30 Fed. 509.

Where a cross-libel has been prematurely filed, the court is not bound to dismiss it upon motion of the cross-libellant so that he may file a new libel in another jurisdiction. An order may be made that a supplemental cross-libel be filed, under which the damages claimed may be adjudicated. *Henderson v. Three Hundred Tons of Iron Ore*, 38 Fed. 36.

45. *Emery Co. v. Tweedie Trading Co.*, 143 Fed. 144.

46. On a libel for salvage, the wrongful act of the libellant causing the necessity for the service would be a defense, but is not a proper subject for a cross-libel. *Southwestern Transp. Co. v. Pittsburgh Coal Co.*, 42 Fed. 920.

47. See *The Electron*, 48 Fed. 689.

48. *Genthner v. Wiley*, 85 Fed. 797.

49. *The Highland Light*, 88 Fed. 296. See *The Eliza Lines*, 61 Fed. 309; *The Cheapside* (1904), Prob. Div. (Eng.) 339.

50. *The Steamer Bristol*, 4 Ben. 55, 4 Fed. Cas. No. 1,889.

d. *Necessity of Filing.* — Although a cross demand exists, the respondent is not required to file a cross-libel based upon it.<sup>51</sup> He may make it the basis of a separate suit,<sup>52</sup> or he may, at his election, plead it by way of counter-claim in his answer.<sup>53</sup> But if he intends to claim a decree in the same suit for damages he must file a cross-libel<sup>54</sup> embodying all the facts necessary to be pleaded.<sup>55</sup> The prayer of the answer cannot be made a substitute therefor.<sup>56</sup> And an agreement by the parties that the answer may stand as a cross-libel is not good practice.<sup>57</sup>

e. *Filing and Proceedings Thereon.* — (I.) **Generally.** — Respondents must proceed as in an original suit, by filing the cross-libel, taking out process and having it served in the usual way.<sup>58</sup> No particular time is prescribed within which a cross-libel must be filed, but the filing should not be unreasonably delayed.<sup>59</sup>

Service may be made on the proctor who has appeared for the adverse party, where the latter is out of the jurisdiction.<sup>60</sup>

The court may treat the original and cross-libel as one suit.<sup>61</sup> And suits filed independently of each other, which are in effect cross-suits, may be treated as such and consolidated.<sup>62</sup>

(II.) **Objections.** — Objection to an improper cross-libel must be taken before a trial on the merits.<sup>63</sup>

(III.) **Security.** — (A.) **GENERALLY.** — The admiralty rules provide that respondent shall furnish security in the usual amount and form to respond in damages as claimed in the cross-libel unless the court for cause shown shall otherwise direct, and that the original suit shall be stayed until such security is given.<sup>64</sup> This rule is based upon a sim-

51. *The New York*, 108 Fed. 102, 47 C. C. A. 232.

52. *Brooklyn & New York Ferry Co. v. The Morrisania*, 35 Fed. 558, where suit was filed in another district. See *The Ciampi Emilia*, 39 Fed. 126.

53. *Snow v. Carruth*, 1 Spr. 324, 22 Fed. Cas. No. 13,144; *Nichols v. Tremlett*, 1 Spr. 361, 18 Fed. Cas. No. 10,247.

54. See *supra*, II, G, 23, b; and *Bowker v. United States*, 186 U. S. 135, 140, 22 Sup. Ct. 802, 46 L. ed. 1090.

In *Collision Case.* — See *The North Star*, 106 U. S. 17, 27, 1 Sup. Ct. 41, 27 L. ed. 91; *The Sapphire*, 18 Wall. (U. S.) 51, 21 L. ed. 814.

55. *The Bertha*, 91 Fed. 272, 33 C. C. A. 509. See *supra*, II, G, 14, c.

56. *The Edward H. Blake*, 92 Fed. 202, 34 C. C. A. 297.

57. *Ward v. Chamberlain*, 21 How. (U. S.) 572, 16 L. ed. 219.

58. *Hawgood & Avery Transit Co. v. Dingman*, 94 Fed. 1011, 36 C. C. A. 627.

59. See *Nichols v. Tremlett*, 1 Spr. 361, 18 Fed. Cas. No. 10,247, nine months after answer held no unreason-

able delay under the circumstances.

60. *The Eliza Lines*, 61 Fed. 309, 322, discussing the authorities and the analogous practice in equity.

But in *Nichols v. Tremlett*, 1 Spr. 361, 18 Fed. Cas. No. 10,247, it was held that service on the proctor of the non-resident libellant was not sufficient although the court might stay the original suit until the libellant therein appeared in the cross suit. See *The Toledo*, 1 Brown Adm. 445, 23 Fed. Cas. No. 14,077.

61. *Empresa Maritima a Vapor v. North & South America Steam Nav. Co.*, 16 Fed. 502. See *infra*, II, G, 24, e, (IV).

62. *The Mersey* (1901), Prob. Div. (Eng.) 369, holding that if suits are filed simultaneously or practically so, that suit in which the largest claim is made is treated as the principal suit; otherwise priority in point of filing governs this matter. See *The Rougemont* (1893), Prob. Div. (Eng.) 275.

63. *The Ping-on v. Blethen*, 11 Fed. 607.

64. Adm. Rule 53.



ilar English statute.<sup>65</sup> The court in its discretion may refuse to order the giving of security where requiring it would be an injustice, the burden being on respondent in the cross-libel to show such injustice.<sup>66</sup> So, too, a motion for security may be denied where the respondent satisfies the court of his ability to pay the cross-claim.<sup>67</sup> But the fact that the cross-libelant has not furnished a stipulation for the release of the *res* is not sufficient ground for denying such motion.<sup>68</sup> The original libelant cannot under this rule exact security to which he is not otherwise entitled from the cross-libelant.<sup>69</sup>

The inability of the respondent in the cross-suit to furnish security is not necessarily a sufficient excuse,<sup>70</sup> though the court for this reason may in its discretion dispense with or modify the requirement.<sup>71</sup>

Unreasonable delay in asking for security is sufficient ground for denying the application.<sup>72</sup> The motion should not be delayed until the testimony has been taken,<sup>73</sup> or the case is called for trial.<sup>74</sup> But

The object of the rule is to place the parties upon an equal footing. *Lochmore S. S. Co. v. Hagar*, 73 Fed. 642. It "was designed to correct the inequality and injustice of the process of the court *in rem* being used to obtain security in favor of one party, in reference to a single subject of dispute, while it was denied to the other party." *Empresa Maritinia a Vapor v. North & South America Steam Nav. Co.*, 16 Fed. 502. It was also intended to remedy the inability of the cross-libelant to get service on or adequate redress from a foreign or non-resident libelant. *The Toledo*, 1 Brown Adm. 445, 23 Fed. Cas. No. 14,077.

A reasonable time should be allowed for furnishing the required security. *Empresa Maritinia a Vapor v. North & South America Steam Nav. Co.*, 16 Fed. 502. See *The Charkieh*, 42 L. J. Adm. 70, 29 L. T. N. S. 404, L. R. 4 A. & E. 120, in which a week was given.

The fact that the master institutes the suit on behalf of the owners does not withdraw the case from the application of the rule. *Old Dominion S. S. Co. v. Kufahl*, 100 Fed. 331.

65. *Old Dominion S. S. Co. v. Kufahl*, 100 Fed. 331. See *The Charkieh*, 42 L. J. Adm. 70, 29 L. T. N. S. 404, L. R. 4 A. & E. 120; *The Mersey* (1901), Prob. Div. (Eng.) 369; *The Newbattle*, 10 Prob. Div. (Eng.) 33.

66. *Morse Ironworks Co. v. Luckenbach*, 123 Fed. 332 (denying the motion for security where the pleadings and affidavits rendered it doubtful whether the cross-libelant had any claim upon which he could recover an affirmative

judgment); *Empresa Maritinia a Vapor v. North & South America Steam Nav. Co.*, 16 Fed. 502.

67. *Lochmore S. S. Co. v. Hagar*, 73 Fed. 642.

68. *Empresa Maritinia a Vapor v. North & South America Steam Nav. Co.*, 16 Fed. 502.

69. *The Rougemont* (1893), Prob. Div. (Eng.) 275, which was a libel *in personam* and cross-libel *in rem*. The original libelant having given security for the release of his vessel contended that he was entitled to security from the cross-libelant on the theory that the original suit was, for the purposes of the rule, the cross-suit.

70. *Old Dominion S. S. Co. v. Kufahl*, 100 Fed. 331. See *infra*, II, G, 24, e, (III), (D); II, K, 2, c.

71. *Inability to Give Security*.—"Where the respondents appear to have a meritorious case, and show circumstances proving their inability to give security under the rule, the court might, in its discretion, according to the circumstances, either deny the order for security altogether, or, on failure to give the security required, order the vessel to be sold, or to be discharged upon the claimant's own stipulation without other security." *Empresa Maritinia a Vapor v. North & South America Steam Nav. Co.*, 16 Fed. 502.

72. *Franklin Sugar Ref. Co. v. Funch*, 66 Fed. 342, *affirmed* in 73 Fed. 844, 20 C. C. A. 61.

73. *Franklin Sugar Ref. Co. v. Funch*, 66 Fed. 342, *affirmed* in 73 Fed. 844, 20 C. C. A. 61.

74. *The George H. Parker*, 1 Flap. 606, 10 Fed. Cas. No. 5,334.

in the latter case, if the cause is continued at the instance of the original libellant, the motion may be renewed and granted.<sup>75</sup>

(B.) PROCEEDINGS IN WHICH REQUIRED.—This rule applies to suits both *in personam*<sup>76</sup> and *in rem*,<sup>77</sup> and covers all cases in which a cross-libel has properly been filed.<sup>78</sup>

(C.) COMPELLING FURNISHING OF SECURITY.—The respondent in the cross-libel cannot lawfully refuse to furnish the security demanded, but the court may enforce obedience to its order by appropriate coercive measures, its power in this respect not being limited to staying the original suit.<sup>79</sup>

(D.) AMOUNT OF.—The security furnished should be in the usual amount required of libellants.<sup>80</sup> The court may, however, in its discretion, upon a sufficient showing, reduce the amount.<sup>81</sup>

(IV.) Trial and Disposition.—(A.) GENERALLY.—The original and cross-suit may be tried together or separately, since the pleadings in each are complete without reference to each other, but they are usually tried together.<sup>82</sup> The court may stay proceedings<sup>83</sup> in one, pending appearance in<sup>84</sup> or the determination of the other.<sup>85</sup>

75. The George H. Parker, 1 Flip. 606, 10 Fed. Cas. No. 5,334.

76. Genthner v. Wiley, 85 Fed. 797. See The Charkieh, 42 L. J. Adm. 70, 29 L. T. N. S. 404, L. R. 4 A. & E. 120.

The rule "seems broad enough to cover all cases where a cross-libel is filed and the application for security is within its provisions." Morse Iron-works, etc. Co. v. Luckenbach, 123 Fed. 332.

Rule Questioned.—In Franklin Sugar-Ref. Co. v. Funch, 66 Fed. 342, the rule of the text is questioned but not passed upon. See *s. c.* on appeal, 73 Fed. 844, 20 C. C. A. 61. But the same judge, in Lochmore S. S. Co. v. Hagar, 78 Fed. 642, admits that the language of rule 53 covers all cases of cross-libel and holds that it applies to a libel *in personam* accompanied by an attachment.

77. The Toledo, 1 Brown Adm. 445, 23 Fed. Cas. No. 14,077. See also The Electron, 48 Fed. 689.

78. See *supra*, II, G, 23, b and c; and The George H. Parker, 1 Flip. 606, 10 Fed. Cas. No. 5,334; The Steamer Bristol, 4 Ben. 55, 4 Fed. Cas. No. 1,889.

79. "It is competent for the court to enforce its order for security, in case of any wilful disobedience or neglect in complying with it, by any further appropriate order in either suit. If the court may enforce its order by disallowing a party's claim or defense, it may, as a punishment for wilful de-

fault, release a part of his security, especially as this would in time become worthless. The Virgo, 13 Blatch. 255, 257." Empresa Maritima a Vapor v. North & South America Steam Nav. Co., 16 Fed. 502.

80. Rule 53. And see *infra*, II, K.

81. See Compagnie Univ. du Canal Int. v. Belloni, 45 Fed. 587, holding insufficient, for this purpose, an affidavit by respondent in the cross-suit that he could not give security in the amount in the libel "without serious embarrassment to his business and great expense and sacrifice."

82. Bowker v. United States, 186 U. S. 135, 22 Sup. Ct. 802, 46 L. ed. 1090; The Dove, 91 U. S. 381, 23 L. ed. 354. See The Rougemont (1893), Prob. Div. (Eng.) 275.

An appeal in the cross-suit from an order denying an application for security and for a stay pursuant to rule 53 does not suspend proceedings in the original suit. Franklin Sugar Ref. Co. v. Funch, 73 Fed. 844, 20 C. C. A. 61.

83. Staying Original Suit Until Security Is Given.—See *supra*, II, G, 24, e, (III).

84. The Eliza Lines, 61 Fed. 309, 323; Nichols v. Tremlett, 1 Spr. 361, 18 Fed. Cas. No. 10,247; Adm. Rule 53. But see The Heart of Oak, 29 L. J. Adm. 78; The Maria, 39 L. T. 549.

85. Where respondent has filed a libel in another district on the counter-claim for damage in a larger sum than is claimed by libellant in the original

(B.) EFFECT OF DISMISSAL ON ORIGINAL SUIT. — The dismissal of the cross-libel by the court does not affect the rights of the parties in the original suit which is tried and disposed of the same as if the cross-suit had never been commenced.<sup>86</sup> Nor does such dismissal for want of jurisdiction give a right to appeal to the supreme court until the original suit is disposed of.<sup>87</sup>

(C.) EFFECT OF DISMISSAL OF ORIGINAL SUIT. — Although the original suit be dismissed, the cross-suit may proceed as an independent proceeding.<sup>88</sup>

25. Petitions and Motions. — As under other systems of practice<sup>89</sup> a motion may be resorted to in admiralty<sup>90</sup> at almost any stage of the cause, where some more appropriate method is not provided,<sup>91</sup> for the purpose of securing relief incidental thereto or of questioning the propriety of some action taken by the adverse party. A motion, the determination of which involves a decision upon the merits of the controversy, cannot properly be made before an answer has been filed,<sup>92</sup> and the issues thereon determined.<sup>93</sup>

suit, entry or execution of a decree in the latter may be stayed pending the determination of the former. The *Ciampi Emilia*, 39 Fed. 126.

86. Although a decree not appealed from, dismissing the cross-libel, *res judicata* so far as a subsequent suit upon the same cause of action is concerned, it does "not impair the right of the respondent in the original suit to avail himself of every legal and just defense to the charge there made which is regularly set in the answer, for the plain reason that the adverse decree in the cross-suit does not dispose of the answer in the original suit." The *Dove*, 91 U. S. 381, 23 L. ed. 354.

87. *Bowker v. United States*, 186 U. S. 135, 22 Sup. Ct. 802, 46 L. ed. 1090.

88. The *Eliza Lines*, 61 Fed. 309, 322. See *Bowker v. United States*, 186 U. S. 135, 22 Sup. Ct. 802, 46 L. ed. 1090, and the title "Cross-Bill."

But if not so connected with the subject-matter of the original suit as to be maintainable, it must be dismissed. *Kemp v. Brown*, 43 Fed. 391.

89. See the title "Motions."

90. Motion to Dismiss Libel. — The *W. J. Hingston*, 144 Fed. 560; The *John C. Sweeney*, 55 Fed. 540. See II, P, 3. See *infra*, II, Y, 7, b.

Motion to Strike Out. — See *supra*, II, G, 19, f. Pleading improperly filed. Eight Hundred and Forty Tons of Iron Ore, 15 Fed. 615. See *infra*, II, Y, 8, d. Jurisdictional questions will not or-

dinarily be determined upon motion or exceptions but must be presented by the pleadings and proofs. *Lands v. A. Cargo of 227 Tons of Coal*, 4 Fed. 478.

Motion to Set Aside Proceedings. — See *Nelson v. Bell*, 17 Fed. Cas. No. 10,101a; and *supra*, II, I, 3, d.

To Set Aside Service of Process. — See *United States v. Bedouin S. S. Co.*, 167 Fed. 863.

For Leave to Amend. — See *supra*, II, G, 21, h.

To Question Irregularity. — *Martin v. Walker*, Abb. Adm. 579, 15 Fed. Cas. No. 9,170; The *Columbus*, 1 Abb. Adm. 37, 6 Fed. Cas. No. 3,041 (in commissioner's report).

Motions for distribution of proceeds as a method of determining question of priority. *Jaurekhe v. The S. G. Troop*, 13 Fed. Cas. No. 7,231.

For New Trial or Rehearing — See *infra*, II, W.

Necessity of incorporating all objections in first motion. See *Nelson v. Bell*, 17 Fed. Cas. No. 10,101a.

Cross-Motion. — See The *Bark Laurens*, 1 Abb. Adm. 302, 14 Fed. Cas. No. 8,121.

91. See *supra*, II, G, 20; II, P, 3.

92. *Burr v. The St. Thomas*, 4 Fed. Cas. No. 2,194a. See *Wicks v. Ellis*, Abb. Adm. 444, 29 Fed. Cas. No. 17,614.

93. A motion for judgment on the pleadings cannot be granted where issues are raised by the answer, and interrogatories propounded by it have not been answered. The *Oregon*, 116 Fed. 482, 53 C. C. A. 650.



There are also certain classes of proceedings collateral or incidental to suits in admiralty which are properly instituted by petition rather than by an independent libel.<sup>94</sup>

**Affidavits.**—The showing of facts required in support of or in opposition to such motions should be by means of affidavits,<sup>95</sup> which may be made by proctors and attorneys when the facts cannot be supposed to rest peculiarly in the knowledge of the party.<sup>96</sup>

**H. MESNE PROCESS.**—1. **Generally.**—Upon the filing of the libel and complying with the rules of court process issues. The latter consists of a writ in the name of the President of the United States directed to the marshal, under the seal of the court, attested by the judge thereof, and signed by the clerk.<sup>97</sup> It recites the filing and nature of the libel, the character of process prayed for, and directs the marshal how to proceed, being governed in this respect by the character of the suit, the prayer and the rules of court.<sup>98</sup> Although several defendants or ships are made defendant, the process may properly include only those against whom it is prayed.<sup>99</sup>

2. **Suits In Personam.**—a. *Generally.*—In suits *in personam* the process may be a simple monition to the defendant to appear and answer, or it may require that he be arrested, or if he cannot be found, that his goods and chattels or credits and effects be attached.<sup>1</sup>

b. *Arrest of Person.*—While the process may direct the arrest of the defendant,<sup>2</sup> there can be no imprisonment for debt on such process in those states where imprisonment for debt has been abolished in similar or analogous cases.<sup>3</sup> This qualification, however, has been held

94. See *The John McDermott*, 109 Fed. 90.

Petition for process requiring a person charged with the possession of freight or proceeds of marine property to show cause why they should not be deposited in court, etc., is not designed to be an independent suit, but merely a means of getting possession after the institution of the suit *in rem*. *Snow v. 180½ Tons of Scrap Iron*, 11 Fed. 517.

**Petition After the Term to Reopen the Decree.**—*The Madgie*, 31 Fed. 926. Petition by sheriff of state court or marshal of another district to have question of priority of jurisdiction over *res* determined. *The Circassian*, 1 Ben. 128, 5 Fed. Cas. No. 2,721.

**For Payment Out of Proceeds.**—*The Selt*, 3 Biss. 344, 21 Fed. Cas. No. 12,649. See *supra*, II, L, 5 and 6.

**Of Intervention.**—See *supra*, II, L, Under Admiralty Rule 59.—See *supra*, II, L, 9.

95. See *United States v. Bedouin S. S. Co.*, 167 Fed. 863; *The Falcon*, 4 Blatchf. 367, 8 Fed. Cas. No. 4,618.

96. *The Brig Harriet*, Ole. Adm. 222, 11 Fed. Cas. No. 6,096.

97. See U. S. Rev. St., §§ 911, 913

and *Manro v. Almeida*, 10 Wheat. (U. S.) 473, 6 L. ed. 369; *Bowler v. Eldridge*, 18 Conn. 1; Adm. Rules, 7, 9.

A monition and attachment signed and sealed by one who is neither clerk nor deputy is void. *Ker v. Bryan*, 163 Fed. 233, 90 C. C. A. 179.

**Necessity of Order.**—See Adm. Rule 7; *The Berkeley*, 58 Fed. 920 (local rule of court).

98. See Adm. Rules, 1, 2, 47, and *infra*, this section.

99. *The F. W. Vosburgh*, 93 Fed. 481.

1. Adm. Rules 2, 7, and local rules.

2. Adm. Rule 2; *Hodge v. Bemis*, 12 Fed. Cas. No. 6,557; *Hanson v. Fowle*, 1 Sawy. 497, 11 Fed. Cas. No. 6,041. But see *The Clara*, Swabey (Eng.) 1.

3. U. S. Rev. St., § 990; *The Carolina*, 14 Fed. 424; *The Kentucky*, 4 Blatchf. 448, 13 Fed. Cas. No. 7,717; *Bell v. Nelson*, 3 Fed. Cas. No. 1,257 (holding that one arrested after the change in the rules but before the publication, is entitled to its benefit). See *Louisiana Ins. Co. v. Nickerson*, 2 Low. 310, 15 Fed. Cas. No. 8,359.

**Rule Applicable to Both Mesne and Final Process.**—*The Kentucky*, 4

inapplicable to suits for unliquidated damages, these not being "debts."<sup>6</sup>

c. *Foreign Attachment*.—(I.) Generally.—The only attachment in admiralty, besides the attachment or arrest of the person<sup>5</sup> or the thing which is the subject of the libel,<sup>6</sup> is what is known as foreign attachment, which is the attachment of the defendant's goods and chattels or his credits and effects, when he is absent from the jurisdiction or cannot be found.<sup>7</sup>

(II.) When Proper.—This attachment is an alternative process and is proper only when the defendant cannot be found within the territorial jurisdiction of the court;<sup>8</sup> but under such circumstances, attachment may be resorted to whether defendant be a resident, non-resident, or foreigner.<sup>9</sup> The fact that defendant cannot lawfully be arrested under the state law does not justify an attachment.<sup>10</sup> And it has been held that owing to the form of the admiralty rule there can lawfully be no attachment except where the defendant could, if present, have been arrested.<sup>11</sup>

The arrest<sup>12</sup> or appearance<sup>13</sup> of the defendant renders any subsequent attachment of his property unlawful, as does a *bona fide* conveyance to a third person.<sup>14</sup>

Blatchf. 448, 13 Fed. Cas. No. 7,717, process against surety on stipulation.

Prior to the enactment of rule 47 some courts interpreted the Acts of 1839 and 1841, abolishing imprisonment for debt where it does not exist under the state law, as inapplicable to proceedings in admiralty. *Gardner v. Isaacson*, Abb. Adm. 141, 9 Fed. Cas. No. 5,230; *Gaines v. Travis*, Abb. Adm. 422, 9 Fed. Cas. No. 5,180. See also *Hanson v. Fowle*, 1 Sawy. 497, 11 Fed. Cas. No. 6,041. But see *Campbell v. Hadley*, 1 Spr. 470, 4 Fed. Cas. No. 2,358. See also *Lee v. Thompson*, 3 Woods 167, 15 Fed. Cas. No. 8,202. And see *Louisiana Ins. Co. v. Nickerson*, 2 Low. 310, 15 Fed. Cas. No. 8,539, where the Act of 1867, of similar import, is said to apply in admiralty as well as other courts.

4. *Bolden v. Jensen*, 69 Fed. 745 (disapproving the contrary cases of *The Bremena v. Card*, 38 Fed. 144; *Chiesa v. Conover*, 36 Fed. 334; *The Carolina*, 14 Fed. 424; *Hanson v. Fowle*, 1 Sawy. 497, 11 Fed. Cas. No. 6,041). Compare *Stroheim v. Deimel*, 77 Fed. 802, 23 C. C. A. 467; *United States v. Walsh*, Deady 281, 28 Fed. Cas. No. 16,635. But see *Stone v. Murphy*, 86 Fed. 158.

5. See *supra*, II, H, 2, b.

6. See *infra*, II, H, 3 and 4.

7. *Atkins v. The Disintegrating Co.*, 18 Wall. (U. S.) 272, 21 L. ed. 841; *The Alpena*, 7 Fed. 361; *Cushing v.*

*Laird*, 4 Ben. 70, 6 Fed. Cas. No. 3,508.

The process of foreign attachment originated in the early admiralty practice and was adopted from the civil law. *Manro v. Almeida*, 10 Wheat. (U. S.) 473, 489, 6 L. ed. 369, holding this practice in America not borrowed from or dependent upon the custom of London. See *Smith v. Miln*, Abb. Adm. 373, 22 Fed. Cas. No. 13,081. It is governed primarily by the admiralty rules of the supreme court. *Shorey v. Rennell*, 1 Spr. 418, 22 Fed. Cas. No. 12,807.

8. *The Bremena v. Card*, 38 Fed. 144; *The International Grain Ceiling Co. v. Dill*, 10 Ben. 92, 13 Fed. Cas. No. 7,053.

9. *Cushing v. Laird*, 4 Ben. 70, 6 Fed. Cas. No. 3,508. See *Atkins v. The Disintegrating Co.*, 18 Wall. (U. S.) 272, 21 L. ed. 841.

10. *Bremena v. Card*, 38 Fed. 144. *Contra*, *Louisiana Ins. Co. v. Nickerson*, 2 Low. 310, 15 Fed. Cas. No. 8,539.

11. *Chiesa v. Conover*, 36 Fed. 334. See *Bremena v. Card*, 38 Fed. 144.

12. *Reed v. Hussey*, Blatchf. & H. Adm. 525, 20 Fed. Cas. No. 11,646; *Grace v. Evans*, 3 Ben. 479, 10 Fed. Cas. No. 5,650.

13. *Reed v. Hussey*, Blatchf. & H. Adm. 525, 20 Fed. Cas. No. 11,646.

14. *Reed v. Hussey*, Blatchf. & H. Adm. 525, 20 Fed. Cas. No. 11,646, even though a lien upon it enforceable in

**Degree of Diligence.**—As to what degree of diligence must be used by the officer in endeavoring to find the defendant, there is no established rule,<sup>15</sup> but there must have been some effort in this direction, or the attachment will be dissolved,<sup>16</sup> especially where the issuance of process has been delayed, notwithstanding ample opportunity for service, with the manifest purpose of obtaining security before judgment.<sup>17</sup>

(III.) **Prerequisites to Issuance.**—In some districts a sworn libel is made a prerequisite to the issuance of process of attachment,<sup>18</sup> and this has been said to be required by the general course of admiralty practice.<sup>19</sup>

Mere irregularities in the verification do not invalidate the proceedings based thereon.<sup>20</sup>

The admiralty rules require a special order of the court upon affidavit or proof showing the propriety thereof, in suits *in personam* for more than five hundred dollars.<sup>21</sup>

(IV.) **Garnishment.**—By admiralty rule,<sup>22</sup> based upon the previous practice in admiralty,<sup>23</sup> it is provided that the credits and effects of the defendant in the hands of a garnishee named in the process may be attached if no goods and chattels can be found.<sup>24</sup>

*rem* still remains. See also *The Merimac*, 29 Fed. 157. But see *infra*, II, H, 5.

15. It has been said that the marshal should not lose an opportunity of attaching property by devoting time to a fruitless search for the defendant. See *The Bremena v. Card*, 38 Fed. 144, quoting *Benedict Adm.* (3d ed.) § 426.

16. *International Grain Ceiling Co. v. Dill*, 10 Ben. 92, 13 Fed. Cas. No. 7,053.

17. *Shewan v. Hallenbeck*, 150 Fed. 231, in which the issuance of process was delayed for over a year.

18. *Pratt v. Thomas*, 1 Ware 437, 19 Fed. Cas. No. 11,377; *Martin v. Walker*, Abb. Adm. 579, 16 Fed. Cas. No. 9,170. Compare Adm. Rule 7.

Libels in *rem* it seems do not come within such a rule. *The J. R. Hoyle*, 4 Biss. 234, 13 Fed. Cas. No. 7,557.

An amended libel filed after the cargo has been released upon stipulation (no claimant of the vessel appearing), and not praying for process, was not required to be sworn to, all the libelants being out of the jurisdiction. *The Marion*, 79 Fed. 104.

As Part of Libel.—The affidavit justifying process of arrest “need not, it would seem, be made on the libel, but may be a separate deposition. Sup. Ct. Rule 7. Such was the practice in the English Admiralty, as the warrant of arrest issued previous to filing the libel. . . . The rule of this court

requires the verification to be in the libel itself.” *Martin v. Walker*, Abb. Adm. 579, 16 Fed. Cas. No. 9,170.

Motion to Set Aside.—See *infra*, II, H, 8.

19. *Martin v. Walker*, Abb. Adm. 579, 16 Fed. Cas. No. 9,170 *per Betts, J.* See also *Pratt v. Thomas*, 1 Ware 437, 19 Fed. Cas. No. 11,377.

20. See *Nelson v. Bell*, 17 Fed. Cas. No. 10,101a.

The absence of the notary's seal from his certificate of verification, although an irregularity, does not invalidate the process of arrest based upon the sworn libel, at least where the statute regulating oaths before a notary does not in terms require his seal to be affixed to his certificate. *The Tug E. W. Gorgas*, 10 Ben. 460, 8 Fed. Cas. No. 4,585.

The officer's failure to sign his name to the jurat does not invalidate the verification and an attachment based thereon, since it may be remedied by proof that the oath was administered. *Nelson v. Bell*, 17 Fed. Cas. No. 10,101a.

21. Adm. Rule 7.

22. Adm. Rule 2.

23. See *Smith v. Miln*, Abb. Adm. 373, 22 Fed. Cas. No. 13,081 (pointing out that the analogous practice in law courts may be looked to in determining the proper practice); *Cushing v. Laird*, 4 Ben. 70, 6 Fed. Cas. No. 3,508.

24. *The Alpena*, 7 Fed. 361.

Seamen's wages are not subject to attachment or garnishment. U. S. Rev.



The process should contain the name of the garnishee,<sup>25</sup> and a summons or notice requiring him to appear and answer, at a given time and place, as to any credits or effects of the defendant in his hands.<sup>26</sup> It has been held, however, that this notice need not be embodied in the process itself.<sup>27</sup>

The garnishee must answer under oath or affirmation as to any credits or effects in his hands and any interrogatories regarding the same propounded by the libellant.<sup>28</sup> He may also contest the liability of the defendant.<sup>29</sup> His sworn answer is conclusive upon the libellant, who cannot reply thereto,<sup>30</sup> unless the court permits a reply as a condition upon setting aside the garnishee's default.<sup>31</sup> It is not conclusive, however, upon third persons.<sup>32</sup> A garnishee in default may be allowed to put in an answer, on terms, but he is not entitled to do so as a matter of right.<sup>33</sup> But the libellant is entitled to compulsory process to compel him to answer.<sup>34</sup> The court may, however, without answer, upon a satisfactory showing of credits or effects in his hands, allow execution to be taken against them.<sup>35</sup>

(V.) Purpose and Effect of Attachment.—The purpose of attachment is not merely to compel the appearance of the defendant, but it is a security for the payment of the claim, and the property attached or the stipulation given for its release may be looked to for satisfaction of the decree.<sup>36</sup>

(VI.) Appearance of Defendant.—The defendant although not served with process may appear and defend upon paying costs, and giving the required stipulation.<sup>37</sup>

Effect.—Appearance by defendant in a suit *in personam* before an attachment has actually been levied renders attachment improper.<sup>38</sup> A subsequent appearance, however, does not invalidate an attachment already made.<sup>39</sup>

St., § 4536; Wilder v. Navigation Co., 211 U. S. 239, 29 Sup. Ct. 58, 58 L. ed. 164.

25. Trask v. Pelletier, 24 Fed. Cas. No. 14,146.

26. Smith v. Miln, Abb. Adm. 373, 22 Fed. Cas. No. 13,081. See also Cushing v. Laird, 4 Ben. 70, 6 Fed. Cas. No. 3,508.

27. Cushing v. Laird, 4 Ben. 70, 6 Fed. Cas. No. 3,508 (per Blatchford, J.). But see Smith v. Miln, Abb. Adm. 373, 382, 383, 22 Fed. Cas. No. 13,081, per Betts, J., apparently to the contrary.

28. Adm. Rule 37. See The Alpena, 7 Fed. 361; Smith v. Miln, Abb. Adm. 373, 379, 22 Fed. Cas. No. 13,081, and *supra*, II, G, 19, a.

29. Smith v. Miln, Abb. Adm. 373, 22 Fed. Cas. No. 13,081.

30. Shorey v. Rennell 1 Spr. 418, 22 Fed. Cas. No. 12,807 (*disapproving* a contrary statement in Benedict's Adm., § 459); McDonald v. Rennell, 16 Fed. Cas. No. 8,765.

31. Shorey v. Rennell, 1 Spr. 418,

22 Fed. Cas. No. 12,807; McDonald v. Rennell, 16 Fed. Cas. No. 8,765.

32. Dent v. Radman, 1 Fed. 882.

33. Shorey v. Rennell, 1 Spr. 418, 22 Fed. Cas. No. 12,807; McDonald v. Rennell, 16 Fed. Cas. No. 8,765 (except, perhaps, as to matters occurring subsequent to default).

34. Smith v. Miln, Abb. Adm. 373, 22 Fed. Cas. No. 13,081; Shorey v. Rennell, 1 Spr. 418, 22 Fed. Cas. No. 12,807; McDonald v. Rennell, 16 Fed. Cas. No. 8,765.

35. Shorey v. Rennell, 1 Spr. 418, 22 Fed. Cas. No. 12,807.

36. McGrath v. Candalero, Bee Adm. 64, 16 Fed. Cas. No. 8,810; Louisiana Ins. Co. v. Nickerson, 2 Low. 310, 15 Fed. Cas. No. 8,539.

37. Millard v. Craig, 17 Fed. Cas. No. 9,548; Millard v. Craig, 17 Fed. Cas. No. 9,547.

38. Reed v. Hussey, Blatchf. & H. Adm. 525, 20 Fed. Cas. No. 11,646.

39. See Harriman v. Rockaway

3. **Proceedings In Rem.**—In proceedings *in rem* the process, unless otherwise provided for by statute, is by warrant of arrest of the *res* described in the libel.<sup>40</sup> In proceedings against freight or the proceeds of property, process issues against the party charged with the possession thereof, requiring him to show cause why the same should not be brought into court.<sup>41</sup>

An insufficient description of the property in the warrant is immaterial if it does not result in an arrest of the wrong property.<sup>42</sup>

4. In petitory and possessory suits the process consists of a warrant of arrest of the ship and a monition to the adverse party or parties to appear and answer.<sup>43</sup>

5. **Property Subject to Attachment.**—*a. Generally.*—In a suit *in rem* all property covered by the lien<sup>44</sup> and the averments of the libel<sup>45</sup> and not exempt from seizure,<sup>46</sup> may be subjected to the process.

The term "goods and chattels" within the rule allowing foreign attachments against such property covers only tangible personalty.<sup>47</sup>

No right to attach real estate is recognized by the admiralty rules,<sup>48</sup> and it has been assumed, though not decided by the courts, that such property is not attachable.<sup>49</sup>

Beach Pier Co., 5 Fed. 461; Millard v. Craig, 17 Fed. Cas. No. 9,548.

40. Adm. Rule 9; United States v. One Case of Silk, 4 Ben. 526, 27 Fed. Cas. No. 15,925.

41. Adm. Rule 38; American Steel Barge Co. v. Chesapeake Coal Agency Co., 115 Fed. 669, 53 C. C. A. 301.

The petition provided for by rule 38 is not an independent suit, but merely a method of getting possession of the *res* in a proceeding *in rem*. Snow v. 180¾ Tons of Scrap Iron, 11 Fed. 517.

42. Lands v. Cargo of 227 Tons of Coal, 4 Fed. 478.

43. Adm. Rule 20.

44. See Hawgood, etc. Co. v. Dingman, 94 Fed. 1011, 36 C. C. A. 627; The Edwin Post, 11 Fed. 602; The Harmonie, 1 W. Rob. (Eng.) 178.

Cargo.—The Freight Money of the Canal Boat Monadnock, 5 Ben. 357, 17 Fed. Cas. No. 9,704; The Roeliff, L. R. 2 Adm. & Ecc. 363, 38 L. J. Adm. 56, 20 L. T. 586; The Flora, L. R. 1 Adm. & Ecc. 45, 35 L. J. Adm. 15, 14 L. T. 192.

**Freight Money.**—See American Steel Barge Co. v. Chesapeake & O. Coal Agency Co., 115 Fed. 669, 53 C. C. A. 207; The Orpheus, L. R. 3 Adm. & Ecc. 308, 40 L. J. Adm. 24, 23 L. T. 855; and Adm. Rule 38.

**Proceeds.**—See *supra*, II, C, 3, c, (II), (C), (4); *infra*, II, S; and Adm. Rule 38.

45. Wrecking apparatus placed upon

a ship to be used when necessary is subject to seizure, regardless of separate ownership, under a libel by seamen against the ship, her tackle, apparel, and furniture. The Edwin Post, 11 Fed. 602.

But a seine boat accompanying a fishing ship is appurtenant to, and therefore attachable as part of its tackle, apparel and furniture, when and only when there is a common ownership of both. The Merrimac, 29 Fed. 157.

46. See *supra*, II, C, 3, c, (II), (B); *infra*, II, H, 5, b.

Canal Boats.—See *supra*, II, C, 3, c, (II), (A).

47. Harriman v. The Rockaway Beach Pier Co., 5 Fed. 461, holding that an iron pier is not "goods and chattels."

**Common Property of Joint and Several Debtors.**—Where the owners of a vessel are jointly and severally liable and cannot be found in the jurisdiction, in a suit against one of them the common property may be attached and held responsible for the whole debt. Card v. Hine, 39 Fed. 818. See National Board of Marine Underwriters v. Melchers, 45 Fed. 643. But apparently the undivided interest of one owner cannot be attached. See Manhattan Fire Ins. Co. v. The Schooner C. L. Breed, 1 Flip. 655, 16 Fed. Cas. No. 9,021.

48. See Adm. Rules 2, 9.

49. Louisiana Ins. Co. v. Nickerson, 2 Low. 310, 15 Fed. Cas. No. 8,539,

The "credits and effects" of the defendant may be garnished, and the latter term is construed to include any personal property of the defendant in the hands of third persons even though it would also fall within the category of goods and chattels.<sup>50</sup>

A debt not yet due cannot be garnished.<sup>51</sup>

b. *Exempt Property*.—Public property in possession of the government cannot be attached.<sup>52</sup> Property seized by a collector of customs is not exempt from attachment.<sup>53</sup>

The proper method of claiming exemption is by claim and answer rather than by motion.<sup>54</sup>

c. *Property in custodia legis* is not subject to seizure or attachment,<sup>55</sup> as, for example, where it is in the hands of a receiver of a state court,<sup>56</sup> or in the custody of a sheriff<sup>57</sup> or the marshal of another district.<sup>58</sup> But an assignment for the benefit of creditors is not within this rule even though such assignments are regulated by law,<sup>59</sup> unless the assignee is, under the state law, an officer of the court.<sup>60</sup> Nor does a garnishment in an admiralty suit prevent a second garnishment of the same credits in a suit in the state court.<sup>61</sup>

6. *How Executed*.—a. *Generally*.—The manner in which process must be executed is governed by general principles and statutes elsewhere treated,<sup>62</sup> as well as by the admiralty rules and the local district rules.<sup>63</sup>

A warrant for the arrest of the person or of tangible property is

where the court says that the inability to attach lands is based upon ancient prohibitory legislation. See *Harriman v. The Rockaway Beach Pier Co.*, 5 Fed. 461; and *Benedict Adm.* (3rd ed.), § 433a, advancing reasons why land should be attachable.

50. *The Alpena*, 7 Fed. 361, involving ships and other tangible property.

51. *Dent v. Rodmann*, 1 Fed. 882.

52. *The Davis*, 10 Wall. (U. S.) 15, 19 L. ed. 875; *The Othello*, 5 Blatchf. 342, 18 Fed. Cas. No. 10,611. See *supra*, II, C, 3, c, (II), (B).

"The possession of the government can only exist through some of its officers using that phrase in the sense of any person charged on behalf of the government with the control of the property, coupled with its actual possession." *The Davis*, 10 Wall. (U. S.) 15, 19 L. ed. 875.

53. *Two Hundred and Fifty Tons of Salt*, 5 Fed. 216; *United States v. One Case of Silk*, 4 Ben. 526, 27 Fed. Cas. No. 15,925. See also *The Conqueror*, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. ed. 937.

54. *The Schooner Othello*, 1 Ben. 43, 5 Fed. Cas. No. 2,483.

55. *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. ed. 981; *Taylor*

*v. Carryl*, 20 How. (U. S.) 583, 15 L. ed. 1028; *The James Roy*, 59 Fed. 784.

*Conflicting Jurisdiction of State and Federal Courts*.—See *supra*, I, B, 5.

56. *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. ed. 981; *The James Roy*, 59 Fed. 784. But see *The Willamette Valley*, 62 Fed. 293.

Property in possession of a receiver of a federal circuit court may be libeled in the district court. *Parson v. Cunningham*, 63 Fed. 132, 11 C. C. A. 111. But see *The Bloomer*, 11 L. T. (Eng.) 46.

57. *Taylor v. Carryl*, 20 How. (U. S.) 583, 15 L. ed. 1028; *The James Roy*, 59 Fed. 784; *The Celestine*, 1 Biss. 1, 5 Fed. Cas. No. 2,541.

58. *The Steamer Circassian*, 1 Ben. 128, 5 Fed. Cas. No. 2,721, holding that the marshal claiming by prior attachment should file a petition to have his rights determined rather than a plea to the jurisdiction.

59. *The City of Frankfort*, 62 Fed. 1006; *The James Roy*, 59 Fed. 784.

60. *The J. G. Chapman*, 62 Fed. 939.

61. *The Olivia A. Carrigan*, 7 Fed. 507.

62. See the title "Process."

63. See the admiralty rules and the rules of the several district courts.



ordinarily executed by taking them into custody,<sup>64</sup> unless they are already in the marshal's custody by virtue of other process,<sup>65</sup> or a stipulation has been furnished to avoid the inconvenience and expense of an actual arrest.<sup>66</sup> There may be, however, a constructive seizure by leaving a copy of the process and notice of attachment, where attachable property is of such a nature that an actual manucaption or seizure is impossible, or where it is held by persons who cannot lawfully be deprived of its custody.<sup>67</sup> And it has been said that this practice is proper in any case where there is no danger of loss and it is desired to save the expense of custody.<sup>68</sup> Freight and the proceeds of marine property are attached in proceedings *in rem* by notice to the person charged with their possession to show cause why they should not be deposited in court.<sup>69</sup>

Garnishment is effected by service upon the garnishee of proper process or notice without an actual levy upon or arrest of property.<sup>70</sup> After arresting the *res* in proceedings *in rem* the marshal must post and publish the required notices to claimants and interested persons.<sup>71</sup> But no personal service of process or notice is required in such proceedings.<sup>72</sup>

b. *Service*. — (I.) *By Whom Made*. — Service must be by the marshal or his deputy, or, when he is interested, by some disinterested third person appointed by the court.<sup>73</sup> But neither the statutes nor rule of court regulating service require service by the marshal or his regular deputy in person, but he may specially depute a third person for this purpose.<sup>74</sup>

64. See Adm. Rules 3, 9.

65. The Haytian Republic, 60 Fed. 292, holding that the mere receipt of process under such circumstances, with intent to levy it, constitutes a constructive service, in spite of his return "withheld."

66. Munks v. Jackson, 66 Fed. 571, 13 C. C. A. 641; The Frank Vanderkerchen, 87 Fed. 763.

67. Two Hundred and Fifty Tons of Salt, 5 Fed. 216 (property seized by collector of customs); United States v. One Case of Silk, 4 Ben. 526, 27 Fed. Cas. No. 15,925 (same). See also Jorgensen v. Three Thousand One Hundred and Seventy-Three Casks of Cement, 40 Fed. 606; Snow v. 180¾ Tons of Scrap Iron, 11 Fed. 517.

68. Flaherty v. Doane, 1 Low. 148, 151, 9 Fed. Cas. No. 4,849, quoted with approval in Snow v. 180¾ Tons of Scrap Iron, 11 Fed. 517. See also Jones v. The Richmond, 13 Fed. Cas. No. 7,492.

69. Adm. Rule 38; American Steel Barge Co. v. Chesapeake Coal Agency Co., 115 Fed. 669, 53 C. C. A. 301; Snow v. 180¾ Tons of Scrap Iron, 11 Fed. 517.

70. Cushing v. Laird, 4 Ben. 70, 6 Fed. Cas. No. 3,508. See *supra*, II, H, 2, c, (IV).

**Whether Service Must Be Personal.**— See *dictum* in Cushing v. Laird, 4 Ben. 70, 73, 6 Fed. Cas. No. 3,508, that service may be made upon an absent garnishee by leaving a copy of the process at his residence or usual place of business with some person of suitable age. See *infra*, II, H, 6, b, (II), (A).

**Effect of Amending Libel.**— Service of new process is apparently necessary. See Cushing v. Laird, *supra*.

71. See Adm. Rule 9, and local rules; and also Bailey v. Sundberg, 49 Fed. 583, 1 C. C. A. 387.

72. The Globe, 2 Blatchf. 427, 10 Fed. Cas. No. 5,483. And see *infra*, II, V.

73. Adm. Rule 1; Rev. St., § 922.

74. The Tug E. W. Gorgas, 10 Ben. 460, 468, 8 Fed. Cas. No. 4,585 (where the appointment was endorsed on the process). Compare The Seraglio, 10 Prob. Div. 120, 54 L. J. Adm. 76, 52 L. T. 865; The Palomares, 54 L. J. Adm. 54, 10 Prob. Div. 36, 52 L. T. 57.

(II.) How Made.—(A.) GENERALLY.—In suits in *personam* service must be personal,<sup>75</sup> but otherwise may be made in the manner provided by either the state or federal law in cases at law or in equity.<sup>76</sup> Thus, where so provided by statute, service upon a foreign corporation may be made upon its agent.<sup>77</sup> Process by which jurisdiction is acquired cannot be served outside the jurisdiction of the district or division in which the suit is filed.<sup>78</sup> And an act which permits the service of process beyond the territorial jurisdiction of the court applies only to such process as may be lawfully so executed.<sup>79</sup>

(B.) ON PROCTOR.—Where libellant is a non-resident, process issuing on the filing of a cross-libel may be served upon libellant's proctor.<sup>80</sup>

(III.) Return.—(A.) GENERALLY.—The marshal must make return of his action under the process on the day set therefor.<sup>81</sup> The return must be in such form as to show a valid and sufficient execution of the process.<sup>82</sup> But since the return constitutes no part of the execu-

75. *Walker v. Hughes*, 132 Fed. 885. But see *Cushing v. Laird*, 4 Ben. 70, 6 Fed. Cas. No. 3,508.

76. *In re Louisville Underwriters*, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. ed. 991; *Doe v. Springfield Boiler Mfg. Co.*, 104 Fed. 684, 44 C. C. A. 128; *Insurance Co. of North America v. Leyland & Co.*, 139 Fed. 67.

77. *In re Louisville Underwriters*, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. ed. 991; *Insurance Co. of North America v. Leyland & Co.*, 139 Fed. 67. See *In re Hoharsh*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. ed. 1211.

Managing or Business Agent—Who Is.—See *Doe v. Springfield Boiler, etc. Co.*, 104 Fed. 684, 44 C. C. A. 128 (applying California Code Civ. Proc., § 411); *Christie v. Davis Coal Co.*, 92 Fed. 3.

*In United States v. Bedonin S. S. Co.*, 167 Fed. 863, a motion to set aside service of process as not having been made upon an agent of the owners was denied, it appearing that the party served represented the owner of the vessel in making the charter which was the basis of the action, and also in the prosecution of a claim against the vessel.

"Agent in England," as used in an act governing the district within which suit may be filed, means an agent who is representing the owner with respect to the vessel or property sued, at the time process is served upon him. *The City of Agra* (1898), Prob. Div. 198.

78. See *In re Louisville Underwriters*, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. ed. 991; *The L. B. X.*, 88 Fed. 290.

In a suit against a foreign corpora-

tion which has a resident agent, since a suit in *personam* may be filed in any district in the state, the process may be served anywhere in the same state. *In re Louisville Underwriters*, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. ed. 991.

Effect of General Appearance to Merits.—See *supra*, II, G, 20, d, (III); II, D, 3, h; *infra*, II, I, 2.

79. The act providing for the territorial divisions of the western district of Maine and the holding of terms of court in each, provides that process issuing out of any division shall be directed to the marshal of the district and may be executed upon the party or parties against whom issued wherever found within the district. This does not enlarge the territorial jurisdiction of the court. "It means only that process, like writs of execution, . . . and writs of subpoena, . . . which may lawfully reach beyond the territorial jurisdiction of the court issuing it shall be executed by the marshal." *The L. B. X.*, 88 Fed. 290. Compare *MacStevens v. Carnegie*, 49 L. J. Ch. 397, 42 L. T. 309; *Harris v. Franconia*, 46 L. J. C. P. 363, 2 C. P. D. 173; *In re Smith*, 1 Prob. Div. 300, 45 L. J. Adm. 92, 35 L. T. 380.

80. *The Eliza Lines*, 61 Fed. 309, 322. And see *supra*, II, G, 24, c, (I).

81. The return day is fixed by local rules of court.

82. *Brennan v. Steam-Tug Anna P. Dorr*, 4 Fed. 459, a return by the marshal that he attached a vessel by serving a copy of the writ on a part owner and on the master does not show an attachment or seizure.

A return "not found" implies a



tion of the process, an actual valid execution thereof is not invalidated by the form or contents of the return.<sup>83</sup>

(B.) AMENDMENT OF RETURN.—The court may permit an amendment of the return to conform it to the facts,<sup>84</sup> even though the officer executing it is no longer in office.<sup>85</sup> But the court cannot compel the marshal to make a substantial change in his return.<sup>86</sup>

7. Defects and irregularities in the process may be such as to render it and the action taken under it void.<sup>87</sup> Where the service of process is legally insufficient a motion may be made to vacate or set it aside.<sup>88</sup> Such irregularities, however, in the process and the service thereof, if known to the respondent,<sup>89</sup> are waived by failure to object to them before taking other proceedings in the case,<sup>90</sup> unless a reservation of the right to question them has been allowed by the court.<sup>91</sup>

8. Dissolving or Releasing Attachment. — a. *Generally.* — As to property not attachable under the process,<sup>92</sup> or libel,<sup>93</sup> or where previously the defendant has been arrested or has appeared,<sup>94</sup> or the

proper effort to locate the defendant. *International Grain Ceiling Co. v. Dill*, 10 Ben. 92, 13 Fed. Cas. No. 7,053.

Unnecessary Statement as to Place of Seizure. — A marshal's return that he seized the vessel "in the open waters of Lake Superior about 3000 feet from the pier at Saulte Ste. Marie, Michigan," does not preclude an inquiry into the jurisdiction, since the statement that the seizure was within the open waters of Lake Michigan was the marshal's unauthorized conclusion. *The Lindrup*, 70 Fed. 718.

The return on garnishment process should state that the defendant was not found and had no goods or chattels within the district, and that his credits and effects in the hands of named garnishees were attached by showing to the garnishees the original process and delivering to them personally a copy thereof, or by leaving a copy at the residence or usual place of business of the garnishees, with some person of suitable age, they being absent. *Cushing v. Laird*, 4 Ben. 70, 6 Fed. Cas. No. 3,508.

83. *The Haytian Republic*, 60 Fed. 292.

84. *The Haytian Republic*, 60 Fed. 292; *Trask v. Pelletier*, 24 Fed. Cas. No. 14,146.

Amending False Return. — See *infra*, II, H, 8, a.

85. *Cushing v. Laird*, 4 Ben. 70, 6 Fed. Cas. No. 3,508. See the title, "Process."

86. *The Steamer Circassian*, 1 Ben. 128, 5 Fed. Cas. No. 2,721. But see

*International Grain Ceiling Co. v. Dill*, 10 Ben. 92, 13 Fed. Cas. No. 7,053.

87. *Ker v. Bryan*, 163 Fed. 233, 90 C. C. A. 179, holding that seizure by marshal under attachment process signed and sealed by one without authority is a trespass. See the title "Process."

88. See *United States v. Bedonin S. S. Co.*, 167 Fed. 863, where forms of affidavits and counter affidavits are set out in full.

89. *The Berkeley*, 58 Fed. 920, giving a stipulation for release of the vessel without knowledge that the requisite order for issuance of process had not been obtained, does not waive objection to such irregularity.

90. *Robinson v. The Lillie Mills*, 20 Fed. Cas. No. 11,958; *Reed v. The Fanny*, 20 Fed. Cas. No. 11,645a; *The Acadia*, Brown's Adm. 73, 1 Fed. Cas. No. 24 (giving stipulation for release of vessel). See *infra*, II, K, 3, 1.

Effect of General Appearance. — See *supra*, II, G, 20, d, (II); *infra*, II, I, 2.

91. *The Roslyn & The Midland*, 9 Ben. 119, 20 Fed. Cas. No. 12,068.

92. *Harriman v. The Rockaway Beach Pier Co.*, 5 Fed. 461.

The owners of property attached as belonging to the defendant may after the latter's default move for the dissolution of attachment. *International Grain Ceiling Co. v. Dill*, 10 Ben. 92, 13 Fed. Cas. No. 7,053.

93. See *supra*, II, H, 5, a.

94. *Reed v. Hussey, Blatchf. & H. Adm.* 525, 20 Fed. Cas. No. 11,646; *Grace v. Evans*, 3 Ben. 479, 10 Fed. Cas. No. 5,650.



required oath or affidavit has not been made,<sup>95</sup> the attachment will, on motion, be dissolved. But where the libel sets forth the necessary facts and the owners have appeared by answer, the court may treat the suit as one *in rem*.<sup>96</sup> And a return that the defendant could not be found is conclusive so far as the attachment is concerned, the proper practice in case of a false return being an action therefor against the officer,<sup>97</sup> unless the falsity of the return is unquestioned, in which case the court may compel it to be amended and dissolve the attachment.<sup>98</sup>

The attachment will be dissolved upon the giving of a sufficient bond or stipulation,<sup>99</sup> or may be released by consent without security.<sup>1</sup>

A motion to set aside an attachment because not supported with the requisite verification or affidavit must be made within a reasonable time.<sup>2</sup> Where the attachment is dissolved the property should be returned to the person from whose possession it was taken.<sup>3</sup> Until the order of release has been properly executed the property is still in the jurisdiction of the court,<sup>4</sup> but where the suit is discontinued and possession of the property surrendered, jurisdiction terminates and the court cannot order a re-delivery even to the proper person.<sup>5</sup>

b. *Damages*.—No damages other than costs are allowable upon the dissolution of an attachment unless there has been a dishonest use of the process in the nature of a malicious prosecution.<sup>6</sup>

9. *Alias process* may issue where the original is returned unexecuted,<sup>7</sup> or the action taken under it is set aside,<sup>8</sup> or where the libel has been amended.<sup>9</sup> Where an amendment is made to cure the failure of the libel to show jurisdiction, it is proper, if not necessary, that an alias monition be served upon parties who have not appeared.<sup>10</sup>

95. See *supra*, II, H, 2, c, (III).

96. *Reed v. Hussey, Blatchf. & H.* Adm. 525, 20 Fed. Cas. No. 11,646.

97. *Harriman v. The Rockaway Beach Pier Co.*, 5 Fed. 461. But see *Hardy v. Moore*, 4 Fed. 843, 844; *Trask v. Pelletier*, 24 Fed. Cas. No. 14,146.

98. *The International Grain Ceiling Co. v. Dill*, 10 Ben. 92, 96, 13 Fed. Cas. No. 7,053, holding that the release upon bond does not estop the respondent from moving to set aside the attachment.

99. Adm. Rule 4. See *infra*, II, K, 3.

Effect of Releasing Arrested Res.—See *infra*, II, K, 3, 1.

1. See the *A. R. Gray*, 7 Ben. 483, 1 Fed. Cas. No. 519, holding that such a release waives the libellant's right to priority.

2. *Nelson v. Bell*, 17 Fed. Cas. No. 10,101a; *Martin v. Walker*, Abb. Adm. 579, 16 Fed. Cas. No. 9,170.

3. *The Schooner Two Marys*, 10 Ben. 558, 24 Fed. Cas. No. 14,300.

4. *The Schooner Two Marys*, 10 Ben. 558, 24 Fed. Cas. No. 14,300.

5. *The Propeller Jack Jewett*, 2 Ben. 353, 13 Fed. Cas. No. 7,121.

6. *Gow v. William W. Brauer S. S. Co.*, 113 Fed. 672. See also *The Evangelismos*, Swabey 378, 12 Moore P. C. 352, 14 Eng. Reprint 945; *The Strathnaver*, 1 App. Cas. 53, 34 L. T. 148; *The Walter D. Wallet* (1893), Prob. Div. 202, 62 L. J. Adm. 88, 69 L. T. 771; *The Elenore, Br. & Lush*, 185, 33 L. J. Adm. 19, 9 L. T. 397; *The Peri*, 32 L. J. Adm. 46, 8 Jur. (N. S.) 1230.

7. See *The United States v. One Case of Silk*, 4 Ben. 526, 27 Fed. Cas. No. 15,925, and also *The Conqueror*, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. ed. 937 (where *pluries* process was issued).

8. *Hardy v. Moore*, 4 Fed. 843, holding that the order for issuance of alias process amounts to a vacation of the action taken on the return of the original process, although an order to that effect would be more regular.

9. See *Cushing v. Laird*, 4 Ben. 70, 6 Fed. Cas. No. 3,508.

10. *In re Long Island, etc. Co.*, 5 Fed. 599, 604.

I. APPEARANCE AND DEFAULT. — 1. **Generally.** — Appearance must be made within the time specified in the process on penalty of a default.<sup>11</sup> Appearance may be effected by filing with the clerk either an appropriate pleading or a written notice signed by respondent's proctor to enter an appearance, or on the return day after the proclamation the proctor may orally appear and ask for further time to prepare and file the necessary pleadings.<sup>12</sup>

2. **Effect of Appearance.** — A general appearance to the merits<sup>13</sup> constitutes a waiver, as to the person appearing, of the necessity for service of a monition both in proceedings *in rem* and *in personam*, and consequently of any defects or irregularities in such process or its service.<sup>14</sup> Even such an appearance, however, is limited by the nature of the suit, and therefore in proceedings *in rem* a final decree *in personam* cannot lawfully be rendered against the claimant.<sup>15</sup>

11. See local rules as to time for appearance, and *infra*, II, I, 3.

By Garnishee. — See *supra*, II, H, 2, c, (IV).

Compelling appearance in cross suit by staying proceedings. See *supra*, II, G, 24 e, (III).

12. Benedict's Adm. (3rd ed.) § 456, 457. See *Atkins v. The Disintegrating Co.*, 18 Wall. (U. S.) 272, 21 L. ed. 841; *Reilly v. Philadelphia & E. R. Co.*, 109 Fed. 349; *The Aberfoyle*, Abb. Adm. 242, 1 Fed. Cas. No. 16.

Appearance by One Defendant for All. — Where one defendant sued with others as partners, puts in an answer for all and a subsequent rejoinder on their behalf is signed by a proctor for the defendants, this constitutes an appearance by all the partners. *Hills v. Ross*, 3 Dall. (U. S.) 321, 1 L. ed. 623.

13. As to general and special appearance, see the title "Appearances," and the *Monte A.*, 12 Fed. 331.

As to whether entry in the record that the named respondent appears and is given time to perfect his appearance, constitutes a general appearance, there is some doubt. In *Atkins v. The Disintegrating Co.*, 18 Wall. (U. S.) 272, 21 L. ed. 841, such an entry was apparently held to be an appearance without reservation, especially in view of similar recitals in subsequent bonds. But Benedict Adm., § 458, though noticing this case states the contrary to be the rule.

Appearance Under Protest. — See *The Agincourt*, 47 L. J. Adm. 37, 3 Prob. Div. 239; *The Vivar*, 2 Prob. Div. 29, 35 L. T. 782; *The Evangelistria*, 46 L. J. Adm. 1, 35 L. T. 410.

14. *The Joseph Gorham*, 7 L. R. 135, 13 Fed. Cas. No. 7,537; *William-*

*son v. Brooks*, 3 Ala. 32 (claimant voluntarily appearing and giving stipulation for release of the vessel, need not be served). See *The Berkeley*, 58 Fed. 920; *The Roslyn*, 9 Ben. 119, 20 Fed. Cas. No. 12,068; *The Bilbao*, Lush. 149, 3 L. T. 338; and *supra*, II, G, 20, d, (III).

Misnomer in the libel and monition is waived by appearance and answer to the merits. *Mina v. Floria S. S. Co.*, 23 Fed. 915.

Voluntary appearance as a claimant makes one a party without service of process. *Briggs v. Taylor*, 84 Fed. 681, 28 C. C. A. 518; *Virginia & M. Steam Nav. Co. v. United States*, Taney 418, 28 Fed. Cas. No. 16,973.

As Waiver of Objection to Place of Filing Suit. — See *supra*, II, D, 3, h; II, G, 20, d, (III).

Effect on Foreign Attachment. — See *supra*, II, H, 2, c, (VI).

15. *The Lowlands*, 147 Fed. 986. See *infra*, II, V, 2, b.

"An action purely *in rem* is itself limited to proceeding against the *res*, and a general appearance in such an action should . . . be deemed no more general than the limited nature and scope of the action itself, and of no greater effect than a special appearance to vacate an unauthorized arrest or attachment upon a general suit *in personam*. No judgment *in personam* can, therefore, be allowed . . . except through some amendment of the proceedings which it is competent for the court to grant, and upon due notice or citation which shall preserve the essential rights of the parties." *The Monte A.*, 12 Fed. 331.

As Waiver of Territorial Jurisdiction. See *supra*, II, G, 20, d, (III).

And since jurisdiction of the subject-matter cannot be conferred by consent, the lack thereof may be questioned at any stage of the proceedings.<sup>16</sup>

**3. Default.** — a. *Generally.* — If no appearance is made on or before the return day by the defendant in a suit *in personam*<sup>17</sup> or the interested persons in proceedings *in rem*,<sup>18</sup> or if after appearance they fail to answer,<sup>19</sup> they are adjudged in default.

A decree *pro confesso* is an interlocutory and not a final decree,<sup>20</sup> except in cases of seizure for condemnation and forfeiture,<sup>21</sup> and has the same effect as in actions at law.<sup>22</sup> It constitutes a formal admission of the truth of the libel,<sup>23</sup> but not of the amount of unliquidated damages averred therein.<sup>24</sup>

As to the matters requiring evidence the court may proceed to a hearing forthwith or at a date fixed therefor, or may order a reference.<sup>25</sup> The hearing is *ex parte* and the defendant or respondent is not entitled to offer evidence.<sup>26</sup> The court may, however, in furtherance of justice, hear any suggestions or proper evidence offered by defendant's proctor as *amicus curiae*.<sup>27</sup>

The final decree and the sale of the *res* or attached property and the disposition of the proceeds are elsewhere discussed in this article.<sup>28</sup>

b. *By Libellant.* — The failure of the libellant to appear and prosecute his suit according to the course and orders of the court, constitutes a default, for which the suit may be dismissed with costs.<sup>29</sup>

c. *Effect Of.* — In a suit *in personam* proceeding by foreign attachments the default and the decree thereon bind only the property attached and the defendant's interest therein; the rights of third per-

16. See *supra*, II, G, 20, d, (III); and also the title "Jurisdiction."

17. Adm. Rule 29.

18. *Rostron v. The Water Witch*, 44 Fed. 95; *United States v. The Steamer Mollie*, 2 Woods 318, 26 Fed. Cas. No. 15,795.

Filing Stipulation for Value After Default. — See *The Sloop Martha C. Burnite*, 10 Ben. 196, 16 Fed. Cas. No. 9,147, and *infra*, II, K, 3, h, note.

19. *Briggs v. Taylor*, 84 Fed. 681, 28 C. C. A. 518. See *Baxter v. The Dona Fermoas*, 2 Fed. Cas. No. 1,123a.

Refusal To Answer Interrogatories. — See *The David Pratt*, 1 Ware 495, 7 Fed. Cas. No. 3,597, and *infra*, II G, 19, g, (III).

20. *The Lopez*, 43 Fed. 95.

21. *The Lopez*, 43 Fed. 95, holding that in such cases the decree of condemnation is absolute, the only question being whether the property be forfeited or not.

It is discretionary with the court whether there shall be a hearing after default on a libel of information for

a forfeiture. *United States v. The Steamer Mollie*, 2 Woods 318, 26 Fed. Cas. No. 15,795, discussing the authorities.

22. *Cape Fear Towing & Transp. Co. v. Pearsall*, 90 Fed. 453, 33 C. C. A. 161; *Briggs v. Taylor*, 84 Fed. 681, 28 C. C. A. 518.

23. *Rostron v. The Water Witch*, 44 Fed. 95.

24. *Cape Fear Tow. & Transp. Co. v. Pearsall*, 90 Fed. 435, 33 C. C. A. 161.

25. *The Lopez*, 43 Fed. 95. See *Cape Fear Tow. & Transp. Co. v. Pearsall*, 90 Fed. 435, 33 C. C. A. 161; *Briggs v. Taylor*, 84 Fed. 681, 28 C. C. A. 518; *The David Pratt*, 1 Ware 495, 7 Fed. Cas. No. 3,597; *Baxter v. The Dona Fermoas*, 2 Fed. Cas. No. 1,123a.

26. *The David Pratt*, 1 Ware 495, 7 Fed. Cas. No. 3,597.

27. *The David Pratt*, *supra*.

28. See *infra*, II, V; II, X.

29. Adm. Rule 39. See also *Douglas v. The Ship Washington, Crabbe* 452, 7 Fed. Cas. No. 4,033.



sons are not affected,<sup>30</sup> unless they have made themselves parties.<sup>31</sup> But in a proceeding *in rem* the decree is conclusive on the whole world.<sup>32</sup>

d. *Opening or Setting Aside*.—The court in its discretion<sup>33</sup> may vacate or set aside the interlocutory decree at any time before final hearing and decree, upon the payment of accrued costs,<sup>34</sup> or the final decree at any time within ten days after its entry upon such terms as it may direct.<sup>35</sup> The motion must be supported by a sworn answer or affidavit showing a meritorious defense<sup>36</sup> and affidavits excusing the default.<sup>37</sup>

The affidavit of merits may be made by defendant's proctor.<sup>38</sup>

J. CLAIM.—1. *Generally*.—The first defensive step in a proceeding *in rem* in instance causes is the interposition of a claim to the property libeled. This is necessary to give the claimant standing as a party,<sup>39</sup> unless waived by the libellant.<sup>40</sup>

2. *Right to Claim*.—A proprietary interest, general or special, in the *res* is necessary to entitle a person to appear as claimant; a mere interest in the suit is not enough.<sup>41</sup>

30. *Boyd v. Urquhart*, 1 Spr. 423, 3 Fed. Cas. No. 1,750. See *Manro v. Almeida*, 10 Wheat. (U. S.) 473, 6 L. ed. 369.

31. *Briggs v. Taylor*, 84 Fed. 681, 28 C. C. A. 518, one who claims the attached property and gives bond for its release.

32. See *infra*, II, V, 8, a.

33. See *Gaines v. Travis*, Abb. Adm. 297, 9 Fed. Cas. No. 5,179.

*Discretion Not Reviewable on Appeal*.—*Cape Fear Tow. & Transp. Co. v. Pearsall*, 90 Fed. 435, 33 C. C. A. 161.

In a suit *in rem* if the libellant's claim is entitled to priority over that of the person petitioning for the opening of the default and the payment of his claim, the petition will be denied. *The Schooner Grapeshot*, 2 Ben. 527, 10 Fed. Cas. No. 5,702.

34. Adm. Rule 29. See *Scott v. The Propeller Young America*, Newb. Adm. 107, 21 Fed. Cas. No. 12,550; *The Ferryboats Roslyn & Midland*, 9 Ben. 119, 141, 20 Fed. Cas. No. 12,068; *The Caroline Casey*, 5 Fed. Cas. No. 2,421a. But see *The Duiveland*, 7 Fed. Cas. No. 4,122.

*Default Irregularly or Unlawfully Entered*.—See *Gaines v. Travis*, Abb. Adm. 297, 9 Fed. Cas. No. 5,179, and the titles, "Affidavits of Merits and Defense;" "Default."

35. Adm. Rule 40. See the *America*, 56 Fed. 1021.

*Time for Motion*.—Rule 40 prevents the granting of a motion made more

than ten days after entry of the final decree. *Northrop v. Gregory*, 2 Abb. 503, 18 Fed. Cas. No. 10,327.

*Terms*.—Where the officer had improperly surrendered attached property without an order of court and there was no explanation for such action, the court as a condition to opening the default required defendant to give a stipulation such as would have been required for the discharge of the attachment. *Van Winkle v. Jarvis*, 3 Ben. 573, 28 Fed. Cas. No. 16,883.

36. *Scott v. The Propeller Young America*, Newb. Adm. 107, 21 Fed. Cas. No. 12,550; *Northrop v. Gregory*, 2 Abb. 503, 18 Fed. Cas. No. 10,327. See the title "Affidavits of Merits and Defense."

37. *Scott v. The Propeller Young America*, Newb. Adm. 107, 21 Fed. Cas. No. 12,550. See also the titles "Default;" "Judgment."

38. *The Brig Harriet*, Olc. Adm. 222, 11 Fed. Cas. No. 6,096.

39. *United States v. 422 Casks of Wine*, 1 Pet. (U. S.) 547, 7 L. ed. 257; *Steamer Spark v. Lee Choi Chum*, 1 Sawy. 713, 718, 22 Fed. Cas. No. 13,206. *To Freight Money*.—*The Monadenock*, 5 Ben. 357, 17 Fed. Cas. No. 9,704.

*Distinguished From Intervention*.—See *infra*, II, L, 2.

*Stipulations Required*.—See *infra*, II, K, 2, b.

40. *Todd v. The Bark Tulchen*, 2 Fed. 600.

41. *United States v. 422 Casks of*

**Right Accruing After Seizure.**—Although his right accrues after the seizure a person may, if application is made within a reasonable time, appear as claimant.<sup>42</sup>

**3. By Whom Made.**—The claim may be made by the party in interest personally or through his agent,<sup>43</sup> or the agent of his government if he be a foreign citizen.<sup>44</sup>

**4. When Made.**—The claim should be interposed on or before the return day of the process<sup>45</sup> and may be filed as soon as the property has been seized.<sup>46</sup> But the owner or person entitled to the remnants or proceeds of the property remaining in the registry may at any time appear and claim them.<sup>47</sup>

**5. Form and Contents.**—a. *Generally.*—A claim is not required to be in any particular form, but it must distinctly and issuably set

Wine, 1 Pet. (U. S.) 547, 7 L. ed. 257; The Steamer Spark, 1 Sawy. 713, 22 Fed. Cas. No. 13,206; The R. W. Skillinger, 1 Flip. 436, 21 Fed. Cas. No. 12,181; The Revenue Cutter No. 1, Brown Adm. 76, 20 Fed. Cas. No. 11,713.

The claimant "must have an interest in the property itself, in a legal and technical sense." The Schooner Boston and Cargo, 1 Sumn. 328, 3 Fed. Cas. No. 1,673.

The assignee of money to become due on a ship-building contract has not such a proprietary interest in the ship as to entitle him to appear as claimant. Revenue Cutter No. 1, Brown's Adm. 76, 20 Fed. Cas. No. 11,713.

A lienholder may be a claimant. The Two Marys, 12 Fed. 152; The Mary Anne, 1 Ware 99, 16 Fed. Cas. No. 9,195; Benedict's Adm. (3d ed.), § 461. See The R. W. Skillinger, 1 Flip. 436, 21 Fed. Cas. No. 12,181; The Revenue Cutter No. 1, Brown Adm. 76, 20 Fed. Cas. No. 12,181. But not in prize courts except in the case of a neutral carrier's lien. The Mary Anne, 1 Ware 99, 16 Fed. Cas. No. 9,195.

A creditor who has attached the *res* may appear as claimant. The Mary Anne, 1 Ware 99, 16 Fed. Cas. No. 9,195.

An insurer or underwriter cannot claim as such unless he has accepted an abandonment of the property. The Ship Packet, 3 Mason 255, 18 Fed. Cas. No. 10,654; The Ship Henry Ewbank, 1 Sumn. 400, 11 Fed. Cas. No. 6,376; 1 Sumn. 328, 3 Fed. Cas. No. 1,673.

A mortgagee, as the conditional owner, and in the absence of mortgagor, was allowed to appear as claimant in *The Selt*, 3 Biss. (U. S.) 344, 21 Fed. Cas. No. 12,649. And a mort-

gagee rightfully in possession is entitled to appear as claimant. *The Jenny Lind*, 3 Blatchf. 513, 13 Fed. Cas. No. 7,287.

**Sheriff.**—See *The Steamer Circassian*, 1 Ben. 128, 5 Fed. Cas. No. 2,721.

42. *The Jenny Lind*, 3 Blatchf. 513, 13 Fed. Cas. No. 7,287, mortgagee's right to possession. See *infra*, II, J, 7. But see *infra*, II, L, 3, c.

43. *The Steamer Spark v. Lee Choi Chum*, 1 Sawy. 713, 22 Fed. Cas. No. 13,206; Adm. Rule 26. See *The Bark Laurens*, Abb. Adm. 302, 14 Fed. Cas. No. 8,121.

44. *The Steamer Spark v. Lee Choi Chum*, 1 Sawy. 713, 22 Fed. Cas. No. 13,206.

**Consul.**—The *Bello Corrunes*, 6 Wheat. (U. S.) 151, 5 L. ed. 229; *United States v. The London Packet*, 1 Mason 14, 15 Fed. Cas. No. 8,474; *La Jeune Eugenie*, 2 Mason 409, 26 Fed. Cas. No. 15,551.

Where a consul claims for unknown parties there can be no restitution without proof of the individual proprietary interest. *The Antelope*, 10 Wheat. (U. S.) 66, 6 L. ed. 268.

45. See *Baxter v. The Dona Fermeas*, 2 Fed. Cas. No. 1,123a; Adm. Rule 29; and *supra*, II, L. But see *The Bark Laurens*, Abb. Adm. 302, 14 Fed. Cas. No. 8,121; *The Jenny Lind*, 3 Blatchf. 513, 13 Fed. Cas. No. 7,287.

Where the claimant does not appear until after a decree *pro confesso* the court may impose terms as a condition to opening the default and allowing him to defend. *The America*, 56 Fed. 1021. See *supra*, II, I, 3, d.

46. See Adm. Rule 26; *Briggs v. Taylor*, 84 Fed. 681, 28 C. C. A. 518.

47. See *The Prindiville*, Brown

forth the facts showing the right of the claimant.<sup>48</sup> When made by an agent, he may claim in his own name as agent or in the name of his principal.<sup>49</sup>

b. *Verification*. — It must be verified by oath or affirmation of the claimant or his agent;<sup>50</sup> if by the latter, the verification should show his authority.<sup>51</sup>

6. *How and When Questioned*. — Objections to the claim are taken by exceptions<sup>52</sup> rather than by motion to strike out,<sup>53</sup> and if not taken before proceedings on the merits, are waived.<sup>54</sup> Such exceptions are disposed of at a preliminary hearing.<sup>55</sup>

7. *Withdrawal and Substitution*. — The court may permit a previous claim to be withdrawn and new claim by the real party in interest<sup>56</sup> or new owner<sup>57</sup> to be substituted therefor. But no substitution is effective until the substituted claimant has been subjected to the jurisdiction of the court.<sup>58</sup>

8. *Separate Claims*. — Where separate rights exist in distinct portions of the property, one owner or interested person cannot merely, as such, claim for the others,<sup>59</sup> but in such case there may be as many claims as there are distinct interests and each claim is treated as an independent proceeding in the nature of a several suit, upon which there may be an independent hearing, decree and appeal.<sup>60</sup>

Adm. 485, 488, 19 Fed. Cas. No. 11,435, and *infra*, II, L, 5.

48. *United States v. 422 Casks of Wine*, 1 Pet. (U. S.) 547, 7 L. ed. 257, Adm. Rule 26; *The R. W. Skillinger*, 1 Flip. 436, 21 Fed. Cas. No. 12,181. See *The Schooner Adeline*, 9 Cranch (U. S.) 244, 286, 3 L. ed. 719; *Todd v. The Bark Tulchen*, 2 Fed. 600; *The Monadnock*, 5 Ben. 357, 17 Fed. Cas. No. 9,704.

“‘No set form of words is necessary to form a claim. In this, as in other pleadings, the court looks to the substance, rather than the form. It must state, that the party is the true and *bona fide* owner of the interest which he represents, and that no other person is the owner thereof.’” *Steamer Spark v. Lee Choi Chum*, 1 Sawy. 713, 22 Fed. Cas. No. 13,206.

49. *In re Stover*, 1 Curt. 201, 23 Fed. Cas. No. 13,507.

50. *The Steamer Spark v. Lee Choi Chum*, 1 Sawy. 713, 22 Fed. Cas. No. 13,206; Adm. Rule 26. See the *Schooner Adeline*, 9 Cranch (U. S.) 244, 286, 3 L. ed. 719.

51. *The Steamer Spark v. Lee Choi Chum*, 1 Sawy. 713, 22 Fed. Cas. No. 13,206.

If the property be taken from the possession of the master he must swear that he is the lawful bailee for the

owner. Adm. Rule 26.

52. *Thomas v. The Kosciuskio*, 23 Fed. Cas. No. 13,901; *The Prindiville*, Brown's Adm. 485, 19 Fed. Cas. No. 11,435. See *United States v. 422 Casks of Wine*, 1 Pet. (U. S.) 541, 7 L. ed. 257; *The Two Marys*, 10 Fed. 919, and *supra*, II, G, 20.

53. *The Prindiville*, Brown's Adm. 485, 19 Fed. Cas. No. 11,435.

54. *The Boston*, Blatchf. & H. Adm. 309, 3 Fed. Cas. No. 1,669; *Thomas v. The Kosciuskio*, 23 Fed. Cas. No. 3,901; *The Prindiville*, Brown's Adm. 485, 19 Fed. Cas. No. 11,435. See also *United States v. 422 Casks of Wine*, 1 Pet. (U. S.) 547, 7 L. ed. 257.

55. *The Prindiville*, Brown's Adm. 485, 19 Fed. Cas. No. 11,435.

A reference may be ordered for the purpose of taking testimony to determine claimant's rights. *The Two Marys*, 10 Fed. 919.

56. *The Bark Laurens*, Abb. Adm. 302, 14 Fed. Cas. No. 8,121. See *The Alexandra*, 104 Fed. 904.

57. *The Cerea*, 149 Fed. 924.

58. *The Eliza Lines*, 61 Fed. 308, 315.

59. *Stratton v. Jarvis*, 8 Pet. (U. S.) 4, 8 L. ed. 846.

60. *Stratton v. Jarvis*, 8 Pet. (U. S.) 4, 8 L. ed. 846.



9. **Effect.**—One who puts in a claim thereby becomes a party to the suit with the corresponding rights and liabilities.<sup>61</sup> He assumes the position of a defendant and must answer the libel<sup>62</sup> or a default decree may be taken, binding upon him and his sureties personally, to the extent of his bond.<sup>63</sup> A claim does not operate as a stay of *ex parte* proceedings by the libellant unless interposed on the return day of the process when proclamation is made in open court.<sup>64</sup>

10. **Release of Res or Proceeds.**—The claimant may obtain the release of the *res*<sup>65</sup> or delivery of its proceeds<sup>66</sup> upon furnishing the required stipulation.<sup>67</sup>

K. **STIPULATIONS AND BAIL.**—1. **Generally.**—The federal statutes,<sup>68</sup> admiralty rules<sup>69</sup> and the practice prior thereto<sup>70</sup> require or permit stipulations of various kinds and bail bonds to be furnished by parties to the suit. A stipulation is the admiralty equivalent for the common-law bond or recognizance,<sup>71</sup> but is not governed entirely by the principles and practice applicable to the latter.<sup>72</sup>

2. **Stipulation for Costs.**—a. *By Libellant.*—Neither the statutes<sup>73</sup>

61. *Briggs v. Taylor*, 84 Fed. 681, 28 C. C. A. 518 (voluntary appearance). See *The Eliza Lines*, 61 Fed. 308, 321.

Where a claim is made by an agent, whether in his own name, as agent, or in the name of his principal, he thereby becomes a party to the suit with the corresponding rights and liabilities. In *Matter of Stover*, 1 Curt. 201, 23 Fed. Cas. No. 13,507. See *Todd v. The Bark Tulchen*, 2 Fed. 600.

A special plea to the jurisdiction may be filed by the claimant. *The Monadnock*, 5 Ben. 357, 17 Fed. Cas. No. 9,704.

Where a false and fraudulent claim is made the claimant thereby forfeits any rights he may have in the property. *The Dos Hermanos*, 2 Wheat. (U. S.) 76, 97, 4 L. ed. 189.

62. *The Two Marys*, 12 Fed. 152; *The Steamer Spark v. Lee Choi Chum*, 1 Sawy. 713, 22 Fed. Cas. No. 13,206. See also *The Commander-in-Chief*, 1 Wall. (U. S.) 43, 17 L. ed. 609; *Todd v. The Bark Tulchen*, 2 Fed. 600.

63. *Briggs v. Taylor*, 84 Fed. 681, 28 C. C. A. 518. See also *Todd v. The Bark Tulchen*, 2 Fed. 600; *Baxter v. The Dona Fermoas*, 2 Fed. Cas. No. 1,123a.

64. *Baxter v. The Dona Fermoas*, 2 Fed. Cas. No. 1,123a. "Then the libellant must regard it as at his peril, although he receives no personal notice of its being filed."

65. Adm. Rules 10, 11.

66. *The Bark Archer*, 10 Ben. 99, 1

Fed. Cas. No. 508, distinguished in *The Chief*, 142 Fed. 349, 73 C. C. A. 459.

67. See fully *infra*, II, K, 3.

68. See U. S. Rev. St., § § 938, 940, 941.

69. Adm. Rules 3, 4, 10, 11, 25, 26, 34, 35, 47, 53, 59.

70. See *Lane v. Townsend*, 1 Ware 289, 14 Fed. Cas. No. 8,054, in which Judge Ware exhaustively discusses the nature and origin of stipulations in admiralty. See also *Peru v. The North American*, 19 Fed. Cas. No. 11,017a.

71. *Lane v. Townsend*, 1 Ware 286, 14 Fed. Cas. No. 8,054. See *United States v. Ames*, 99 U. S. 35, 40, 25 L. ed. 295; *Munks v. Jackson*, 66 Fed. 571, 13 C. C. A. 641; *The Sydney*, 47 Fed. 260; *Cure v. Bullus*, Abb. Adm. 555, 6 Fed. Cas. No. 3,486.

72. *Lane v. Townsend*, 1 Ware 286, 14 Fed. Cas. No. 8,054. See *The Steamboat Delaware*, Olc. Adm. 240, 7 Fed. Cas. No. 3,762; *Cure v. Bullus*, Abb. Adm. 555, 6 Fed. Cas. No. 3,486, and *infra*, II, K, 9.

"Stipulations in admiralty are not subject to the rigid rules of the common law with respect to the liability of the surety." *Fairgrieve v. Marine Ins. Co.*, 112 Fed. 364, 50 C. C. A. 286.

But "the contract of a surety, whether at common law or in admiralty, is *strictissimi juris*, and cannot be changed by implication." *The Oregon*, 153 U. S. 186, 209, 15 Sup. Ct. 804, 39 L. ed. 943.

73. *Bradford v. Bradford*, 2 Flip. 281, 3 Fed. Cas. No. 1,766.

nor the general admiralty rules require a libellant to furnish security for costs, but local rules,<sup>74</sup> in conformity with the established practice of admiralty,<sup>75</sup> frequently provide for such a stipulation.

**The Unwilling Plaintiffs.** — Where, by reason of the fact that a cause of action is joint, a suit thereon must be brought in the names of all the parties, those libellants unwilling to prosecute may require that indemnity for costs be furnished them.<sup>76</sup>

**b. By Respondents and Intervenor.** — Defendants,<sup>77</sup> claimants,<sup>78</sup> and intervenors<sup>79</sup> and respondents petitioning for a forced intervention by other persons,<sup>80</sup> may be required to give this stipulation.

**c. Poverty as Excuse.** — (I.) **Generally.** — Upon a proper showing of his pecuniary inability a party may be relieved of the obligation to file a stipulation for costs,<sup>81</sup> even though such a stipulation is required by an absolute rule of court.<sup>82</sup> The case, however, may be so uncertain on the facts as not to justify an exemption even under such circumstances.<sup>83</sup>

(II.) **Suits In Forma Pauperis.** — (A) **GENERALLY.** — Suits *in forma pauperis* are provided for by federal statute,<sup>84</sup> and by local rules;<sup>85</sup> but independently thereof existed under the admiralty practice, being technically known as suits upon a juratory caution.<sup>86</sup> During the progress of a suit commenced in this way the respondent may ask that security be required.<sup>87</sup> But the proper practice where the allegation or affidavit of poverty is false or the alleged cause of action appears to be frivolous or malicious is a motion or petition to dismiss the suit.<sup>88</sup>

(B.) **SHOWING REQUIRED.** — It has been held that the federal statute

74. *The Phoenix*, 36 Fed. 272; *Rawson v. Lyon*, 15 Fed. 831; *Polydore v. Prince*, 1 Ware 402, 19 Fed. Cas. No. 11,257; *Bradford v. Bradford*, 2 Flip. 281, 3 Fed. Cas. No. 1,766; *The Infanta*, Abb. Adm. 327, 13 Fed. Cas. No. 7,031. See *Raymond v. La Compagnie Generale*, 90 Fed. 105.

An informer who is beneficially interested in the suit and a party thereto may be compelled to give a stipulation for costs, on penalty of having his name stricken from the record. *United States v. Planter*, Newb. Adm. 262, 27 Fed. Cas. No. 16,054.

75. *Polydore v. Prince*, 1 Ware 402, 19 Fed. Cas. No. 11,257; *The Infanta*, Abb. Adm. 327, 13 Fed. Cas. No. 7,031.

76. *Richmond v. New Bedford Copper Co.*, 2 Low. 315, 20 Fed. Cas. No. 11,800.

77. Adm. Rule 25; *Rawson v. Lyon*, 15 Fed. 831. See *Pharo v. Smith*, 18 How. Pr. (N. Y.) 47.

Where a libellant has allowed the case to go to issue without objection he cannot disregard the answer filed

without the required stipulation. *Gaines v. Travis*, Abb. Adm. 297, 9 Fed. Cas. No. 5,179.

78. Adm. Rule 26.

79. Adm. Rule 34; *Rawson v. Lyon*, 15 Fed. 831. But see *infra*, II, K, 5.

80. Adm. Rule 59; and *infra*, II, L, 9.

81. *Raymond v. La Compagnie Generale*, etc., 90 Fed. 105; *Polydore v. Prince*, 1 Ware 402, 19 Fed. Cas. No. 11,257; *Bradford v. Bradford*, 2 Flip. 281, 3 Fed. Cas. No. 1,766. See *Rawson v. Lyon*, 15 Fed. 831.

82. *The Phoenix*, 36 Fed. 272.

83. *Cole v. Tollison*, 40 Fed. 303.

84. *Donovan v. Salem & P. Nav. Co.*, 134 Fed. 316. See *O'Flaherty v. Hamburg-American Pack. Co.*, 168 Fed. 411, and the title "Paupers."

Application of Statute to Appeals. — See *infra*, II, K, 2, f.

85. *Donovan v. Salem & P. Nav. Co.*, 134 Fed. 316.

86. See *The Phoenix*, 36 Fed. 272; *infra*, II, K, 2, c, (II), (B).

87. *Donovan v. Salem & P. Nav. Co.*, 134 Fed. 316. See *The Our Friend*, 131 Fed. 395.

88. *The Our Friend*, 131 Fed. 395.

governing suits *in forma pauperis* must be complied with, even though the local rules are not so rigid in their requirements.<sup>89</sup> But independently of the statute, which applies only to libelants, a party claiming exemption must show his inability by affidavit<sup>90</sup> setting forth the facts as to his pecuniary condition rather than his mere conclusions.<sup>91</sup>

Where there are several co-parties<sup>92</sup> or persons interested in the recovery<sup>93</sup> it must be shown that none of them are able to furnish the security.

A certificate by an attorney of the court as to the merits of the libellant's cause of action is sometimes required.<sup>94</sup>

d. *Seamen* are not ordinarily required to file a stipulation of this kind,<sup>95</sup> but since their exemption is due merely to their supposed poverty rather than to any favor shown them in admiralty as a class,<sup>96</sup> it ceases when their ability appears.<sup>97</sup> So, also, the nature and circumstances of the case may be such as not to justify a suit without the usual stipulation,<sup>98</sup> as where the cause of action is not for wages, under rules confining the exemption to such cases.<sup>99</sup> The amount involved in the suit is, however, immaterial.<sup>1</sup>

e. *Salvors* may be exempt by local rule,<sup>2</sup> or when they are mere seamen.<sup>3</sup>

f. *On Appeal*.—There must be express statutory authority for an appeal *in forma pauperis*, and the statute providing for such a suit in the district court has no application to appeals.<sup>4</sup>

g. *Increasing*.—Where the security furnished appears to be insuffi-

89. *Donovan v. Salem & P. Nav. Co.*, 134 Fed. 316, setting out the statute, and holding that the matters therein enumerated must appear either by a separate affidavit or by appropriate averments in the libel, before process is issued. For the requirements of the statute, see the title "Paupers."

90. *Juratory Caution*.—The *Phoenix*, 36 Fed. 272; *Thomas v. Thorweigan*, 27 Fed. 400; *Polydore v. Prince*, 1 Ware 402, 19 Fed. Cas. No. 11,257. See note to *Bradford v. Bradford*, 2 Flip. 281, 3 Fed. Cas. No. 1,766, for forms.

91. *Raymond v. La Compagnie Generale*, 90 Fed. 105.

92. *Raymond v. La Compagnie Generale*, 90 Fed. 105.

93. *Donovan v. Salem & P. Nav. Co.*, 134 Fed. 316.

94. *Bradford v. Bradford*, 2 Flip. 281, 3 Fed. Cas. No. 1,766.

95. *The Shelbourne*, 30 Fed. 510; *The Cetewayo*, 7 Fed. 128 (in salvage suit); *Wheatley v. Hotchkiss*, 1 Spr. 225, 29 Fed. Cas. No. 17,483; *Polydore v. Prince*, 1 Ware 402, 19 Fed. Cas. No. 11,257; *Collins v. Hathaway, Olc. Adm.* 176, 6 Fed. Cas. No. 3,014; *Chambers v. The Henry Kneeland*, 5 Fed. Cas. No. 2,581a. See *Rawson v.*

*Lyon*, 15 Fed. 831; *The Arctic, Brown's Adm.* 347, 1 Fed. Cas. No. 509a.

*Preliminary Hearing Before Commissioner*.—See *The Shelbourne*, 30 Fed. 510, and the title "Seamen."

96. *The Shelbourne*, 30 Fed. 510; *Wheatley v. Hotchkiss*, 1 Spr. 225, 29 Fed. Cas. No. 17,483.

97. *Wheatley v. Hotchkiss*, 1 Spr. 225, 29 Fed. Cas. No. 17,483; *The Arctic, Brown's Adm.* 347, 1 Fed. Cas. No. 509a.

98. See *supra*, II, K, 2, c; and *The Arctic, Brown's Adm.* 347, 1 Fed. Cas. No. 509a.

99. *The Ship Great Britain, Olc. Adm.* 1, 10 Fed. Cas. No. 5,736; *The Caroline & Cornelia*, 2 Ben. 105, 5 Fed. Cas. No. 2,420.

1. *The Arctic, Brown's Adm.* 347, 1 Fed. Cas. No. 509a.

2. See *Rawson v. Lyon*, 15 Fed. 831.

3. *The Cetewayo*, 7 Fed. 128.

4. *The Presto*, 93 Fed. 522, 35 C. C. A. 394. See also *Bradford v. Southern R. Co.*, 195 U. S. 243, 25 Sup. Ct. 55, 49 L. ed. 243; *The Joseph B. Thomas*, 158 Fed. 559 (where libellant appeals the security furnished thereon is liable for costs both above and below). But see *Wheatley v. Hotchkiss*, 1 Spr. 225, 29 Fed. Cas. No. 7,483.



cient, additional security may be required.<sup>5</sup> But a stipulation regularly taken and accompanied by the required oath is presumptively sufficient in the absence of evidence.<sup>6</sup> Increased security for costs will not be required on account of delay in the progress of the cause occasioned by the adverse party.<sup>7</sup>

**h. Waiver.** — The prescribed security may be waived by the adverse party's allowing the case to proceed without demanding it.<sup>8</sup>

**3. For Release of Person and Property.** — **a. Suits In Personam.** — An arrested defendant may give bail to secure his release from custody,<sup>9</sup> but it can be required only in those cases in which it is required by the laws of the state where an arrest is made upon similar or analogous state process.<sup>10</sup>

The bond or stipulation is conditioned upon the appearance of the defendant so as to be amenable to the process of the court.<sup>11</sup> It may in addition thereto be conditioned upon the payment of the final decree<sup>12</sup> only where allowed by the state law upon similar or analogous process.<sup>13</sup>

Where process of foreign attachment has been executed the defendant may appear and give a stipulation for the release of the attached property,<sup>14</sup> conditioned upon payment of the final decree.<sup>15</sup>

**No Arrest.** — Where neither the person nor property of the defendant has been arrested he cannot be required to give a stipulation to pay the decree.<sup>16</sup>

**b. Suits In Rem.** — **(I.) Generally.** — In suits *in rem* the court may re-

5. The Poconoket, 61 Fed. 106; The Phoenix, 36 Fed. 272; The Harriet, Ole. Adm. 222, 11 Fed. Cas. No. 6,095.

6. The Snap, 24 Fed. 510.

7. The Bark Laurens, 1 Abb. Adm. 302, 14 Fed. Cas. No. 8,121.

8. Polydore v. Prince, 1 Ware 402, 19 Fed. Cas. No. 11,257 ("it is for the party to move for the security if he wishes it, and if he is silent it is considered as waived"); Pharo v. Smith, 18 How. Pr. (N. Y.) 47 (after final decree it is too late for libellant to demand such a stipulation from the defendant). See Gaines v. Travis, Abb. Adm. 297, 9 Fed. Cas. No. 5,179.

9. Adm. Rule 3.

In the matter of discharging without bail and mitigating or enhancing bail, the court may exercise its discretion in accordance with the equities of the case. Martin v. Walker, Abb. Adm. 579, 16 Fed. Cas. No. 9,170.

10. Adm. Rule 47; Stone v. Murphy, 86 Fed. 158; Louisiana Ins. Co. v. Nickerson, 2 Low. 310, 15 Fed. Cas. No. 8,359.

11. Adm. Rule 3; Millard v. Craig, 17 Fed. Cas. No. 9,547; Lane v. Townsend, 1 Ware 286, 14 Fed. Cas. No. 8,054; Cure v. Bullus, Abb. Adm. 555, 6 Fed. Cas. No. 3,486.

12. Adm. Rule 3.

13. Stone v. Murphy, 86 Fed. 158; Adm. Rule 47; U. S. Rev. St., §§ 990, 991.

Prior to the enactment of the admiralty rules by the supreme court the sureties could discharge themselves by producing the defendant at any time before final decree (Lane v. Townsend, 1 Ware 289, 14 Fed. Cas. No. 8,054); but this was changed by Adm. Rule 3 (Gardner v. Isaacson, Abb. Adm. 141, 9 Fed. Cas. No. 5,230). Subsequently Adm. Rule 47 was enacted, followed by U. S. Rev. St., §§ 990, 991, conforming the practice with respect to arrest of the person and bail to the state laws. Louisiana Ins. Co. v. Nickerson, 2 Low. 310, 15 Fed. Cas. No. 8,359.

14. Adm. Rule 4; Poland v. The Brig Spartan, 1 Ware 134, 19 Fed. Cas. No. 11,246; Millard v. Craig, 17 Fed. Cas. No. 9,547.

**Defendant in Cross Suit.** — The Cameo, Lush. 408, 5 L. T. N. S. 773.

15. Adm. Rule 4; Pope v. Seckworth, 46 Fed. 858, refusing to order the release upon a stipulation for the value of the vessel. But see Murphy v. Roberts, 30 Ala. 232; Bell v. Thomas, 8 Ala. 527.

16. Louisiana Ins. Co. v. Nickerson,

lease the arrested *res* upon a stipulation or bond with sureties.<sup>17</sup>

(II.) Seizure for Forfeiture. — Where a vessel has been seized to enforce a forfeiture, it seems that a stipulation for its release may be allowed in the discretion of the court under some circumstances,<sup>18</sup> but not where the purpose of the arrest is to prevent a violation of the neutrality laws.<sup>19</sup>

In prize cases a release on bail can only be allowed after a hearing of the cause and where the claimant shows a *prima facie* title which may ultimately entitle him to restitution.<sup>20</sup>

c. *In Possessory Suit.* — The right to secure the release of arrested property by giving a stipulation or bond applies to possessory suits.<sup>21</sup> It has been held, however, in suits between part owners to obtain possession, that the vessel will not be released upon bond before the merits are determined.<sup>22</sup>

d. *Disagreement Between Part Owners.* — In case of a dispute between part owners as to the use of a vessel, the majority owners, or, if they refuse to use the vessel, the minority owners may be compelled to give a bond of indemnity against loss to the non-consenting owners.<sup>23</sup> Where partition is sought between equal owners who disagree as to the use of a vessel, the one in possession of and using the vessel may secure its release by furnishing the required stipulation.<sup>24</sup>

2 Low. 310, 15 Fed. Cas. No. 8,359. But see *Millard v. Craig*, 17 Fed. Cas. No. 9,547; *Millard v. Craig*, 17 Fed. Cas. No. 9,548.

17. See Adm. Rules 10, 11; *infra*, II, K, 3, g; *The Jeanie Landles*, 9 Sawy. 102, 17 Fed. 91; *The City of Norwich*, 1 Ben. 89, 19 Fed. Cas. No. 11,202; *Peru v. The North America*, 19 Fed. Cas. No. 11,017a.

"When cargo is arrested in respect to the freight due for its transportation, the ordinary course is for the owner of the cargo to pay into the registry any freight acknowledged to be due, and thus obtain a release of his property from the custody of the marshal, and a discharge of his liability for the freight so paid. Freighters cannot be compelled to give bail for the value of a cargo seized only in respect to freight, nor forced to incur a liability for the cost of defending a suit in which they have no interest; and they have no right under ordinary circumstances, to give bail for freight which they acknowledge to be due (*Coote's Ad. Prac.* pp. 14, 24; *The Lady Durham*, 3 Hagg. 300; *The Riby Grove*, 2 W. Rob. 52; *The Victor*, 1 Lush. p. 72)." *The Monadnock*, 5 Ben. 357, 17 Fed. Cas. No. 9,704.

18. *The Haytian Republic*, 154 U. S. 118, 14 Sup. Ct. 992, 38 L. ed. 930; *United States v. Ames*, 99 U. S. 35, 99, 25 L. ed. 295, 299; *The Sloop Pitt*, 2

Wheel. Crim. 602, 27 Fed. Cas. No. 16,052; *The Brig Struggle*, 1 Gall. 476, 23 Fed. Cas. No. 13,550. But see *The Three Friends*, 166 U. S. 1, 17 Sup. Ct. 495, 41 L. ed. 897.

Seizure of Goods. — See *Four Cases Silk Ribbons*, 1 Ben. 214, 9 Fed. Cas. No. 4,986; U. S. Rev. St., § 938.

19. *The Three Friends*, 166 U. S. 1, 17 Sup. Ct. 495, 41 L. ed. 897; *The Mary N. Hogan*, 17 Fed. 813.

20. *The Diana*, 2 Gall. 93, 7 Fed. Cas. No. 3,876. But see *The Gran Para*, 10 Wheat. (U. S.) 497, 6 L. ed. 375.

The bail given in such suit is a substitute for the *res* as to all matters before the court. *The Nied Elwin*, 1 Dods. (Eng.) 50.

21. *The Poconoket*, 61 Fed. 106. See also *United States v. Towns*, 7 Ben. 444, 23 Fed. Cas. No. 16,534; *The Evangelistria*, 46 L. J. Adm. 1, 35 L. T. 410.

22. *Treat v. The Rainbow*, 1 Ben. 40, 24 Fed. Cas. No. 14,161. See also *Muir v. The Brisk*, 4 Ben. 252, 17 Fed. Cas. No. 9,901. But see *infra*, the succeeding section.

23. *The Orleans*, 11 Pet. (U. S.) 175, 9 L. ed. 677; *Coyne v. Caples*, 8 Fed. 638; *Tunno v. The Betsina*, 24 Fed. Cas. No. 14,236; *The Brig Susan E. Voorhis*, 10 Ben. 380, 23 Fed. Cas. No. 13,633.

24. *The Emma B.*, 140 Fed. 770,

e. *Release of Proceeds*.—There is the same right to give a stipulation or bond for the release of the proceeds of arrested property which has been sold, as exists in the case of the property itself.<sup>25</sup>

f. *By United States Government*.—When the United States government claims property arrested in admiralty it stands upon the same footing as any other suitor and can therefore secure the release of the property only upon giving the ordinary stipulation.<sup>26</sup>

g. *Stipulation for Value*.—(I.) *Generally*.—The stipulation for value, while not expressly provided for in the general admiralty rules,<sup>27</sup> is provided for by statute in certain cases,<sup>28</sup> and is an ancient and well recognized form of stipulation to secure the release of property held under admiralty process in any suit in which release is proper.<sup>29</sup> It is allowable at any stage of the cause.<sup>30</sup>

The amount of the bond is the appraised<sup>31</sup> or agreed<sup>32</sup> value<sup>33</sup> of the property for which it is substituted, even though the amount claimed in a suit *in rem*,<sup>34</sup> or the aggregate amount claimed in several such suits against the same property,<sup>35</sup> exceeds the value of the *res*. Where, however, the value is disputed the court may require the bond to conform to the highest estimate, subject to be reduced at the hearing to the value of the libeled property as shown by the evidence.<sup>36</sup>

(II.) *For Benefit of All Creditors*.—Upon public notice to all credit-

fixing the amount at twice the value of a one-half interest.

25. *The Bark Archer*, 10 Ben. 99, 1 Fed. Cas. No. 508, allowing a mortgagee in possession under an overdue mortgage to bond the proceeds rather than the libellant whose claim was contested. See also *The Union*, 4 Blatchf. 90, 24 Fed. Cas. No. 14,346; *The Wild Ranger*, Br. & Lush. (Eng.) 84.

26. *The Revenue Cutter*, 4 Sawy. 136, 20 Fed. Cas. No. 11,712. But see *supra*, II, H, 5, b.

27. See Adm. Rules 10, 11, 54, and also local district rules. All these rules recognize the admiralty stipulation, for value as a substitute for the *res*.

Such a stipulation cannot be given under Adm. Rule 4, though it may be under rules 10 and 11. *Pope v. Leekworth*, 46 Fed. 858.

28. See U. S. Rev. St., § 938; *The Brig Struggle*, 1 Gall. 476, 23 Fed. Cas. No. 13,550; *Four Cases Silk Ribbons*, 1 Ben. 214, 9 Fed. Cas. No. 4,986.

Such a stipulation cannot be filed under § 941, U. S. Rev. St., which is confined to bonds to the marshal. *The Martha C. Burnite*, 10 Ben. 196, 16 Fed. Cas. No. 9,147.

29. See *United States v. Ames*, 99 U. S. 35, 40, 25 L. ed. 295; *The Steamboat City of Norwich*, 1 Ben. 89, 19

Fed. Cas. No. 11,202; *Lane v. Townsend*, 1 Ware 286.

*Release of Vessel, Cargo and Freight*. *The Bark Archer*, 9 Ben. 455, 1 Fed. Cas. No. 507.

30. *The Martha C. Burnite*, 10 Ben. 196, 16 Fed. Cas. No. 9,147.

31. *Appraisement*.—Adm. Rules 10, 11, and *infra*, II, K, 3, g, (III).

32. See *The Sydney*, 47 Fed. 260; *The Monarch*, 30 Fed. 283; *Colgrove v. The Steamship City of Columbia*, 11 Hawaii 544.

33. *The Bark Archer*, 9 Ben. 455, 1 Fed. Cas. No. 507; *Colegrove v. The Steamship City of Columbia*, 11 Hawaii 544.

*Repairs Subsequent to Arrest*.—Where pending the suit the ship has been repaired and its value correspondingly increased, without the consent of the claimant, the bail should be based upon the value before the repairs. *The St. Olaf*, L. R. 2 Adm. & Ecc. 360, 20 L. T. N. S. 758, 38 L. J. Adm. 41.

*Goods in Bonded Warehouse*.—*Four Cases of Silk Ribbons*, 1 Ben. 214, 9 Fed. Cas. No. 4,986.

34. *The Bark Vivid*, 3 Ben. 397, 28 Fed. Cas. No. 16,977. See also *The Duchess de Brabant*, Swabey (Eng.) 264, 6 W. R. 329.

35. *The Antelope*, 1 Ben. 521, 1 Fed. Cas. No. 481.

36. *The Twilight*, 138 Fed. 1005.



ors the court may authorize a stipulation for the value of the libeled *res* to be substituted in its place, thus relieving it of all liens.<sup>37</sup>

(III.) Appraisement. — The value of the libeled or attached property sought to be released is determined by appraisers appointed by the court at the instance of the claimant on notice to the adverse party,<sup>38</sup> the procedure being largely governed by local district rules.<sup>39</sup> Such an appraisement is not, however, conclusive upon the court.<sup>40</sup> A new appraisement may be made where a petition for limitation of liability is filed.<sup>41</sup> A valid stipulation may be executed without such an appraisement.<sup>42</sup>

h. *Bond to Marshal*. — By statute in all suits *in rem* except seizures to enforce forfeitures a bond in double the amount of the libellant's claim may be given to the marshal to stay the execution of process or to release the arrested property.<sup>43</sup> This statute does not deprive the court of its power to take stipulations in conformity with the general principles of admiralty procedure.<sup>44</sup>

i. *Under Rules 10 and 11*. — Admiralty rules 10 and 11 provide for the release of ships and perishable property. Under these rules the issuance<sup>45</sup> and amount<sup>46</sup> of the bond rests in the discretion of the court.

j. *Order on Release*. — Where a stipulation for the release of property has been allowed and filed, the court or other officer before whom it is executed issues a writ or order to the marshal in the nature of a supersedeas.<sup>47</sup>

k. *Increasing and Reducing*. — Where it appears that the bail exacted is excessive it may be reduced on motion.<sup>48</sup> But where the

37. *The Steamboat City of Norwich*, 1 Ben. 89, 19 Fed. Cas. No. 11,202, holding that such procedure is not authorized by the limited liability act but may be allowed by virtue of the inherent power of the court.

38. *Alliance Ins. Co. v. The Morning Light*, 1 Fed. Cas. No. 246a; Adm. Rules 10, 11. See U. S. Rev. St., §§ 938, 940.

39. See district rules.

40. *The Twilight*, 138 Fed. 1005. See *infra*, II, K, 3, k.

41. *The Doris Eckhoff*, 30 Fed. 140.

42. See *United States v. The Little Charles*, 1 Brock. 380, 26 Fed. Cas. No. 15,612; and II, K, 3, k.

43. U. S. Rev. St., § 941.

After a default decree has been entered such a bond cannot be given. *The Martha C. Burnite*, 10 Ben. 196, 16 Fed. Cas. No. 9,147.

A stipulation for costs cannot be required by the libellant after a bond to the marshal has been given. *Gaines v. Travis*, Abb. Adm. 297, 9 Fed. Cas. No. 5,179.

44. *Peru v. The North American*, 19

Fed. Cas. No. 11,017a. See *The City of Hartford*, 11 Fed. 89.

45. *The Three Friends*, 166 U. S. 1, 67, 17 Sup. Ct. 495, 41 L. ed. 897.

46. *The Ship Antelope*, 1 Ben. 521, 1 Fed. Cas. No. 481. But see *The Bark Archer*, 9 Ben. 455, 1 Fed. Cas. No. 507.

47. By *The Jeanie Landles*, 9 Sawy. 102, 17 Fed. 91, this writ or order "should contain a recital of the issue of the process, the allowance of the stipulation, and require the marshal to forbear the further execution of the process, and to surrender or deliver the property taken thereon to the claimant on demand."

48. *The Twilight*, 138 Fed. 1005; *The Monarch*, 30 Fed. 283; *The Ship Merrimac*, 1 Ben. 68, 9 Fed. Cas. No. 4,927; *The Chieftain*, Br. & Lush. 104, 32 L. J. Adm. 106, 8 L. T. 120; *The Duchesse de Brabant*, Swabey (Eng.) 264, 6 W. R. 329; Adm. Rule 6. See also *The Iris*, 100 Fed. 104, 40 C. C. A. 301.

Upon the filing of a petition for limitation of liability arising from a collision, if the stipulation for value

amount of the stipulation is fixed by consent without an appraisal, the court will not reduce it<sup>49</sup> unless the circumstances justify equitable relief.<sup>50</sup> An increase in the amount of the security cannot be required after the release to the libeled *res*.<sup>51</sup>

1. *Effect of Stipulation and Release.*—The giving of a stipulation for the release of the property is a waiver of known<sup>52</sup> irregularity and illegality in,<sup>53</sup> or lack of service of, the process.<sup>54</sup> But the mere act of giving a stipulation does not amount to a waiver of objection to a seizure of property outside the territorial jurisdiction of the court.<sup>55</sup>

The stipulation or bail given for the release of property is a substitute for the property itself<sup>56</sup> as to all matters fairly in adjudication before the court.<sup>57</sup> The remedy of the libelant after the release of the property is upon the stipulation or bond,<sup>58</sup> and liability thereon is not affected by the subsequent fate of the vessel.<sup>59</sup> Property so released, and the proceeds of its subsequent sale,<sup>60</sup> are freed of the lien upon which the libel is based<sup>61</sup> and of the control of the court,<sup>62</sup> and cannot thereafter be subjected to the decree in the case,<sup>63</sup> or be rearrested upon the same cause of action,<sup>64</sup> even with the consent of the par-

was based upon the value of the vessel after it had been repaired the stipulation may be reduced to exclude the value of the repairs. *The Doris Eekhoff*, 30 Fed. 140.

49. *The Monarch*, 30 Fed. 283. But see *The Duchesse de Brabant*, Swabey (Eng.) 264, 6 W. R. 329.

50. *The Iris*, 100 Fed. 104, 40 C. C. A. 301.

51. *The Mutual*, 78 Fed. 144. But see Rule 23, Adm. Rules of the Southern District of New York. Compare *infra*, II, K, 8, e, (II).

52. *The Berkeley*, 58 Fed. 920.

53. *The Acadia*, Brown's Adm. 73, 1 Fed. Cas. No. 24. See *supra*, II, H, 7; II, G, 20, d, (III).

54. *The Frank Vanderkerchen*, 87 Fed. 763.

55. *The Hungaria*, 41 Fed. 109, *affirmed* in 42 Fed. 510; *The Norma*, 32 Fed. 411; *The Fidelity*, 16 Blatchf. 569, 8 Fed. Cas. No. 4,758. See *Reilly v. Philadelphia & R. R. Co.*, 109 Fed. 349; *The Roslyn & The Midland*, 9 Ben. 119, 20 Fed. Cas. No. 12,068. But see *The Willamette*, 70 Fed. 874, 18 C. C. A. 366, 31 L. E. A. 715, and *supra*, II, G, 20, d, (III).

56. *United States v. Ames*, 99 U. S. 35, 25 L. ed. 295; *The Wanata*, 95 U. S. 600, 611, 24 L. ed. 461; *The Steamer Webb*, 14 Wall. (U. S.) 406, 20 L. ed. 774; *The Palmyra*, 12 Wheat. (U. S.) 1, 6 L. ed. 531; *The New York*, 113 Fed. 810, 51 C. C. A. 432; *Fairgrieve v. Marine Ins. Co.*, 112 Fed. 364, 50 C. C. A. 286; *The Fred M. Lawrence*,

94 Fed. 1,017, 36 C. C. A. 631; *The Wild Ranger*, Brown & Lush. (Eng.) 84. See *infra*, II, K, 8, g.

57. *The Oregon*, 158 U. S. 186, 209, 15 Sup. Ct. 804, 39 L. ed. 943.

**Liability for Subsequent Intervening Claims.**—See *infra*, II, K, 8, e, (II).

58. *Carroll v. The Leathers*, Newb. Adm. 432, 5 Fed. Cas. No. 2,455.

59. *The Percy Birdsall v. The Intervertrossacks*, 55 Fed. 683.

60. *The Union*, 4 Blatchf. 90, 24 Fed. Cas. No. 14,346; *Senab v. The Josephine*, 21 Fed. Cas. No. 12,663. See also *The Wild Ranger*, Brown & Lush. (Eng.) 84.

61. *The Fred M. Lawrence*, 94 Fed. 1017, 36 C. C. A. 631; *The Mutual*, 78 Fed. 144; *The Thales*, 3 Ben. 327, 23 Fed. Cas. No. 13,855; *Carroll v. The Leathers*, Newb. Adm. 432, 5 Fed. Cas. No. 2,455.

62. *United States v. Towns*, 7 Ben. 444, 28 Fed. Cas. No. 16,534.

**Under State Statute Giving Lien.**—*The Edith*, 94 U. S. 518, 24 L. ed. 167.

63. *Richardson v. Cleaveland*, 5 Port. (Ala.) 251.

64. *United States v. Ames*, 99 U. S. 35, 25 L. ed. 295; *The Fred M. Lawrence*, 94 Fed. 1,017, 36 C. C. A. 631; *The Cleveland*, 98 Fed. 631; *The Union*, 4 Blatchf. 90, 24 Fed. Cas. No. 14,346; *Roberts v. The Huntsville*, 3 Woods, 386, 20 Fed. Cas. No. 11,904; *The Old Concord*, Brown Adm. 270, 18 Fed. Cas. No. 10,482; *The Wild Ranger*, Brown & Lush. (Eng.) 84.

ties,<sup>65</sup> or though the first libel has been dismissed with the consent of the claimant.<sup>66</sup> But where the release has been obtained through fraud, misrepresentation, or mistake,<sup>67</sup> or has been improvidently or illegally made,<sup>68</sup> the property may be rearrested before, but not after, judgment on the bond.<sup>69</sup> And the property released is still subject to all other liens and charges<sup>70</sup> or causes of forfeiture<sup>71</sup> which have not been incorporated in the libel as a ground of suit, whether arising previous or subsequent to the release<sup>72</sup> or while the property was in custody.<sup>73</sup> And the same rules apply where only part of the arrested property is released.<sup>74</sup>

Releasing without security does not destroy the libellant's lien but does waive his priority over claims subsequently accruing.<sup>75</sup>

m. *Effect of Failure To Give Stipulation.*—The giving of a stipulation for release is a privilege, and the failure to exercise it does not deprive the claimant or respondent of his right to defend.<sup>76</sup>

Where the libel for injury to the ship has properly included the cargo owner's claim for injury, he cannot after the release of the attached property rearrest it in another suit on the same cause of action, even though the libel has been dismissed as to his claim. *The Wm. Murtagh*, 17 Fed. 259. See also *The Nahor*, 9 Fed. 213.

Where a ship had been arrested and released on bond in a suit by a husband claiming ownership of the injured vessel, it was held that his wife, in a separate suit for the same injury, by alleging ownership in herself, rearrested the bonded vessel. *The William F. McRae*, 23 Fed. 557.

*Effect of Insolvency of Sureties.*—See *infra*, II, K, 8, c.

65. *The White Squall*, 4 Blatchf. 103, 29 Fed. Cas. No. 13,856. See also *Senab v. The Josephine*, 21 Fed. Cas. No. 12,663.

66. *The Thales*, 3 Ben. 327, 23 Fed. Cas. No. 13,855, *affirmed*, 10 Blatchf. 203, 23 Fed. Cas. No. 13,856. See also *The Cleveland*, 98 Fed. 631. *Compare The Propeller Jack Jewett*, 2 Ben. 353, 13 Fed. Cas. No. 7,121. But see *The Wm. Murtagh*, 17 Fed. 259, where the dismissal was pursuant to a previous agreement not to sue.

67. *United States v. Ames*, 99 U. S. 35, 42, 25 L. ed. 295; *The Union*, 4 Blatchf. 90, 24 Fed. Cas. No. 14,346. See also *The Cleveland*, 98 Fed. 631.

“Where a fraudulent appraisalment has been had, or a fraudulent or illegal bond has been given in an admiralty proceeding, the court has the power to recall the vessel for the purpose of

requiring an honest appraisalment and of exacting a legal bond.” *The Haytian Republic*, 154 U. S. 118, 126, 14 Sup. Ct. 992, 38 L. ed. 930.

Where through fraud or mistake property has been released upon a stipulation which is not binding, it may be rearrested. *The Favorite*, 2 Flip. 86, 8 Fed. Cas. No. 4,698, stipulation by married woman.

68. *The Three Friends*, 166 U. S. 1, 17 Sup. Ct. 495, 41 L. ed. 897; *United States v. Ames*, 99 U. S. 35, 42, 25 L. ed. 295; *The Union*, 4 Blatchf. 90, 24 Fed. Cas. No. 14,346.

69. *United States v. Ames*, 99 U. S. 35, 25 L. ed. 295; *The Hattie Bell*, 65 Fed. 119.

70. *Hawgood v. Dingman*, 94 Fed. 1011, 36 C. C. A. 627; *The Union*, 4 Blatchf. 90, 24 Fed. Cas. No. 14,346; *The Langdon Cheves*, 2 Mason 58, 14 Fed. Cas. No. 8,063; *Carroll v. The Leathers, Newb. Adm.* 432, 5 Fed. Cas. No. 2,455.

71. *The Haytian Republic*, 154 U. S. 118, 14 Sup. Ct. 992, 38 L. ed. 930.

72. *The Union*, 4 Blatchf. 90, 24 Fed. Cas. No. 14,346. See also *The Haytian Republic*, 154 U. S. 118, 14 Sup. Ct. 992, 38 L. ed. 930.

73. *The Witch Queen*, 3 Sawy. 17, 30 Fed. Cas. No. 17,915.

74. *Hawgood v. Dingman*, 94 Fed. 1,011, 36 C. C. A. 627.

75. *The A. R. Gray*, 7 Ben. 483, 1 Fed. Cas. No. 519.

76. *The Ship Nathaniel Hooper*, 3 Sumn. 542, 17 Fed. Cas. No. 10,032; *Louisiana Ins. Co. v. Nickerson*, 2 Low. 310, 15 Fed. Cas. No. 8,359.



**Interlocutory Sale.**—Such failure may, however, result in a sale of the *res*.<sup>77</sup>

**4. To Prevent Arrest.**—A stipulation or bond may be given before the property has been taken into custody to avoid the expense and inconvenience incident thereto.<sup>78</sup> It is governed by the same principles and rules as are applied to bonds and stipulations for release.<sup>79</sup>

**5. By Intervenor or Cross-Libellant.**—An intervenor in suits *in rem* is required by the admiralty rules to file a stipulation to abide by the final decree and to pay the costs and damages awarded.<sup>80</sup> The security required of a cross-libellant has been hereinbefore treated.<sup>81</sup>

**6. How Taken.**—Bonds and stipulations in admiralty may be taken in open court, or at chambers or before a commissioner,<sup>82</sup> and may be taken in vacation as well as during term time.<sup>83</sup> The bond to the marshal may be taken before the collector of the port.<sup>84</sup> But, except in vacation upon the production of an order of court and certificate by the collector as to the sufficiency of the sureties,<sup>85</sup> such bail or bonds cannot be executed before the clerk.<sup>86</sup>

**7. Nature and Form.**—The security taken may be in the form of either a stipulation or a bond,<sup>87</sup> or the court may accept cash bail.<sup>88</sup> The form and contents of the bond or stipulation depend upon the purpose for which it is given and the appropriate rules and statutes.<sup>89</sup> Although not in compliance with the statute it may be sufficient as a common-law bond,<sup>90</sup> or if insufficient as a bond it may be good as a stipulation.<sup>91</sup> It should be signed by the parties to it.<sup>92</sup> The stipulators themselves cannot complain of irregularities in the form of stip-

**77.** See *infra*, II, Q.

**78.** *Munks v. Jackson*, 66 Fed. 571, 13 C. C. A. 641; *The Frank Vanderkerchen*, 87 Fed. 763. See *Jones v. The Richmond*, 13 Fed. Cas. No. 7,492.

**79.** See *supra*, II, K, 3.

**80.** Adm. Rule 34; *Rawson v. Lyon*, 15 Fed. 831.

But in the *W. J. Hingston*, 144 Fed. 560, which was a libel against bailiffs to recover possession of a vessel seized for violation of the state fishing law, the state fish warden was not required to furnish a stipulation upon intervening. "It is a question whether this is an intervention within the meaning of the rule; the parties named as respondents in the libel being merely representatives of others as the libellant must have known."

**81.** See *supra*, II, G, 24, e, (III).

**82.** Adm. Rules 5, 35. See *Sawyer v. Oakman*, 11 Blatchf. 65, 21 Fed. Cas. No. 12,403.

**83.** U. S. Rev. St., § 940.

**84.** U. S. Rev. St., § 941.

**85.** U. S. Rev. St., § 940.

**86.** *The Jeanie Landles*, 9 Sawy. 102, 17 Fed. 91.

**87.** *The Brig Alligator*, 1 Gall. 145, 1 Fed. Cas. No. 248. See also *United States v. Ames*, 99 U. S. 35, 40, 25 L. ed. 295; *Munks v. Jackson*, 66 Fed. 571, 13 C. C. A. 641; *The Sydney*, 47 Fed. 260.

**88.** Adm. Rules 10, 11.

**89.** See Adm. Rules 3, 4, 10, 11, 25, 34, 53; U. S. Rev. St., § 941; *Stone v. Murphy*, 86 Fed. 168; *Grace v. Evans*, 3 Ben. 479, 10 Fed. Cas. No. 5,650.

**Stipulation for Benefit of Libellants in Several Suits.**—The form may be settled before the court if necessary. *The Ship Antelope*, 1 Ben. 521, 1 Fed. Cas. No. 481.

**Interest.**—Some courts require the stipulation to provide for interest on the value of the property from the time of its receipt. See *The Ship Antelope*, 1 Ben. 521, 525, 1 Fed. Cas. No. 481.

**90.** *Murphy v. Roberts*, 30 Ala. 232. See *Munks v. Jackson*, 66 Fed. 571, 13 C. C. A. 641; *Franklin v. Pendleton*, 3 Sandf. (N. Y.) 572.

**91.** *The Brig Alligator*, 1 Gall. 145, 1 Fed. Cas. No. 248.

**92.** *Sawyer v. Oakman*, 11 Blatchf. 65, 21 Fed. Cas. No. 12,403.

ulation,<sup>93</sup> or of defects which do not invalidate the obligation.<sup>94</sup> And the party for whose benefit they are given waives irregularities in stipulations to which timely objection is not interposed.<sup>95</sup>

3. **Sureties.** — a. *Generally.* — Sureties are required by the admiralty rules, but their character, number and sufficiency are determined to some extent by the practice and rules of the various districts.<sup>96</sup> By virtue of the federal statutes the bond of a surety company is proper and sufficient.<sup>97</sup>

b. *Justification.* — The sureties may be required to justify and may be examined as to their sufficiency.<sup>98</sup>

c. *Substitution.* — Upon the withdrawal or substitution of parties to the cause the court may permit a corresponding substitution in the parties to the stipulation or bond.<sup>99</sup> New sureties may be required in place of those who become insolvent pending the suit,<sup>1</sup> either in proceedings *in rem* or *in personam*.<sup>2</sup> This is an inherent power of the court and applicable to all admiralty bonds and stipulations including those provided for by statute.<sup>3</sup> Upon a refusal to comply with an order requiring new sureties, the answer of the defaulting party may be stricken out and a default decree entered against him.<sup>4</sup> The libeled *res* which has been released cannot, however, be rearrested.<sup>5</sup>

d. *Relation to Cause.* — Sureties on a bond or stipulation are not parties to the cause,<sup>6</sup> but they are bound by the subsequent orders

93. *United States v. The Little Charles*, 1 Brock. 380, 26 Fed. Cas. No. 15,613. See *Todd v. The Tulchen*, 2 Fed. 600.

94. The omission, in the condition clause, of the specified sum that shall be paid in case of default, is immaterial where there is in the bond a distinct obligation to pay the appraised value of the property released. *The Haytian Republic*, 59 Fed. 476, reversed on other grounds, 154 U. S. 118, 14 Sup. Ct. 992, 38 L. ed. 930.

95. *The Infanta*, Abb. Adm. Cas. 327, 13 Fed. Cas. No. 7,031, holding that the signature of only one surety where two are required is an irregularity which is waived by failure to make a timely exception.

96. See local district rules, and *The City of Hartford*, 11 Fed. 89; *The Infanta*, Abb. Adm. 327, 13 Fed. Cas. No. 5,179.

A married woman was rejected as a surety in *The Ship Antelope*, 1 Ben. 521, 1 Fed. Cas. No. 481. See also *The Favorite*, 2 Flip. 86, 8 Fed. Cas. No. 4,698. But the sufficiency of such a person as surety would manifestly depend upon her legal status and right to contract.

**Partners Incompetent.** — *The Corner, Br. & Lush*. (Eng.) 161, 33 L. J. Adm. 16, 12 L. T. 62.

97. **Bond of Surety Company.** — *The John D. Dailey*, 158 Fed. 642. See also *The New York*, 104 Fed. 561, 44 C. C. A. 38; *Jacobsen v. Lewis Klondike Expedition Co.*, 112 Fed. 73, 50 C. C. A. 121; and see *infra*, II, Z, "Fees and Costs." But see *The Willowdene*, 97 Fed. 509.

98. See *Jaycox v. Chapman*, 10 Ben. 517, 13 Fed. Cas. No. 7,243; *The Corner, Br. & Lush*. (Eng.) 161, 33 L. J. Adm. 16, 12 L. T. 62; *Benedict's Adm.* (3d ed.) § 491; and local district rules.

99. *Thompson v. The Jachin*, 23 Fed. Cas. No. 13,959.

1. Adm. Rule 6.

**In Appellate Court.** — *The Virgo*, 13 Blatchf. 255, 28 Fed. Cas. No. 16,976.

2. *The City of Hartford*, 11 Fed. 89.

3. *The City of Hartford*, 11 Fed. 89.

4. *The Fred M. Lawrence*, 94 Fed. 1017, 36 C. C. A. 631. See also *The Old Concord*, *Brown's Adm.* 270, 18 Fed. Cas. No. 10,482.

5. See *supra*, II, K, 3, 1.

6. *Perriam v. Pacific Coast Co.*, 133 Fed. 140, 66 C. C. A. 206; *The New York*, 104 Fed. 561, 44 C. C. A. 38; *The Glide*, 72 Fed. 200, 18 C. C. A. 504. But see *Fairgrieve v. Marine Ins. Co.*, 112 Fed. 364, 50 C. C. A. 286, containing a contrary statement.

made therein, as if parties, to the same extent as the principal.<sup>7</sup>

e. *Liability and Enforcement*.—(I.) Generally.—The rights and obligations of the sureties are fixed by the final decree in the cause.<sup>8</sup> If it goes against the principal or the *res*, summary judgment may be taken against the sureties.<sup>9</sup> A return of execution against the principal unsatisfied is not necessary to charge them.<sup>10</sup> The application to the court should be by petition rather than motion, a copy of which should be served on the persons to be affected.<sup>11</sup> Where the obligation is joint and several the stipulators may be pursued separately.<sup>12</sup> A decree cannot be lawfully entered against a deceased stipulator,<sup>13</sup> but may be entered against his legal representative.<sup>14</sup>

(II.) Extent.—The extent of the liability as sureties is limited by the terms of the bond or stipulation.<sup>15</sup> And, unless a general bond or stipulation is given intended to cover other claims,<sup>16</sup> liability on it is limited to the claim for which it is given.<sup>17</sup> Sureties cannot be held

**Right to Appeal.**—See *infra*, II, Y, 4, a.

7. *Fairgrieve v. Marine Ins. Co.*, 112 Fed. 364, 50 C. C. A. 286. See *infra*, II, K, 8, e.

8. See *The Monte*, 12 Fed. 331; *The Brig Antelope*, 1 Ben. 343, 1 Fed. Cas. No. 480, and *infra*, II, K, 8, g.

9. *Munks v. Jackson*, 66 Fed. 571, 13 C. C. A. 641; *Sawyer v. Oakman*, 11 Blatchf. 65, 21 Fed. Cas. No. 12,403; *The Baltic*, 1 Blatchf. & H. 149, 2 Fed. Cas. No. 826. See *The Glide*, 72 Fed. 200, 18 C. C. A. 504; *The C. F. Ackerman*, 14 Blatchf. 360, 5 Fed. Cas. No. 2,564; *Gardner v. Tyler*, 16 Abb. Pr. (N. Y.) 17.

**In Appellate Court.**—*The Belgenland*, 108 U. S. 153, 2 Sup. Ct. 864, 27 L. ed. 685; *Perriam v. Pacific Coast Co.*, 133 Fed. 140, 66 C. C. A. 206; *United States v. The Schooner Little Charles*, 1 Brock. 380, 26 Fed. Cas. No. 15,613.

Upon an order to show cause why summary judgment should not be entered against them, every defense, legal or equitable, is ordinarily available to the sureties that they might obtain in the defense of a plenary suit upon the bond. *Smith v. Prendergast*, 82 Fed. 504.

10. *In the Matter of the Bail of Snow*, 2 Curt. 485, 22 Fed. Cas. No. 13,141. See also *The C. F. Ackerman*, 14 Blatchf. 360, 5 Fed. Cas. No. 2,564.

11. *The Baltic*, 1 Blatchf. & H. 149, 2 Fed. Cas. No. 826. See *In the Matter of the Bail of Snow*, 2 Curt. 485, 22 Fed. Cas. No. 13,141; *The Octavia*, 1 Mason 149, 18 Fed. Cas. No. 10,423. But see *The Glide*, 72 Fed. 200, 18 C.

C. A. 504; *Murphy v. Roberts*, 30 Ala. 232.

But by virtue of the terms of U. S. Rev. St., § 941, governing bonds given to the marshal, judgment on such bonds may be against both principal and sureties at the time of rendering the decree in the original cause. See *Perriam v. Pacific Coast Co.*, 133 Fed. 140, 66 C. C. A. 206; *The Glide*, 72 Fed. 200, 18 C. C. A. 504; *The City of Seattle*, 1 Alaska 471. But it is within the power of the court to postpone a decree against the sureties until the time for appeal by the principal has expired and then to proceed only on notice. *The Belgenland*, 108 U. S. 153, 2 Sup. Ct. 864, 27 L. ed. 685.

12. *The Octavia*, 1 Mason 149, 18 Fed. Cas. No. 10,423.

13. *The Clara Davidson*, 5 Fed. Cas. No. 2,791.

14. *The Octavia*, 1 Mason 149, 18 Fed. Cas. No. 10,423.

15. *Jaycox v. Chapman*, 10 Ben. 517, 13 Fed. Cas. No. 7,243.

16. *The City of Norwich*, 1 Ben. 89, 19 Fed. Cas. No. 11,202.

17. The stipulation given for the release of a vessel in a proceeding *in rem* does not cover any of the claims subsequently made by a petition in intervention, but the petitioner must rearrest the vessel. *The Oregon*, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. ed. 943; *Laidlaw v. Oregon R. & N. Co.*, 81 Fed. 876, 26 C. C. A. 665; *The Wilamette*, 70 Fed. 874, 18 C. C. A. 366, 31 L. R. A. 715.

Sureties who by the terms of the bond are responsible only for the performance by one party of a decree



liable in a sum greater than that specified in the stipulation or bond,<sup>18</sup> even though it is conditioned upon the payment of the final decree.<sup>19</sup> They may, however, be charged with interest upon the stipulated sum in case of their default in complying with the terms of the stipulation,<sup>20</sup> or where they appear and defend the suit.<sup>21</sup>

(III.) Execution. — A judgment or decree against sureties or stipulators is executed in the same manner as any other decree in admiralty.<sup>22</sup> A stipulation usually contains the consent of the stipulators that execution may issue against all of their estate of whatever nature,<sup>23</sup> and such execution is provided for by rule.<sup>24</sup> But execution cannot be taken on the property of the claimant in a suit *in rem* unless he is also a stipulator.<sup>25</sup>

f. *Subrogation*. — Sureties who have paid a decree are entitled to be subrogated to the rights of the libellant against their principal,<sup>26</sup> but inasmuch as the libellant's lien is destroyed by the release on bail<sup>27</sup> their rights are inferior to those of other lien holders.<sup>28</sup>

g. *Release of Sureties*. — (I.) *Generally*. — A decree against the libellant,<sup>29</sup> or the dismissal of the suit against the *res* for the release of which the bond or stipulation was given,<sup>30</sup> discharges the sureties. And where the attachment is dissolved for irregularities, the bond is canceled.<sup>31</sup> But the sureties cannot relieve themselves of their obliga-

against him cannot be held liable on a decree against a co-party. *Jaycox v. Chapman*, 10 Ben. 517, 13 Fed. Cas. No. 7,243.

18. *The Wanata*, 95 U. S. 600, 612, 24 L. ed. 461; *The Steamer Webb*, 14 Wall. (U. S.) 406, 20 L. ed. 774; *The Southwark*, 129 Fed. 171; *The Susan E. Voorhis*, 10 Ben. 380, 23 Fed. Cas. No. 13,633.

A judgment in excess of the amount named in the bond is a nullity for the excess only. *Manks v. Jackson*, 66 Fed. 571, 13 C. C. A. 641.

19. *Brown v. Burrows*, 2 Blatchf. 340, 4 Fed. Cas. No. 1,996.

Costs, being part of the final decree, may be included in the judgment against sureties if the amount of the bond is not thereby exceeded, even though a separate stipulation for costs has been given. *The Madgie*, 31 Fed. 926. See *infra*, II, Z.

20. *The Sydney*, 47 Fed. 260.

21. *The Maggie M.*, 33 Fed. 591. See also *The Maggie J. Smith*, 123 U. S. 349, 356, 8 Sup. Ct. 159, 31 L. ed. 175; *The Wanata*, 95 U. S. 600, 612, 24 L. ed. 461.

22. *The Delaware, Olc.* 240, 7 Fed. Cas. No. 3,762. See also *The Blanche Page*, 16 Blatchf. 1, 3 Fed. Cas. No. 1,524 (such a decree cannot be enforced by contempt proceedings, nor by sequestration of the property of the

sureties); *Holmes v. Dodge*, Abb. Adm. 60, 12 Fed. Cas. No. 6,637; and *infra*, II, V, 6; II, X.

23. *The Ferryboats Roslyn & Midland*, 9 Ben. 119, 20 Fed. Cas. No. 12,063; *The Delaware, Olc.* 240, 7 Fed. Cas. No. 3,762. See *The Glide*, 72 Fed. 200, 18 C. C. A. 504.

24. Adm. Rule 21.

25. *Atlantic Mut. L. Ins. Co. v. Alexandre*, 16 Fed. 279.

26. *The Madgie*, 31 Fed. 926; *Carroll v. The Leathers, Newb.* Adm. 432, 5 Fed. Cas. No. 2,455.

27. See *supra*, II, K, 3, 1.

28. *Roberts v. The Huntsville*, 3 Woods 386, 20 Fed. Cas. No. 11,904; *Carroll v. The Leathers, Newb.* Adm. 432, 5 Fed. Cas. No. 2,455.

29. *The Martha*, 1 Blatchf. & H. 151, 16 Fed. Cas. No. 9,144.

Upon the dismissal of the libel for the default of the libellant the claimant may enter an order canceling the stipulation for costs and bond for the release of the vessel, without notice to the libellant. But the court or the claimant may set aside the default and restore the liability of the sureties. *The Brig Antelope*, 1 Ben. 343, 1 Fed. Cas. No. 1,039.

30. *The Monte A*, 12 Fed. 331.

31. See *International Grain Ceiling Co. v. Dill*, 10 Ben. 92, 13 Fed. Cas. No. 7,053; *The Nahor*, 9 Fed. 213.

tion by surrendering the person of the defendant<sup>32</sup> or the released property.<sup>33</sup> It has been held, however, that upon the rearrest of the property the stipulator is entitled to be discharged, since the purpose of the stipulation has failed.<sup>34</sup> Stipulations or bonds are given, however, subject to any legal disposition which may be made of the case.<sup>35</sup> A default decree against the libellant may therefore be set aside, though such action restores the liability of the sureties,<sup>36</sup> and a dismissed appeal may be reinstated.<sup>37</sup>

(II.) *Effect of Amendment.* — Sureties are not released by amendments which do not increase their liability.<sup>38</sup> It has been strongly intimated that any amendment which is otherwise proper does not release them,<sup>39</sup> and it has been so held where the bond or stipulation specified the precise amount of the obligation.<sup>40</sup> The liability of sureties on the stipulation given by the claimant of attached property is not released by the addition of another libellant.<sup>41</sup> by the substitution of the real owner in place of the original claimant,<sup>42</sup> or by the substitution of the real party in interest as libellant,<sup>43</sup> or even as defendant

32. See *Adm. Rule 3*; *Gardner v. Isaacson*, *Abb. Adm.* 141, 9 *Fed. Cas.* No. 5,230.

33. *Livingston v. The Jewess*, 1 *Ben.* 21 note, 15 *Fed. Cas.* No. 8,412.

34. *Livingston v. The Jewess*, 1 *Ben.* 21 note, 15 *Fed. Cas.* No. 8,412.

Where rearrested on other libels a motion for the release of the sureties is not proper until the process in such other suits has been returned. *The Empire*, 1 *Ben.* 19, 8 *Fed. Cas.* No. 4,472.

35. *The Palmyra*, 12 *Wheat.* (U. S.) 1, 6 *L. ed.* 531; *Newell v. Norton*, 3 *Wall.* (U. S.) 266, 18 *L. ed.* 271; *United States v. Mosely*, 7 *Sawyer.* (U. S.) 265, 8 *Fed. Cas.* 688; *The Harmony*, 1 *Gall.* 123, 125, 11 *Fed. Cas.* No. 6,081. See also *Fairgrieve v. Marine Ins. Co.*, 112 *Fed.* 364, 50 *C. C. A.* 286; *The Corozal*, 19 *Fed.* 655.

36. *The Brig Antelope*, 1 *Ben.* 343, 1 *Fed. Cas.* No. 1,039.

But a rehearing by consent of the parties to the cause, after the term, cannot affect the rights of non-consenting sureties under the previous decree. *The Martha*, 1 *Blatchf. & H.* 151, 16 *Fed. Cas.* No. 9,144.

37. *The Palmyra*, 12 *Wheat.* (U. S.) 1, 6 *L. ed.* 531.

38. *Newell v. Norton*, 3 *Wall.* (U. S.) 266, 18 *L. ed.* 271; *Fairgrieve v. Marine Ins. Co.*, 112 *Fed.* 364, 50 *C. C. A.* 286; *Boden v. Demwolf*, 56 *Fed.* 846. See *The Corozal*, 19 *Fed.* 655.

An amendment increasing the amount claimed does not increase the liability

of the sureties. *Darrell v. The Alice Gray*, 6 *Fed. Cas.* No. 3,579.

39. *United States v. Mosely*, 7 *Sawyer.* (U. S.) 265, 8 *Fed. Cas.* 688; *The Maggie Jones*, 1 *Flip.* 635, 16 *Fed. Cas.* No. 8,947.

40. *United States v. Mosely*, 7 *Sawyer.* (U. S.) 265, 8 *Fed. Cas.* 688. See also *The Schooner Harmony*, 1 *Gall.* 123, 11 *Fed. Cas.* No. 6,081.

Where a stipulation for the value of the libeled property has been given, the amount claimed in the libel may be increased by amendment. The sureties in such case "are not entitled to interfere in questions relating to the equity of parties to amend the form of their pleadings so as to bring within the action all the rights which may be legally determined by it." *McCready v. The Brother Jonathan*, 15 *Fed. Cas.* No. 8,732a, *per Betts, J.*

41. *The Maggie Jones*, 1 *Flip.* 635, 16 *Fed. Cas.* No. 8,947.

42. *The Cerea*, 149 *Fed.* 924.

43. *The Beaconsfield*, 158 *U. S.* 303, 15 *Sup. Ct.* 860, 39 *L. ed.* 993, where the court says: "Stipulations in admiralty are not subject to the rigid rules of the common law with respect to the liability of the surety, and so long as the cause of action remains practically the same a mere change in the name of the libellant, as by substituting the real party in interest for a nominal party, will not avoid the stipulation as against the sureties; or, as it is said in some cases, stipulations are to be interpreted as to the extent and limita-

under some circumstances.<sup>44</sup> But the sureties after decree cannot take advantage of irregularities in the proceedings.<sup>45</sup>

**9. Construction.**—In construing any ambiguity in a stipulation given in admiralty, it is not the intention of the parties which is to be consulted, but the intention of the court or the law which required the stipulation and dictated its terms.<sup>46</sup>

**L. INTERVENTION.**—**1. Generally.**—The right of intervention obtaining in equity and at civil law<sup>47</sup> is recognized in admiralty<sup>48</sup> so far as is consistent with its limited jurisdiction.<sup>49</sup> There are two sorts of intervention provided for by the admiralty rules, though one is perhaps included within the other: first, the general right of one who has a legal interest in the subject-matter of the litigation to intervene for its protection;<sup>50</sup> second, the right of one who is interested in the proceeds of marine property in the registry of the court to petition for their delivery.<sup>51</sup>

**2. Distinguished From Claim.**—Putting in a claim to a vessel or other libeled property is frequently spoken of as an intervention. But technically there is a distinction between a claimant and an intervenor; the former appears as a defendant claiming possession of the vessel or *res*, while the latter appears as a plaintiff to protect or enforce his interest in it.<sup>52</sup> The circumstances may be such that a party has his election to appear in either capacity.<sup>53</sup>

**3. Interest of Intervenor.**—**a. Generally.**—An interest in the *res* or subject-matter of the suit which may be affected by the decree justifies an intervention for its protection.<sup>54</sup> The interest, however,

tion of responsibility created by them by the intention of the court which required them, and not by the intention of the parties who are bound by them." See also *The Neid Elwin*, 1 Dod. (Eng.) 50.

44. *Boden v. Demwolf*, 56 Fed. 846, where the real owner appeared as claimant, and answered to the merits, and the recitals of the bond and other circumstances indicated that claimant and sureties were proceeding upon the basis that an amendment would be made substituting the owner.

45. *Wodd v. The Bark Tulchen*, 2 Fed. 600.

46. *Lane v. Townsend*, 1 Ware 286, 14 Fed. Cas. No. 8,054. See also *The Beaconsfield*, 158 U. S. 303, 311, 15 Sup. Ct. 860, 39 L. ed. 993; *The Roslyn*, 9 Ben. 119, 20 Fed. Cas. No. 12,068.

The term "court" in a bond conditioned on the performance of the decree of the court, means the court which shall ultimately decide the cause. *United States v. The Little Charles*, 1 Brock. 380, 26 Fed. Cas. No. 15,613.

47. See the title "Intervention."

48. See Adm. Rules, 34, 43.

49. See *infra*, II, L, 3, b.

50. Adm. Rule 34. See *Home Ins. Co. v. The Concord*, 12 Fed. Cas. No. 6,659.

The thirty-fourth rule does not determine in what cases third persons may intervene. *The Ann C. Pratt*, 1 Curt. 340, 1 Fed. Cas. No. 409.

51. Adm. Rule 43. See *The Chief*, 142 Fed. 349, 73 C. C. A. 459; *Sheldrake v. The Chatfield*, 52 Fed. 495, and *infra*, II, L, 5.

The forty-third rule "extends only to an interest in any proceeds in the registry and has no application to a case where a third person seeks to come in as sole owner of the *res* and contest the suit." *The Ann C. Pratt*, 1 Curt. 340, 1 Fed. Cas. No. 409.

52. *The Two Marys*, 12 Fed. 152. See Adm. Rules, 26, 34, 43; *The Steamship Idaho*, 4 Ben. 272, 12 Fed. Cas. No. 6,996.

53. *The Two Marys*, 12 Fed. 152.

54. *Coleman v. Martin*, 6 Blatchf. 119, 6 Fed. Cas. No. 2,985. See also *The Mary Anne*, 1 Ware 99, 16 Fed. Cas. No. 9,195; *The Two Ellens*, L. R. 3 Ad. and Ecc. (Eng.) 345, 355, and *infra*, II, L, 4.



must be more than that acquired by a merely colorable assignment,<sup>55</sup> or by an agreement indemnifying the respondent against the result of the suit.<sup>56</sup>

b. *Non-Maritime Cause of Action*.—Intervention is not proper for the purpose of enforcing a non-maritime cause of action.<sup>57</sup> But one who could not sue in admiralty for the enforcement of his claim may petition that a fund in the registry be applied to its payment.<sup>58</sup>

c. *Interest Acquired Pendente Lite*.—One whose interest in or ownership of the *res* has been acquired *pendente lite* by voluntary assignment from the respondent is not entitled to intervene for the purpose of controlling the defense of the suit.<sup>59</sup> But this rule is not applicable where the interest or ownership is acquired by operation of law.<sup>60</sup>

4. **Persons Entitled to Intervene**.—a. *Generally*.—Persons who could have been made parties to the original libel may intervene by petition.<sup>61</sup>

Salvors omitted from a libel by other salvors may intervene, though it is not essential that they do so, especially where their interests are somewhat antagonistic to the libelants.<sup>62</sup>

b. *Lienholder*.—Any lienholder whose rights may be affected by the suit may intervene to contest the claims of the libellant upon the *res* or its proceeds,<sup>63</sup> or to protect his interests there-

55. *The Trader*, 129 Fed. 462.

56. *The Steamship Idaho*, 4 Ben. 272, 12 Fed. Cas. No. 6,996.

57. *The Eclipse*, 135 U. S. 599, 10 Sup. Ct. 873, 34 L. ed. 269, a libel for possession, in which the intervenors sought the enforcement of an alleged contract of sale.

58. *Schuchardt v. The Ship Angeliqne*, 19 How. (U. S.) 239, 15 L. ed. 625 ("where it was said that this application by petition is frequently entertained for proceeds in the registry, in cases where a suit in admiralty would be wholly inadmissible"); *Petrie v. Steam-Tug Bluff No. 2*, 3 Fed. 531. See *infra*, II, L, 5.

59. *The Ann C. Pratt*, 1 Curt. (U. S.) 340, 1 Fed. Cas. No. 409. But see *supra*, II, J, 2.

60. *The Ann C. Pratt*, 1 Curt. 340, 1 Fed. Cas. No. 409, as where the respondent dies or abandons the property to underwriters who accept the abandonment.

61. *The Grand Republic*, 10 Fed. 398.

Passengers and seamen injured in the same collision may upon their petition be made co-libelants with the owner of the injured vessel in a suit for damages, although an interlocutory decree has been rendered. *The Queen*, 40 Fed. 694. But seamen claiming

wages cannot intervene in suit on a bottomry bond. *Jaurekhe v. The S. G. Troop*, 13 Fed. Cas. No. 7,232.

The owner of cargo may intervene in a suit for injury thereto brought by the master (*The Mercedes*, 108 Fed. 559), or by the owner of the carrying ship (*The Nahor*, 9 Fed. 213).

An administrator may intervene in a suit *in rem* based on a collision, for the purpose of enforcing his claim against the *res* for the death of his decedent occurring in the same collision. *The S. S. Oregon*, 42 Fed. 78.

62. See *supra*, II, E, 6, a, (IV), and *The Steamship Merrimac*, 1 Ben. 68, 9 Fed. Cas. No. 4,927.

**Necessity of Filing New Libel**.—Salvors omitted from the original libel for salvage need not file a new libel where the property has already been taken into custody, but may become parties by suitable allegations of their claims without the necessity of notice or process. *The Ship Henry Ewbank*, 1 Sumn. 400, 11 Fed. Cas. No. 6,376.

Petition by salvor for allowance out of award to co-salvor. See *infra*, II, L, 5, a, note.

63. *The Hull of a New Vessel*, 2 Ware 199, 12 Fed. Cas. No. 6,859; *Furniss v. Magoun*, Olc. Adm. 55, 9 Fed. Cas. No. 6,153. See *The Julia*, 57 Fed. 233.

in.<sup>64</sup> This rule does not apply to petitory or possessory suits, since they do not involve or affect the rights of lien claimants.<sup>65</sup> The mortgagee,<sup>66</sup> or his transferee,<sup>67</sup> may intervene to protect his interest in the property or its proceeds. He may petition for the payment of his mortgage out of the proceeds after the satisfaction of prior maritime claims.<sup>68</sup>

c. *An insurer of the res* who has been subrogated to the rights of the owner may intervene.<sup>69</sup>

d. *A consul* may intervene on behalf of absent but interested citizens of his own country, although he cannot intervene for his sovereign when the latter has a minister or ambassador resident in the country.<sup>70</sup>

e. *Claimant*.—One who has appeared as claimant cannot, in the absence of strong reasons therefor, also take the inconsistent position of intervenor, as against the same party.<sup>71</sup> But where his interest consists of a claim against the *res* which must be settled before the case can be disposed of, it is essential that he be permitted to file a petition setting forth the facts.<sup>72</sup>

5. **Claim on Proceeds in Registry.**—One who has an interest in proceeds in the registry of the court arising from the sale of libeled property may intervene by petition for the allowance and payment of

In proceedings *in rem* against a vessel, other creditors desiring to test the claim of any lien claimant must do so by appearing in the action or on the reference. *The Ethelwold*, 165 Fed. 806.

**Attachment and judgment creditors** who have acquired a lien may intervene in a suit *in rem*. *Home Ins. Co. v. The Concord*, 12 Fed. Cas. No. 6,659. See also *The Mary Anne*, 1 Ware 99, 16 Fed. Cas. No. 9,195, and *supra*, II, J, 2. *Compare Myers v. Fenn*, 5 Wall. (U. S.) 205, 18 L. ed. 604; *George v. St. Louis Cable & W. R. Co.*, 44 Fed. 117.

64. *The Two Marys*, 12 Fed. 152; *The Young Mechanic*, 3 Ware 58, 30 Fed. Cas. No. 18,182. See *Hawgood & A. Transp. Co. v. Dingman*, 94 Fed. 1011, 36 C. C. A. 627.

65. *The Taranto*, 1 Spr. 170, 23 Fed. Cas. No. 13,751.

66. *Schuchardt v. The Ship Angelique*, 19 How. (U. S.) 239, 15 L. ed. 625; *The H. N. Emilie*, 70 Fed. 511; *The Old Concord*, Brown Adm. 270, 18 Fed. Cas. No. 10,482; *Elmore v. The Alida*, 8 Fed. Cas. No. 4,419; *The Dubuque*, 2 Abb. 20, 7 Fed. Cas. No. 4,110. See *The Orienta* (1894), Prob. Div. 271; *The Tagus* (1903), Prob. Div. 44.

The mortgagee of a vessel lost in a collision may intervene in a suit by the

owner against the offending vessel. *The Grand Republic*, 10 Fed. 398.

67. *The Two Ellens*, L. R. 3 Adm. & Ecc. 345, 354.

68. See *infra*, II, L, 5.

69. *Mason v. Marine Ins. Co.*, 110 Fed. 452, 49 C. C. A. 106, 54 L. R. A. 700; *The Steamer City of Paris*, 1 Ben. 529, 5 Fed. Cas. No. 2,766.

"The insurer may at all times intervene in courts of admiralty, if he has the equitable right to the whole or any part of the damages. Under the 34th rule in admiralty of this court, he may be allowed to intervene, and become the *dominus litis*, where he can show an abandonment, which divests the original claimant of all interest. . . . Under the 43rd rule also he may intervene after decree, and claim the damages recovered, by showing that he is equitably entitled to them." *Propeller Monticello v. Mollison*, 17 How. (U. S.) 153, 15 L. ed. 68.

70. *Robson v. The Huntress*, 2 Wall. Jr. 59, 20 Fed. Cas. No. 11,971. See also *The Adolph*, 1 Curt. 87, 1 Fed. Cas. No. 86.

71. *The Two Marys*, 12 Fed. 152. But see *The H. N. Emilie*, 70 Fed. 511; *The Ship Panama*, Ole. Adm. 343, 18 Fed. Cas. No. 10,703. *Compare Hawgood & A. Transp. Co. v. Dingman*, 94 Fed. 1011, 36 C. C. A. 627.

72. *The Two Marys*, 12 Fed. 152.

the same.<sup>73</sup> The claimant, however, must have a specific lien upon the property or proceeds.<sup>74</sup> A mere general creditor is not entitled to file such a petition, whether his claim against the owner is maritime or non-maritime,<sup>75</sup> except, perhaps, where all lien claimants have been satisfied.<sup>76</sup> But any lien,<sup>77</sup> maritime or non-maritime,<sup>78</sup> gives the pe-

73. *The Ship Panama*, Olc. Adm. 343, 18 Fed. Cas. No. 10,703. See *The Olivia A. Carrigan*, 7 Fed. 507; *The Phoebe, Ware* 354, 19 Fed. Cas. No. 11,065; *Bracket v. The Hercules, Gilp.* 184, 3 Fed. Cas. No. 1,762; *The Chiggia* (1898), Prob. Div. (Eng.) 1.

Admiralty rule forty-three was probably intended to apply to cases where an order of distribution pursuant to rules 57 and 58 has been made, and does not authorize a petition, before the libellant's rights have been determined, that money realized from a sale of the *res* be turned over to petitioner upon his giving security therefor, pending a determination of possible outstanding rights thereto. *The Chief*, 142 Fed. 349, 73 C. C. A. 459.

In *Andrews v. Wall*, 3 How. (U. S.) 568, 11 L. ed. 729, which was a libel for salvage, a petition was filed to enforce an alleged claim to part of the salvage award still remaining in the registry. Story, J., answering an objection to the right to entertain the petition, says: "This is a case of proceeds rightfully in the possession and custody of the admiralty; and it would seem to be, and we are of opinion that it is, an inherent incident to the jurisdiction of that court, to entertain supplemental suits by the parties in interest, to ascertain to whom those proceeds rightfully belong, and to deliver them over to the parties who establish the lawful ownership thereof. This is familiarly known and exercised in cases of the sales of ships to satisfy claims for seamen's wages, for bottomry bonds, for salvage services, and for supplies of material-men, where, after satisfaction thereof, there remain what are technically called 'remnants and surplusses,' in the registry of the admiralty. But a more striking example is that of supplemental libels and petitions, by persons asserting themselves to be joint captors, and entitled to share in prize proceeds, and of custom-house officers, for their distributive shares of the proceeds of property seized and condemned for breaches of the revenue laws, where

the jurisdiction is habitually acted upon in all cases of difficulty or controversy." But see *Sheldon v. The Chatfield*, 52 Fed. 495, holding that one salvor cannot petition for a portion of the fund awarded to his co-salvor. Compare *McMullin v. Blackburn*, 59 Fed. 177.

A sheriff from whose possession the *res* has been taken may in his official capacity petition for the proceeds. *Eneas v. The Charlotte Minerva*, 8 Fed. Cas. No. 4,483.

74. *The Allianza*, 65 Fed. 245; *Miller v. The Peerless*, 45 Fed. 491.

75. *The Willamette Valley*, 76 Fed. 838; *Sheldrake v. The Chatfield*, 52 Fed. 495; *The Balize*, 52 Fed. 414; *Remnants in Court*, Olc. Adm. 382, 20 Fed. Cas. No. 11,697. And see *The Favorite*, 3 Sawy. 405, 8 Fed. Cas. No. 4,699, holding that a mere agreement by the owner to mortgage the vessel to him did not give the petitioner a sufficient legal interest. But see *The Stephen Allen, Blatchf. & H. Adm.* 175, 22 Fed. Cas. No. 13,361; *The Santa Anna, Blatchf. & H. Adm.* 79, 21 Fed. Cas. No. 12,325.

But although the lien has been waived, either expressly or by implication of law, leaving an original remedy merely in *personam*, a petition for the allowance of the claim may be entertained. *Zane v. The President*, 4 Wash. 453, 30 Fed. Cas. No. 18,201.

76. *The Willamette Valley*, 76 Fed. 838. But see *The Lydia A. Harvey*, 84 Fed. 1000, holding that against the objection of the owner petitioning for the residue, claims not secured by maritime liens could not be allowed.

77. *The Advance*, 63 Fed. 704; *The Wyoming*, 37 Fed. 543; *The Guiding Star*, 18 Fed. 263. See *The Willamette Valley*, 76 Fed. 83.

78. *The E. V. Mundy*, 22 Fed. 173; *Petrie v. Steam-Tug Coal Bluff* No. 2, 3 Fed. 531; *Justi Pon v. Arbustei*, 14 Fed. Cas. No. 7,589 (mortgagee). See also *The Lottawanna*, 21 Wall (U. S.) 558, 22 L. ed. 654; *The Gordon Campbell*, 131 Fed. 963; *The Advance*, 63 Fed. 704; *The Mary Zephyr*, 2 Fed. 824; *Leland v. The Ship Medora*, 2 Woodb. & M. 92, 114, 15 Fed. Cas. No.



itioner sufficient standing to invoke this remedy, even though he could not have appeared as claimant.<sup>79</sup> But where the claims are difficult and complex, the court in its discretion may require them to be adjudicated in an independent suit or action, rather than in a summary proceeding by petition.<sup>80</sup>

**6. When and How Made.**—*a. Time For.*—There is no fixed time for intervention, the rules in admiralty being analogous to, if not identical with, those in equity.<sup>81</sup> Intervention must take place, however, before the rights of adverse parties have become fixed beyond the power of the court to change them.<sup>82</sup> Where an interest in the proceeds is claimed, the petition may be filed at any time before the final distribution thereof.<sup>83</sup> But after the *res* has been released upon stipulation not for its value, but merely to answer the original libel, there can be no intervention, at least for the purpose of enforcing any additional claim, but a new libel must be filed and the *res* rearrested.<sup>84</sup>

*b. Method Of.*—**(I.) Generally.**—The right to intervene is determined by the filing of a petition setting forth the material facts,<sup>85</sup> which must be passed upon by the court.<sup>86</sup> Where an order allowing intervention has been improperly made, the proper practice is a motion to vacate it.<sup>87</sup> The stipulation provided for in the rules must be filed.<sup>88</sup>

**(II.) Notice and Advertisement.**—There must be notice to the adverse parties of the intervention.<sup>89</sup> But in a proceeding *in rem* where the

8,237; *Harper v. New Brig*, Gilp. 536, 11 Fed. Cas. No. 6,090.

The mortgagee may petition for the payment of his mortgage out of the proceeds after the satisfaction of prior maritime claims. *Schuchardt v. The Ship Angelique*, 19 How. (U. S.) 239, 15 L. ed. 625; *Justi Pon v. Arbustei*, 14 Fed. Cas. No. 7,589.

Although the settlement of partnership accounts is necessary, the petitions of part owners will be entertained. *The L. B. Goldsmith*, Newb. Adm. 123, 15 Fed. Cas. No. 8,152.

**79.** *The Boston*, Blatchf. & H. Adm. 309, 3 Fed. Cas. No. 1,669, holding that an administrator of the deceased owner, though not entitled to appear as claimant because not appointed in the state where the court is sitting, may file a petition after the sale of the vessel praying that the proceeds be reserved for legal representatives of the owner and putting in question the libellant's right to receive them.

**80.** *The Ship Panama*, Ole. Adm. 343, 353, 18 Fed. Cas. No. 10,703.

**81.** See *Mason v. Marine Ins. Co.*, 110 Fed. 452, 49 C. C. A. 106, 54 L. R. A. 700.

A mortgagee may intervene before or after the sale of the ship. *The Old Concord*, Brown's Adm. 270, 18 Fed. Cas. No. 10,482. See also *Schuchardt*

*v. The Ship Angelique*, 19 How. (U. S.) 239, 15 L. ed. 625.

**After an Interlocutory Decree.**—*The Queen*, 40 Fed. 694; *The Steamer City of Paris*, 1 Ben. 529, 5 Fed. Cas. No. 2,766. See *The America*, 56 Fed. 1021.

**82.** *The James G. Swan*, 106 Fed. 94, before the time for appeal has expired.

**83.** *Mason v. Marine Ins. Co.*, 110 Fed. 452, 49 C. C. A. 106, 54 L. R. A. 700. See also *Andrews v. Wall*, 3 How. (U. S.) 568, 11 L. ed. 729; *The Steamer City of Paris*, 1 Ben. 529, 5 Fed. Cas. No. 2,766 (after decree and pending a reference). But see *The Chief*, 142 Fed. 349, 73 C. C. A. 459.

**84.** *The Oregon*, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. ed. 943, reversing 45 Fed. 62; *The Willamette*, 70 Fed. 874, 18 C. C. A. 366, 31 L. R. A. 715. See also *Laidlow v. Oregon R. & N. Co.*, 81 Fed. 876, 26 C. C. A. 665, holding that an intervening petition may be treated as an original libel.

**85.** Adm. Rule 34. See *The Chief*, 142 Fed. 349, 73 C. C. A. 459. But see *The S. S. Oregon*, 42 Fed. 78.

**Form of Petition.**—See *Andrews v. Wall*, 3 How. (U. S.) 568, 11 L. ed. 729.

**86.** *The Clara A. McIntyre*, 94 Fed. 552.

**87.** *The Alexandra*, 104 Fed. 904.

**88.** See *infra*, II, K, 5.

**89.** *The Alexandra*, 104 Fed. 904

libeled property has not been released upon stipulation, no new advertisement is necessary.<sup>90</sup>

c. *Exceptions*.—The adverse parties may except to a petition or libel in intervention,<sup>91</sup> and if the right of the intervenor to appear be not excepted to before proceedings upon the merits, the right to object is waived.<sup>92</sup>

7. *Answer to the petition* may be required of the other parties.<sup>93</sup>

8. *Reference*.—Where necessary a reference may be ordered to determine the merits and amount of the petitioner's claim.<sup>94</sup>

9. *Forced Intervention*.—a. *In Collision Cases*.—By admiralty rule 59 it is provided that in a suit for damage by collision the claimant or defendant may by petition bring in other guilty vessels or persons. This rule is liberally interpreted to apply to cases within its spirit, though not covered by its express words.<sup>95</sup>

b. *In Analogous Cases*.—The principle embodied in the fifty-ninth rule<sup>96</sup> has been extended by analogy to cases not covered by its language, but where the same or similar reasons have existed for its application.<sup>97</sup> And in any case, in furtherance of justice, the court may grant the respondent's petition that other persons liable with or bound to indemnify him may be made parties defendant,<sup>98</sup> even though an action at law by the libellant is pending against them on the same

See also *The L. B. Goldsmith*, Newb. Adm. 123, 15 Fed. Cas. No. 8,152. But see *The Ship Henry Ewbank*, 1 Sumn. 400, 11 Fed. Cas. No. 6,376.

90. *The Julia*, 57 Fed. 233.

91. *The S. S. Oregon*, 42 Fed. 78.

92. *Furniss v. Magoun*, Olc. Adm. 55, 9 Fed. Cas. No. 5,163. See *supra*, II, J, 6.

93. Adm. Rule 34; *The Two Marys*, 12 Fed. 152. See *The S. S. Oregon*, 42 Fed. 78.

*Form of Answer to Petition*.—See *Andrews v. Wall*, 3 How. (U. S.) 568, 11 L. ed. 729.

94. *The Steamer City of Paris*, 1 Ben. 529, 5 Fed. Cas. No. 2,766.

95. *The Barnstable*, 181 U. S. 464, 21 Sup. Ct. 684, 45 L. ed. 954. See the section following.

The fifty-ninth rule resulted from *The Hudson*, 15 Fed. 162, which first sanctioned the practice in the United States (*Evans v. New York & P. S. S. Co.*, 163 Fed. 405), though a similar practice exists in some cases in other countries. See *The Alert*, 40 Fed. 836, 838; *The Cartburn*, 5 Prob. Div. (Eng.) 35.

96. The principle underlying the 59th rule and the other cases in which forced intervention has been held proper is the equitable one that circuity of action and multiplicity of suits upon the same question should be avoided to prevent diverse and con-

tradictory decisions upon the same subject and a consequent injustice to some of the parties. *In re New York*, etc. S. S. Co., 155 U. S. 525, 15 Sup. Ct. 183, 39 L. ed. 246; *Evans v. New York & P. S. S. Co.*, 163 Fed. 405; *The Alert*, 40 Fed. 836.

97. *The Alert*, 40 Fed. 836. See also *In re New York*, etc. S. S. Co., 155 U. S. 523, 15 Sup. Ct. 183, 39 L. ed. 246; *McCaldin Bros. Co. v. Donald S. S. Co.*, 169 Fed. 992; *Hastorf v. Hudson River Stone S. Co.*, 110 Fed. 669; *Christy v. Davis Coal & Coke Co.*, 92 Fed. 3.

98. *Dailey v. City of New York*, 119 Fed. 1005. See also *Evans v. New York & P. S. S. Co.*, 163 Fed. 405; *Salisbury v. Seventy Thousand Feet of Lumber*, 68 Fed. 916 (suit for freight and demurrage).

In a suit for salvage, either *in personam* (*Dailey v. New York*, 119 Fed. 1005), or *in rem* (*The No. K. 1*, 150 Fed. 111, 80 C. C. A. 65), the respondent may bring in third parties whose alleged negligence caused the necessity for the salvage service. *Public Bath No. 13*, 61 Fed. 692 (the bailee of the property).

In a suit for damage to or non-delivery of cargo the person or ship responsible therefor may be brought in on respondent's petition. *The John Cottrell*, 34 Fed. 907 (barge); *The City of Lincoln*, 25 Fed. 835 (owners of wharf).

cause of action,<sup>99</sup> and though their liability is non-maritime.<sup>1</sup> But the rule cannot be extended to bring in matters not connected with the original controversy.<sup>2</sup>

**Discretion.**—The allowance of the petition rests, however, in the discretion of the court.<sup>3</sup>

*c. Petition and Process.*—The petition should set forth all the facts necessary, in connection with the libel, to show a cause of action against the proposed new defendant,<sup>4</sup> and may join, as respondents, both a ship and a person, if he is not the owner thereof.<sup>5</sup> The process should require the respondents to answer the libel and petition.<sup>6</sup>

**M. CONSOLIDATION AND SEVERANCE.**—**1. Consolidation.**—*a. Generally.*—For the purpose of more effectively, speedily and economically administering justice, the court, in the exercise of its discretion, may consolidate separate suits relating to the same subject-matter.<sup>7</sup> But a request for consolidation will be denied where it might result in injustice to one of the parties.<sup>8</sup> Consolidation may be effected at any

The claimant may thus bring in the charterers. *The Crown of Castile*, 148 Fed. 1012; *The Centurion*, 57 Fed. 412; *The Alert*, 40 Fed. 836.

99. *The Cerea*, 149 Fed. 924, where the court says: "It does not appear how the libelants can be prejudiced by such a course unless it would follow therefrom that they would be deprived of a right of a trial by jury in the actions which they allege they have brought against the persons sought by the claimant to be made parties here. The libelants have invoked the jurisdiction of this court and subjected themselves to the equitable principles which prevail here. It appears that if the claimant can in any way be protected by the presence of the other parties, whom, in the event of an adverse decision here, it would have to sue to indemnify itself, it should have the right to such indemnity in the one action."

1. *Evans v. New York & P. S. S. Co.*, 163 Fed. 405.

2. *McCaldin Bros. Co. v. Donald S. S. Co.*, 169 Fed. 992, though arising under the same charter party.

3. *The Black Heath*, 154 Fed. 758, dismissing the claimant's petition that the pilot be made a party defendant because of his alleged negligence, but without prejudice to claimant's right to bring suit on his claim against the pilot.

4. *The Alert*, 40 Fed. 836.

5. *The No. K. 1*, 150 Fed. 111, 80 C. C. A. 65. See also *Joice v. Canal Boats*, 32 Fed. 553; and *supra*, II, F, 3, c.

6. *The Alert*, 40 Fed. 836.

7. U. S. Rev. St., § 921; *The North Star*, 106 U. S. 17, 27, 1 Sup. Ct. 41, 27 L. ed. 91; *Rich v. Lambert*, 12 How. (U. S.) 347, 13 L. ed. 1017; *The Burke v. Hurney*, 4 Cliff. 582, 4 Fed. Cas. No. 2,159; *The Strathgarry* (1895), Prob. Div. (Eng.) 264; *The Demetrius*, L. R. 3 Adm. & Ecc. (Eng.) 523.

In *The Eliza Lines*, 114 Fed. 307, 52 C. C. A. 195, there were consolidated four libels, one for salvage against the ship, cargo and freight; a second for possession of the cargo; a third against the cargo and several persons for freight and general average; and a fourth against the ship and freight on a bottomry bond. "There seems to be no limit upon the power of the court, in the exercise of a sound discretion, to consolidate different cases pending in the same court and relating to the same subject-matter where justice can be administered more speedily and less expensively through such consolidation, and the duty of the court to order such consolidation would seem to be plain when no individual interests will be prejudiced, and when all interests will be beneficially subserved by thus speeding an ultimate ascertainment and establishment of the several rights."

**For Purpose of Bonding Vessel.**—*The Ship Antelope*, 1 Ben. 521, 1 Fed. Cas. No. 481.

8. In *The Morocco*, 24 L. T. N. S. (Eng.) 578, several sets of salvors filed libels for concurrent services; one of them refused to consolidate on the ground that in addition to assisting the



time before any of the suits have been actually determined.<sup>9</sup>

b. *Particular Instances.*—The power to consolidate may be exercised in case of libels based upon the same collision,<sup>10</sup> libels for seamen's wages,<sup>11</sup> for salvage,<sup>12</sup> or for the breach of contracts of affreightment<sup>13</sup> or carriage<sup>14</sup> growing out of the same transaction. And in all cases where property libeled or the proceeds thereof are insufficient to meet the claims made in several suits against it, they may be consolidated.<sup>15</sup>

c. *How Effected.*—Consolidation is effected by an order<sup>16</sup> properly made and entered by the court of its own motion, or upon request of one of the parties.<sup>17</sup>

d. *Effect.*—*Trial.*—Cases consolidated may be tried together or separately as the court in its discretion may determine to be proper for the sake of convenience or in furtherance of justice.<sup>18</sup> Where the

others in saving the vessel, they also saved the lives of the passengers, a service of higher merit. The refusal on this ground was held justifiable.

9. Suits can only be consolidated after each of them has become a *lis pendens*, and a suit *in personam* does not become a *lis pendens* until after the service of the writ of summons. The *Helenslea*, 7 Prob. Div. (Eng.) 57. But see *supra*, II, D, 1.

**Consolidation After Trial.**—In *Pacific Steam Whaling Co. v. Grismore*, 117 Fed. 68, 54 C. C. A. 454, it appears that after trial three separate libels and one intervening libel filed by passengers for breach of contract of carriage, were consolidated.

A suit which has been heard and decided cannot be consolidated with one which is yet to be tried. The *Demetrius*, L. R. 3 Adm. & Ecc. (Eng.) 523.

10. The *North Star*, 106 U. S. 17, 27 L. ed. 91; The *Vildosala*, 42 L. T. N. S. (Eng.) 95.

11. Suits for seamen's wages may be consolidated, and the fact that claims for an additional allowance because of the bad quality of food furnished are included in some of the libels does not change the rule. The *Sarah E. Kennedy*, 25 Fed. 672.

12. The *Mississippi*, 17 Fed. Cas. No. 9,651; The *Charles Henry*, 1 Ben. 8, 5 Fed. Cas. No. 2,617; The *Melpomene*, L. R. 4 Adm. & Ecc. (Eng.) 129, 42 L. J. Adm. 45; The *William Hutt*, Lush. (Eng.) 25.

Libels by different sets of salvors may be consolidated although the ser-

vices embraced in the separate libels were rendered at different times and places. The *Strathgarry* (1895), Prob. Div. 264; The *Demetrius*, L. R. 3 Adm. & Ecc. (Eng.) 523. But where injustice to one salvor might result because his services were of higher merit, consolidation was refused. The *Morocco*, 24 L. T. N. S. (Eng.) 578.

13. *Rich v. Lambert*, 12 How. (U. S.) 347, 13 L. ed. 1017; *Queen of the Pacific*, 61 Fed. 213, s. c., 94 Fed. 180, 36 C. C. A. 135.

14. See *Pacific Steam Whaling Co. v. Grismore*, 117 Fed. 68, 54 C. C. A. 454.

**Passengers' claims for unwholesome and insufficient food furnished on the same voyage may be consolidated.** The *Oregon*, 133 Fed. 609, 68 C. C. A. 603.

15. The *Ship Antelope*, 1 Ben. 521, 1 Fed. Cas. No. 481. See also The *H. A. Baxter*, 172 Fed. 260.

16. A mere agreement by the parties to different causes that they may be tried together, and a trial in accordance with such agreement, does not constitute a consolidation for the purpose of an appeal. *Shotter Co. v. Larsen*, 134 Fed. 705, 67 C. C. A. 259.

17. Consent of the parties is not necessary to give the court the power to consolidate suits. The *Strathgarry* (1895), Prob. Div. (Eng.) 264.

18. The *Ship Antelope*, 1 Ben. 521, 1 Fed. Cas. No. 481. See *infra*, II, M, 2.

"But if tried together the court must be careful not to apply evidence taken before the consolidation to any issue with reference to which it was

interests of one libellant are adverse to the interests of others separate counsel may be heard on his behalf.<sup>19</sup>

**Separate Reference.** — A separate reference of consolidated cases may be ordered where it is more convenient to proceed in this manner.<sup>20</sup>

**The right of appeal** by either party, so far as dependent upon the amount of the claim or the decree, is in nowise enlarged or affected.<sup>21</sup>

**2. Severance.** — Where some of the claims or causes of action joined in the same libel are admitted, the court may sever the admitted from the contested claims and render a decree on the former, reserving the latter, together with the questions of interests and costs, for further consideration and adjudication.<sup>22</sup> And where separate claims to distinct portions of libeled property have been interposed they may be treated as independent suits.<sup>23</sup> So, also, consolidated suits may be severed in furtherance of the convenience of the court.<sup>24</sup>

**N. ABATEMENT BY DEATH.** — **1. Generally.** — The general rules as to the abatement of a suit by the death of a party obtain in admiralty.<sup>25</sup> A suit upon a cause of action for a purely personal tort is abated by the death of the injured party.<sup>26</sup> Thus a proceeding *in rem* for personal injuries sustained through negligence is abated by the death of the libellant,<sup>27</sup> unless the state statute otherwise provides.<sup>28</sup> But the contrary rule applies to suits for tortious injuries to property.<sup>29</sup> Suits founded upon contracts survive the death of the libellant.<sup>30</sup>

The death of a claimant does not abate a proceeding *in rem*.<sup>31</sup>

not taken." The Eliza Lines, 61 Fed. 308.

19. The Scout, L. R. 3 Adm. & Ecc. 512, 26 L. T. N. S. 371, 41 L. J. Adm. 42.

20. The Helen R. Cooper, L. R. 3 Adm. & Ecc. (Eng.) 339.

21. Rich v. Lambert, 12 How. (U. S.) 347, 13 L. ed. 1017.

22. Larrinaga v. Two Thousand Bags of Sugar, 40 Fed. 507, holding that such action was not rendered improper by the fact that the amount in suit was so reduced as to destroy the right of appeal to the United States Supreme Court.

23. See *supra*, II, J, 8.

24. See The Steamer City of Paris, 1 Ben. 529, 5 Fed. Cas. No. 2,766; The Ship Antelope, 1 Ben. 521, 524, 1 Fed. Cas. No. 481; The Melpomene, 42 L. J. Adm. (Eng.) 45; The William Hutt, 1 Lush. (Eng.) 25.

25. See the titles "Abatement, Pleas Of;" "Judgment;" "Revival of Judgments and Decrees."

26. Crapo v. Allen, 1 Spr. 184, 6 Fed. Cas. No. 3,360, aggravated assault and battery upon a seaman.

27. The City of Belfast, 135 Fed. 208.

28. The City of Belfast, 135 Fed. 208, holding that under the Pennsylvania statute permitting the personal representatives of the deceased to be substituted as plaintiffs, the cause of action remained the same and decedent's administrator was entitled to continue the suit.

29. A suit by the master on behalf of the owners of a vessel and cargo for damages from a collision does not abate upon the libellant's death (The Margaret B. Roper, 106 Fed. 741, 45 C. C. A. 578); nor does a parent's suit for an injury to his child abate by the latter's death (Plummer v. Webb, 1 Ware 75, 19 Fed. Cas. No. 11,234); a husband's libel for injuries to his wife by her death (The Seagull, Chase 145, 21 Fed. Cas. No. 12,578).

30. The Ship Norway, 1 Ben. 493, 18 Fed. Cas. No. 10,357.

31. The James A. Wright, 10 Blatchf. 160, 13 Fed. Cas. No. 7,191, following a *dictum* in Penhallow v. Doane's Admr., 3 Dall. (U. S.) 54, 101, 1 L. ed. 507. See also The Cerea, 149 Fed. 924.

**2. Substitution.**—*a. Generally.*—Upon the death of a libellant<sup>32</sup> or respondent,<sup>33</sup> if the cause of action survives, there may be a substitution. If the death occurs pending an appeal, the substitution may be made in the appellate court.<sup>34</sup>

*b. Who Substituted.*—Ordinarily, the proper person to be substituted for a deceased party is his legal representatives.<sup>35</sup> But where the libellant is suing in behalf of himself and numerous others on a cause of action common to all it is not necessary that the personal representatives of the decedent should be substituted, if others of the interested parties are represented in the litigation by counsel, or that any person should *ex officio* be designated as libellant, but the court as a matter of convenience may substitute any of the persons represented.<sup>36</sup>

*c. How Effected.*—The proper manner of presenting the matter of a party's death to the court is by a suggestion of that fact.<sup>37</sup> A motion for substitution may be made either by the representative of the decedent or by other parties to the suit.<sup>38</sup> In the absence of statutory requirement the motion may be made at any time.<sup>39</sup>

32. *The Margaret B. Roper*, 106 Fed. 741, 45 C. C. A. 578; *The Cadiz*, 20 Fed. 157; *The Ship Norway*, 1 Ben. 493, 18 Fed. Cas. No. 10,357.

33. Mayor, etc., of New York v. White, 59 Fed. 617 (claimant); *Nevitt v. Clarke*, Ole. Adm. 316, 18 Fed. Cas. No. 10, 138; *The Brig Ann C. Pratt*, 1 Curt. 340, 1 Fed. Cas. No. 409.

34. *Substitution on Appeal.*—Where pending an appeal the libellant dies and the cause of action is one which survives, the proper representative in the personality or realty of the deceased party, according to the nature of the case, may be substituted as a party in place of the decedent. *The Margaret B. Roper*, 106 Fed. 741, 45 C. C. A. 578, following the rules of the circuit court of appeals of the supreme court covering such a case.

35. See *The Margaret B. Roper*, 106 Fed. 741, 45 C. C. A. 578; *The City of Belfast*, 135 Fed. 208; *The Cadiz*, 20 Fed. 157; *The Ship Norway*, 1 Ben. 493, 18 Fed. Cas. No. 10,357.

36. *United States v. Sampson*, 187 U. S. 436, 23 Sup. Ct. 216, 47 L. ed. 248, which was a libel in prize by Rear Admiral Sampson in his own behalf and in behalf of all officers and enlisted men entitled to share in the prize. Upon his death, the court as a matter of convenience, substituted Rear Admiral Taylor, who was within the jurisdiction and was represented in the litigation by counsel.

37. *Nevitt v. Clarke*, Ole. Adm. 316, 18 Fed. Cas. No. 10,138.

38. *The Ship Norway*, 1 Ben. 493, 18 Fed. Cas. No. 10,357. But see *Nevitt v. Clarke*, Ole. Adm. 316, 328, 18 Fed. Cas. No. 10,138.

39. *The Ship Norway*, 1 Ben. 493, 18 Fed. Cas. No. 10,357.

Laches cannot be predicated on the mere lapse of time. *The Ship Norway*, 1 Ben. 493, 18 Fed. Cas. No. 10,357.

But see Mayor, etc., of New York v. White, 59 Fed. 617, granting the libellant's application to revive a libel *in rem* filed nineteen years before, although the claimant's executor had qualified and been discharged in the interim, subject, however, to the right of the executor and his sureties to move for a dismissal on the ground of laches and want of prosecution.

**Stay of Proceedings.**—Where pending a stay of proceedings, for the taking of testimony, the libellant dies and several years intervene before his executor seeks to be substituted, the court will continue to stay a sufficient length of time to permit the taking of the testimony of a witness who in the meantime has left the country. *The Ship Norway*, 1 Ben. 493, 18 Fed. Cas. No. 10,357.

**After Appeal in Name of Decedent.**—In *The James A. Wright*, 10 Blatchf. 160, 13 Fed. Cas. No. 7,191, the claimant died before the decree below was rendered, but this fact was not sug-



O. STAYING PROCEEDINGS — A court of admiralty may stay proceedings in any case before it when the circumstances are such that injustice will otherwise result.<sup>40</sup>

P. DISMISSAL. — 1. **Generally.** — The court upon sustaining exceptions may dismiss the suit<sup>41</sup> or the cross-suit,<sup>42</sup> if the case is not a proper one for amendment,<sup>43</sup> as where there is a lack of jurisdiction.<sup>44</sup> So where by reason of the insufficiency of the evidence and the circumstances of the case the rendition of a satisfactory judgment is impossible, the suit may be dismissed without prejudice.<sup>45</sup> Failure to prosecute a suit with diligence does not justify its dismissal where it was equally within the power of the adverse party to have put an end to the delay.<sup>46</sup> But the libellant's failure to appear or refusal to prosecute his suit according to the course and orders of the court constitutes a default, for which the suit may be dismissed with costs unless a sufficient ground for continuance be presented.<sup>47</sup>

2. **Voluntary.** — A libellant has the right, without other liability than for accrued costs, to dismiss his suit as to all<sup>48</sup> or any<sup>49</sup> of the parties thereto at any time up to the hearing on the merits. But after testimony has been introduced upon which a judgment on the merits might be based,<sup>50</sup> such right ceases unless granted by the court for sufficient cause<sup>51</sup> or by stipulation of the parties.<sup>52</sup> A suit upon a joint cause of action will not be dismissed upon motion of some of the libellants unwilling to proceed therein.<sup>53</sup>

gested to the court. An appeal to the circuit court was taken in the name of the decedent. It was suggested but not decided that if an objection on that ground had been taken the appeal would have been dismissed.

40. *The Albert Schultz*, 12 Fed. 156; *The Steamship Idaho*, 4 Ben. 272, 12 Fed. Cas. No. 6,996, as where several suits are pending involving the same issues. See *The Eliza Lines*, 61 Fed. 308, 323; *The Edith*, 34 Fed. 927, and *supra*, II, G, 24, e, (III), (A); II, T, 1.

**On Death of Party.** — See *supra*, II, N, 2, c.

41. See *supra*, II, G, 20.

42. See *supra*, II, G, 24, e, (IV), and *The Dove*, 91 U. S. 391, 23 L. ed. 354.

**Effect of Dismissal of Original or Cross Libel.** — See *supra*, II, G, 24, e, (IV), (B) and (C).

43. See *supra*, II, G, 21.

44. *Vandewater v. Mills*, 19 How. (U. S.) 82, 15 L. ed. 554; *The City of Clarksville*, 94 Fed. 201; *Williams v. Providence Wash. Ins. Co.*, 56 Fed. 159 (cannot be allowed); *The Pauline*, 1 Biss. 390, 19 Fed. Cas. No. 10,848.

45. *The Elsie Fay*, 48 Fed. 700.

46. *The Mariel*, 6 Fed. 831. See also *The Ship Norway*, 1 Ben. 493, 18

Fed. Cas. No. 10,357; *Chambers v. The Henry Kneeland*, 5 Fed. Cas. No. 2,581a. But see *Mayor, etc., of New York v. White*, 59 Fed. 617.

47. Adm. Rule 39; *Douglass v. The Ship Washington*, *Crabbe* 452, 7 Fed. Cas. No. 4,033.

48. *The Brig Oriole*, *Olc. Adm.* 67, 18 Fed. Cas. No. 10,573. See *The Thales*, 3 Ben. 327, 23 Fed. Cas. No. 13,855.

49. Where it appears that one of the defendants is not properly a party the suit as to him may be dismissed. *Dugan v. Pentz*, 2 Hughes 66, 7 Fed. Cas. No. 4,121.

50. *Folger v. The Robert G. Shaw*, 2 Woodb. & M. 531, 9 Fed. Cas. No. 4,899.

51. *Folger v. The Robert G. Shaw*, 2 Woodb. & M. 531, 9 Fed. Cas. No. 4,899.

52. *Folger v. The Robert G. Shaw*, 2 Woodb. & M. 531, 9 Fed. Cas. No. 4,899. See also *The Robert Jenkins*, 22 Fed. 797, oral stipulation not enforced if the parties do not agree as to its terms.

53. *Richmond v. New Bedford Copper Co.*, 2 Low. 315, 20 Fed. Cas. No. 11,800, holding that the suit would merely be stayed until proper indemnity was furnished the non-consenting libellants.

**3. Motion.** — Amendable defects in the libel should be questioned by exceptions rather than by a motion to dismiss.<sup>54</sup> But on such a motion, made before the hearing, the libel is taken as true and new matter in the answer is deemed denied.<sup>55</sup> A motion to dismiss will not be entertained at the close of libellant's case unless the moving party also rests his case.<sup>56</sup>

**4. Effect.** — a. *On Right to Rearrest Vessel.* — Where attached property has been released on bond or stipulation, the subsequent voluntary dismissal of the suit does not revive the libellant's lien and right to rearrest the released property upon the same cause of action;<sup>57</sup> nor can third persons, claiming a delivery by the marshal to the wrong party, petition for rearrest of the property.<sup>58</sup>

b. *On Cross-Libel.* — The dismissal of the original libel does not necessitate the dismissal of a cross-libel,<sup>59</sup> except where it is not so connected with the subject-matter of the libel as to be maintainable.<sup>60</sup>

**Q. SALE PENDING SUIT.** — Pending the suit, a libeled or attached vessel which has not been released on bail,<sup>61</sup> and other attached property perishable in its nature or liable to deterioration or injury by detention,<sup>62</sup> may in the discretion of the court be ordered sold upon a proper and sufficient showing of the necessity therefor.<sup>63</sup>

**R. TENDER.** — **1. Generally.** — In admiralty, as elsewhere, a tender before suit filed entitles the respondent to costs.<sup>64</sup> Although the amount due is unliquidated there may be a valid tender, as in salvage cases.<sup>65</sup> The same strictness does not exist as to tenders in admiralty as at common law.<sup>66</sup> A good faith offer of the amount to which the adverse party is entitled is sufficient.<sup>67</sup> It is not essential that the money be produced or that it be in legal tender.<sup>68</sup> There must, however, be an ability to pay and the offer should be unconditional<sup>69</sup> and should be repeated on the record before or during the litigation.<sup>70</sup>

**2. Pleading and Payment Into Court.** — Local rules may require a

54. The *J. R. Hoyle*, 4 Biss. 234, 13 Fed. Cas. No. 7,557.

55. The *W. J. Hingston*, 144 Fed. 560.

56. The *Persiana*, 158 Fed. 912.

57. The *Thales*, 3 Ben. 327, 23 Fed. Cas. No. 13,855; *affirmed*, 10 Blatchf. 203, 23 Fed. Cas. No. 13,856.

58. The *Propeller Jack Jewett*, 2 Ben. 353, 13 Fed. Cas. No. 7,121.

59. See *Bowker v. United States*, 186 U. S. 135, 141, 22 Sup. Ct. 802, 46 L. ed. 1090.

60. *Kemp v. Brown*, 43 Fed. 391.

61. Adm. Rule 11; The *Ship Nathaniel Hooper*, 3 Sumn. 542, 17 Fed. Cas. No. 10,032; The *Cheshire*, Blatchf. Prize Cas. 165, 5 Fed. Cas. No. 2,656.

62. Adm. Rule 10; *United States v. Lion*, 1 Spr. 399, 25 Fed. Cas. No. 15,607 (expense of storage justifies a sale). See also *Jennings v. Carson*, 4 Cranch (U. S.) 2, 2 L. ed. 531; The *Nevada*, 85

Fed. 681; The *Nathaniel Hooper*, 3 Sumn. 542, 17 Fed. Cas. No. 10,032; The *Ella Wasley*, Blatchf. Pr. Cas. 213, 8 Fed. Cas. No. 4,372; The *Venus*, L. R. 1 Adm. & Ecc. (Eng.) 50; Conkling's Adm. (1848), 458, 507-509.

63. See *infra*, II, X.

64. See cases following.

65. *Evans v. The Charles Newb.* Adm. 329, 8 Fed. Cas. No. 4,556; *Dedekam v. Vose*, 3 Blatchf. 44, 7 Fed. Cas. No. 3,729. See The *Mona* (1894), Prob. Div. (Eng.) 268.

66. *Boulton v. Moore*, 14 Fed. 922; *Dedekam v. Vose*, 3 Blatchf. 44, 7 Fed. Cas. No. 3,729. See The *Mona* (1894), Prob. Div. (Eng.) 268.

67. *Dedekam v. Vose*, 3 Blatchf. 44, 7 Fed. Cas. No. 3,729, where the amount due was partly unliquidated. See also The *Glencairn*, 78 Fed. 379.

68. *Boulton v. Moore*, 14 Fed. 922.

69. *Boulton v. Moore*, 14 Fed. 922.

70. *Boulton v. Moore*, 14 Fed. 922.

tender to be kept good by a deposit in court.<sup>71</sup> In salvage cases this is required by the general practice.<sup>72</sup> The respondent may in any case, after suit filed, prevent liability for further costs or entitle himself to subsequent costs, by tendering in his answer the amount due plus accrued costs and depositing the same in court.<sup>73</sup> Where tender is so made for the first time, the amounts tendered respectively as payment and as costs must be specified in the answer.<sup>74</sup> Only such costs as are properly taxable when the tender and deposit is made need be included in it.<sup>75</sup> Such a tender and deposit amount to a conclusive admission of the claim to that extent,<sup>76</sup> and the libellant may, without prejudice to his litigation for a larger amount, withdraw as a matter of right the amount tendered less such a sum as the court shall see fit to withhold to cover the respondent's future costs.<sup>77</sup> Such a withdrawal terminates his right to interest *pro tanto*.<sup>78</sup>

**S. PAYMENT INTO COURT.**—In proceedings *in rem* the court may, on petition by the interested party, order freight or other proceeds of property attached to or bound by the suit, to be paid into court by the person in whose possession they are.<sup>79</sup> So, also, upon a petition or libel of interpleader the fund in controversy may be deposited in court subject to the rights of the contending parties.<sup>80</sup>

**T. SPECIAL DEFENSES.**—**1. Another Suit Pending.**—*a. In Same*

**71.** See district rules.

**In England.**—*The Mona* (1894), Prob. Div. (Eng.) 268; *The Nasmyth*, 10 Prob. Div. (Eng.) 41.

**72.** *Evans v. The Charles, Newb.* Adm. 329, 8 Fed. Cas. No. 4,556.

**73.** *Ye Seng Co. v. Corbitt*, 7 Sawy. 368, 9 Fed. 423. See *The Glencairn*, 15 Fed. 379; *The Hickman*, L. R. 3 Adm. & Ecc. 15, 39 L. J. Adm. 7, 21 L. T. 472.

By rule 36 of the district court of the southern district of New York provision is made for tender and payment into court, by virtue of which the respondent is entitled to recover costs from the time of deposit if the libellant does not recover a more favorable decree. *The Claverburn*, 148 Fed. 139. See also *Swan v. Wiley, Harker & Camp Co.*, 161 Fed. 236.

**74.** *The Good Hope*, 40 Fed. 608.

**75.** A proctor's docket fee and deposition fees need not be included in an offer made before trial. *The Claverburn*, 148 Fed. 139. See also *Merritt & Co. v. Catskill, etc.*, 112 Fed. 442; *Kaempfer v. Taylor*, 78 Fed. 795. See *infra*, II, Z, 2, d, (II).

**76.** *Califarno v. MacAndrews*, 51 Fed. 300; *Ye Seng Co. v. Corbitt*, 7 Sawy. 368, 9 Fed. 423. *Contra*, *The Mona* (1894), Prob. Div. (Eng.) 268.

**77.** *Merritt, etc. Co. v. Catskill, etc.*

*Co.*, 112 Fed. 442; *Higbee v. Ninety-Six Hundred Cases of Tomatoes*, 59 Fed. 783; *Califarno v. MacAndrews*, 51 Fed. 300; *Ye Seng Co. v. Corbitt*, 7 Sawy. 368, 9 Fed. 423. But see *Alexandria v. Patten*, 1 Cranch C. C. 294, 1 Fed. Cas. No. 186; *The Annie Childs*, Lush. Adm. (Eng.) 509.

Although costs accruing subsequent to the tender and deposit need not be included if they are actually deposited, they become liable to withdrawal by the libellant at any time subject to the retention in court of such sum as may be necessary to secure the claimant's subsequent costs. *The Claverburn*, 148 Fed. 139.

**78.** *Califarno v. MacAndrews*, 51 Fed. 300.

**79.** Adm. Rule 38; *The George Prescott*, 1 Ben. 1, 10 Fed. Cas. No. 5,339. See *The Monadnock*, 5 Ben. 357, 17 Fed. Cas. No. 9,704.

Money deposited with the agent of the vessel by the consignees of the cargo to cover a possible salvage award may on petition of the salvors be ordered into court although not technically the proceeds of the cargo. *The Queen of the Pacific*, 9 Sawy. (U. S.) 421.

**80.** *Copp v. De Castro & D. Sug. Ref. Co.*, 8 Ben. 321, 6 Fed. Cas. No. 3,215. See *supra*, II, C, 4, b.



*Court.* — A party who has a remedy both *in rem* and *in personam* for the same cause of action may not only pursue either at his election,<sup>81</sup> but may invoke them both in separate suits in the same district,<sup>82</sup> such a case being governed by the rules generally applicable to a plea of another action pending.<sup>83</sup> But where in a suit *in rem* a stipulation for the whole amount of the claim has been given, to which all the persons personally liable for the claim are parties, a subsequent suit *in personam* is improper.<sup>84</sup> And though both suits are properly filed, the proceedings therein may be regulated by the court in its discretion as the rights of the parties may dictate.<sup>85</sup> The entry of a decree<sup>86</sup> or taking of an appeal<sup>87</sup> in one suit may in the discretion of the court be stayed pending the results in the other, but the respondent is not entitled to such a stay as a matter of right.<sup>88</sup>

b. *In Another Court.* — (I.) Federal Court. — Whether as a general proposition the pendency of another suit in a federal court sitting in another state can be pleaded as a defense has not been determined,<sup>89</sup> but if such a plea can be made, it is available only in accordance with the principles generally applicable thereto.<sup>90</sup> The court may, however, stay the suit pending the outcome of the other suit.<sup>91</sup>

(II.) State Court. — A prior action pending in a state court is no defense,<sup>92</sup> but may justify or require a stay of proceedings to avoid a conflict of jurisdiction,<sup>93</sup> or injustice to the parties.<sup>94</sup>

(III.) Foreign Court. — The pendency of another action or suit in a foreign court cannot be pleaded as a defense.<sup>95</sup>

c. *The effect of proceedings to limit liability* as a suspension of other suits is elsewhere discussed.<sup>96</sup>

d. *How and When Pleaded.* — This defense is made by exceptions alleging the necessary facts,<sup>97</sup> which should be filed before answering

81. See *supra*, II, C, 3, b.

82. *La Normandie*, 58 Fed. 427, 7 C. A. 285, *affirming* 40 Fed. 590; *Providence Wash. Ins. Co. v. Wager*, 35 Fed. 364; *Atlantic Mut. Ins. Co. v. Alexandre*, 16 Fed. 279.

83. See the title "Another Action Pending," and *Atlantic Mut. Ins. Co. v. Alexandre*, 16 Fed. 279.

84. *The City of New York*, 25 Fed. 149; *Atlantic Mut. Ins. Co. v. Alexandre*, 16 Fed. 279.

85. *La Normandie*, 58 Fed. 427, 7 C. A. 285, *affirming* 40 Fed. 590. See also *The City of New York*, 25 Fed. 149; *Atlantic Mut. Ins. Co. v. Alexandre*, 16 Fed. 279.

86. *La Normandie*, 58 Fed. 427, 7 C. A. 285.

87. *The City of New York*, 25 Fed. 149.

88. *Providence Wash. Ins. Co. v. Wager*, 35 Fed. 364.

89. See *The Haytian Republic*, 154 U. S. 118, 14 Sup. Ct. 992, 38 L. ed.

930, *reversing* 59 Fed. 476, 8 C. C. A. 182.

90. See *The Haytian Republic*, 154 U. S. 118, 14 Sup. Ct. 992, 38 L. ed. 930; *The Pioneer*, 1 Dedy 58, 19 Fed. Cas. No. 11,176; and see fully the title "Another Action Pending."

91. *The Ciampi Emilia*, 39 Fed. 126.

92. *The Prince Albert*, 5 Ben. 386, 19 Fed. Cas. No. 11,426; *Certain Logs of Mahogany*, 2 Sumn. 589, 5 Fed. Cas. No. 2,559. See fully the title "Another Action Pending."

93. *Taylor v. The Royal Saxon*, 1 Wall. Jr. 311, 23 Fed. Cas. No. 13,803.

94. *The Edith*, 34 Fed. 927. See also *The Albert Schultz*, 12 Fed. 156; *The Idaho*, 4 Ben. 272, 12 Fed. Cas. No. 6,996; and *supra*, II, O.

95. *The Tubal Cain*, 9 Fed. 835, and the title "Another Action Pending."

96. See the title "Shipping."

97. *The Prince Albert*, 5 Ben. 386, 19 Fed. Cas. No. 11,426; *Certain Logs of Mahogany*, 2 Sumn. 589, 5 Fed. Cas. No. 2,559. See *supra*, II, G, 20.

to the merits—"before the *contestatio litis* or general defence in bar."<sup>98</sup>

**2. Former Adjudication.**—A plea of *res judicata* in admiralty is governed by the same principles applied in other courts.<sup>99</sup> Where there is a remedy both *in rem* and *in personam* for the same injury, if one remedy has been pursued to a final decree this can be pleaded as *res judicata* in the other suit,<sup>1</sup> but only as to matters necessarily and properly adjudicated,<sup>2</sup> and in accordance with the principles generally applicable to such a plea.<sup>3</sup> If the merits of the basic cause of action have been passed upon the decree bars a resort to the other remedy except for the purpose of securing a full satisfaction.<sup>4</sup>

A prior adjudication in a state<sup>5</sup> or other non-maritime court<sup>6</sup> is available in admiralty as *res judicata*, but only in accordance with the principles governing such a plea.<sup>7</sup>

Where there has been a voluntary dismissal<sup>8</sup> or discontinuance<sup>9</sup> of the former action the judgment cannot be pleaded as *res judicata*. Nor can it be pleaded as a bar to another suit where it is based entirely upon a defense, such as contributory negligence, which would not be available in admiralty.<sup>10</sup>

The right to institute proceedings to limit liability is not barred by a previous judgment in a state court, although the latter is conclusive as to the liability and amount of damages.<sup>11</sup>

98. Certain Logs of Mahogany, 2 Sumn. 589, 5 Fed. Cas. No. 2,559. See *supra*, II, G, 20, d.

99. See the title "Former Adjudication," and *Erie R. Co. v. Erie & W. Transp. Co.*, 204 U. S. 220, 27 Sup. Ct. 246, 51 L. ed. 450 (suit for partial contribution); *The Haytian Republic*, 154 U. S. 118, 14 Sup. Ct. 992, 38 L. ed. 930; *The Tubal Cain*, 9 Fed. 834.

Effect of Decree In Rem.—See *infra*, II, V, 8, a.

Set-Off as Bar to Subsequent Suit.—See *supra*, II, G, 23, b.

In Proceedings to Limit Liability.—*The Benefactor*, 103 U. S. 239, 26 L. ed. 351; *Gleason v. Duffy*, 116 Fed. 298, 54 C. C. A. 100; *Oregon R. & N. Co. v. Balfour*, 90 Fed. 295, 33 C. C. A. 57.

Necessity of Pleading.—See *The Tubal Cain*, 9 Fed. 834, and the title "Another Action Pending."

Particularity of Plea.—See *The Schooner Navarro*, Olc. Adm. 127, 17 Fed. Cas. No. 10,059.

1. *Providence Wash. Ins. Co. v. Morse*, 35 Fed. 363. See *The Tubal Cain*, 9 Fed. 834; *The Propeller East*, 9 Ben. 76, 8 Fed. Cas. No. 4,251.

2. *Morris v. Bartlett*, 108 Fed. 675, 47 C. C. A. 578; *Ballantyne v. Mackinnon* (1896), 65 L. J. Q. B. 616, 75 L. T. N. S. 95, 2 Q. B. 455. See *The Propeller East*, 9 Ben. 76, 8 Fed. Cas. No. 4,251.

3. See the title "Former Adjudication," and *Bailey v. Sundberg*, 49 Fed. 583, 1 C. C. A. 387; *The James G. Swan*, 106 Fed. 94.

4. *Yeo v. Tatem*, 8 Moore P. C. (N. S.) 74, 40 L. J. Adm. 29, L. R. 3 P. C. 696, 24 L. T. 918; *The Pet*, 20 L. T. 961, 17 W. R. 899. See U. S.—*The Cerro Gordo*, 54 Fed. 391; *The Brothers Apap*, 34 Fed. 352. Ark.—*Toby v. Brown*, 11 Ark. 308. Pa.—*Odorilla v. Baizley*, 128 Pa. 283, 18 Atl. 511.

5. *Goodrich v. Chicago*, 5 Wall. (U. S.) 566, 18 L. ed. 511; *Gleason v. Duffy*, 116 Fed. 298, 54 C. C. A. 100; *Ball v. Trenholm*, 45 Fed. 588; *The City of Lincoln*, 25 Fed. 835; *The Tubal Cain*, 9 Fed. 834.

6. *The Griefswald*, Swabey (Eng.) 430. See *The City of Lincoln*, 25 Fed. 835, 843; *The Tubal Cain*, 9 Fed. 834, 837. But see *Lang v. Holbrook*, *Crabbe* 179, 14 Fed. Cas. No. 8,057; *The Ann and Mary*, 2 W. Rob. (Eng.) 189.

7. *The City of Lincoln*, 25 Fed. 835; *The Tubal Cain*, 9 Fed. 834; *The Vincennes*, 3 Ware 171, 28 Fed. Cas. No. 16,945. See the title "Former Adjudication."

8. *The Pioneer*, 21 Fed. 426.

9. *Bingham v. Wilkins*, *Crabbe* 50, 3 Fed. Cas. No. 1,416.

10. *The City of Rome*, 49 Fed. 392.

11. *Gleason v. Duffy*, 116 Fed. 298, 54 C. C. A. 100.

**3. Lapse of Time.**—a. *Generally.*—With respect to the time within which a suit must be commenced, courts of admiralty are governed by the acts of congress and the general maritime law, rather than state statutes<sup>12</sup> or the early English statutes.<sup>13</sup> Except in a few classes of cases<sup>14</sup> there are no statutes of limitation in admiralty.<sup>15</sup> But where the right of action or remedy is one created by statute and not otherwise available in admiralty,<sup>16</sup> the limitations provided in the statute will be recognized and enforced, whether, in form, they prescribe the duration of the right<sup>17</sup> or merely provide the time within which the suit shall be commenced,<sup>18</sup> the limitation in either event being construed to be a condition upon the right of action rather than upon the remedy, and therefore not governed by the law of the forum. Where, however, such a statute does not purport to regulate the life of the right or the time for commencing suit, the ordinary rules in admiralty will govern.<sup>19</sup>

b. *Laches.*—(I.) *Generally.*—The equitable principle of laches is, however, enforced in admiralty,<sup>20</sup> especially with respect to the enforcement of liens.<sup>21</sup> It is applied not only to the institution of a

12. *The San Rafael*, 141 Fed. 270, 72 C. C. A. 388; *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 Fed. 180, 36 C. C. A. 135.

13. The English statute of Anne providing a period of limitation for suits for seamen's wages. *Willard v. Dorr*, 3 Mason 91, 29 Fed. Cas. No. 17,679.

14. Acts of congress have provided limitations governing suits for certain penalties and forfeitures. *Hatch v. The Steamboat Boston*, 3 Fed. 807.

15. *The Key City*, 14 Wall. (U. S.) 653, 20 L. ed. 896, and see sections following.

16. See *The San Rafael*, 141 Fed. 270, 72 C. C. A. 388; *The Lyndhurst*, 48 Fed. 839; *The Chusan*, 2 Story 455, 5 Fed. Cas. No. 2,717, and *supra*, II, C, 5.

17. *The Edith*, 94 U. S. 518, 24 L. ed. 167; *The James G. Swan*, 106 Fed. 94 (*distinguishing The William M. Hoag*, 69 Fed. 742). See *The Catherine Whiting*, 99 Fed. 445, 39 C. C. A. 592; *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 Fed. 180, 188, 36 C. C. A. 135; *Srodes v. The Collier*, 22 Fed. Cas. No. 13,272a.

18. *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. ed. 358; *Stern v. La Compagnie Gen. Trans.*, 110 Fed. 996; *The H. N. Emilie*, 70 Fed. 511 (*following The Menominie*, 36 Fed. 197). See *The Shady Side*, 23 Fed. 731. *Contra*, *The William M. Hoag*, 69 Fed. 742. This case was appealed and affirmed on a question of jurisdiction,

168 U. S. 443, 18 Sup. Ct. 114, 42 L. ed. 537.

19. *The Shady Side*, 23 Fed. 731. See also *The Asher W. Parker*, 84 Fed. 832, 28 C. C. A. 224.

20. *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 Fed. 180, 36 C. C. A. 135; *Willard v. Dorr*, 3 Mason 161, 29 Fed. Cas. No. 17,680; *The Utility*, *Blatchf. & H. Adm.* 218, 28 Fed. Cas. No. 16,806; *Smith v. Sturgis*, 3 Ben. 330, 22 Fed. Cas. No. 13,111; *Pease v. The Propeller Napoleon*, *Newb. Adm.* 37, 19 Fed. Cas. No. 10,883 (application to set aside sale); *The Walter M. Fleming*, 9 Fed. 474.

21. **Enforcement of Liens.**—In *The Key City*, 14 Wall. (U. S.) 653, 20 L. ed. 896, Miller, J., lays down the following rules with respect to the enforcement of maritime liens: "1. That while the courts of admiralty are not governed in such cases by any statute of limitation, they adopt the principle that laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defense. 2. That no arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case. 3. That where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defense will be held valid under shorter time, and a more rigid



suit, but also to the necessity of promptly executing process *in rem*,<sup>22</sup> and diligently prosecuting the suit,<sup>23</sup> and to the right to amend by stating a new cause of action,<sup>24</sup> or to bring in new parties by amendment<sup>25</sup> or by petition of forced intervention.<sup>26</sup> So, also, it may be applied in favor of subsequent lienors,<sup>27</sup> even though it may not entirely defeat the claim.<sup>28</sup>

(II.) What Constitutes. — (A.) GENERALLY. — While there are certain general principles and rules governing what constitutes laches, whether the defense is available in a particular case depends upon the circumstances and equities of that case.<sup>29</sup> Where the rights of third persons are not involved,<sup>30</sup> as in a suit *in personam*,<sup>31</sup> and there has been no material change in the position of the adverse party,<sup>32</sup> a much longer period of time may elapse without constituting laches.

But the rule as to laches is not based wholly upon the ground of estoppel and injustice to third persons, but also upon the principle of

scrutiny of the circumstances of the delay, than when the claimant is the owner at the time the lien accrued." See also the titles "Maritime Liens;" "Shipping."

22. *The Robert Gaskin*, 9 Fed. 62, where the failure to execute process by seizure was held to be laches as against a *bona fide* purchaser, although the process was renewed from time to time.

A proctor's neglect to take out process will not be allowed to prejudice the libelants where they are seamen and injustice is not thereby done to the adverse parties. *The Leo*, 8 Ben. 506, 15 Fed. Cas. No. 8,253.

23. See *supra*, II, P, 1.

24. *The Southwark*, 128 Fed. 149. See *supra*, II, G, 21, c.

25. *The Southwark*, 128 Fed. 149. See *The Ship Norway*, 1 Ben. 493, 18 Fed. Cas. No. 10,357.

26. See *The Cerea*, 149 Fed. 924.

27. See the title "Maritime Liens," and *The Young America*, 30 Fed. 789.

28. *The Columbia*, 13 Blatchf. 521, 6 Fed. Cas. No. 3,036. See *The City of Tawas*, 3 Fed. 170.

29. *Butt v. The Norfolk*, 2 Hughes 123, 18 Fed. Cas. No. 10,297; *The Little*, 168 Fed. 393; *The John Dillion*, 46 Fed. 527.

"The question as to what is to be considered a reasonable time has not been, and cannot be, settled by any precise or definite rule, that would be applicable to all kinds and classes of cases. The proper solution of the question depends, to a great extent, upon the facts and circumstances of each particular case. . . . The court, in determining the question, must neces-

sarily be governed by the exercise of its sound legal discretion, with special reference to the facts." *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 Fed. 180, 36 C. C. A. 135.

Fear of loss of employment may justify a delay in suing on a claim against the employer which might otherwise constitute laches. *Coburn v. Factors' & Traders' Ins. Co.*, 20 Fed. 644.

The pendency of another suit in the supreme court, growing out of the same transaction and involving the merits of the case, is an excuse for delay. *Jones v. The Richmond*, 13 Fed. Cas. No. 7,492.

A partial loss of testimony by respondent is not alone sufficient to make a delay of two years laches, although the first or the second opportunity of enforcing a lien has not been embraced. *The Martino Cilento*, 22 Fed. 859. But the death of the libellant's most important witnesses in the collision constituting the basis of his suit excuses a delay of eleven months although the ship has meanwhile passed into the hands of *bona fide* purchasers. *The Alaska*, 33 Fed. 107.

30. *Butt v. The Norfolk*, 2 Hughes 123, 18 Fed. Cas. No. 10,297; *The Gallo-way C. Morris*, 2 Abb. 164, 9 Fed. Cas. No. 5,204; *The Columbia*, 13 Blatchf. 521, 6 Fed. Cas. No. 3,036.

31. *Sonderburg v. Towboat Co.*, 3 Woods 146, 22 Fed. Cas. No. 13,175.

32. *Coburn v. Factors' & Traders' Ins. Co.*, 20 Fed. 644; *The Platina*, 3 Ware 180, 19 Fed. Cas. No. 11,210. See *Hall v. Hudson*, 2 Spr. 65, 11 Fed. Cas. No. 5,935.

staleness.<sup>33</sup> Diligence in pursuing a remedy *in rem* will not excuse delay in invoking the remedy *in personam*.<sup>34</sup> But the refusal to take advantage of an opportunity to sue *in personam*,<sup>35</sup> or to proceed by foreign attachment,<sup>36</sup> cannot be urged as laches against a suit *in rem* brought at the first reasonable opportunity. The libellant is not bound to go into another jurisdiction to pursue his remedy, but may wait for a reasonable opportunity in the jurisdiction where the obligation was incurred.<sup>37</sup>

(B.) EFFECT OF TRANSFER OF RES.—Where there has been a prior *bona fide* transfer for value of the libeled property to persons having no notice of the claim, the rule as to staleness and laches is much stricter.<sup>38</sup> The period of limitations for a lien as against a *bona fide* purchaser is a reasonable opportunity to enforce it.<sup>39</sup> But where there is no showing that a transfer was *bona fide*,<sup>40</sup> and for value,<sup>41</sup> or if the circumstances were such as to charge the purchaser with notice,<sup>42</sup> mere delay does not necessarily constitute laches.

(C.) ANALOGY OF STATUTE OF LIMITATIONS.—Admiralty courts, like courts of equity, will, in the absence of special circumstances, govern themselves by the analogy of the statute of limitations in similar cases.<sup>43</sup> Thus, unless the equities of the case otherwise compel, they

33. *The Robert Gaskin*, 9 Fed. 62. See *The Utility*, Blatchf. & H. Adm. 218, 28 Fed. Cas. No. 16,806; *The Sarah Ann*, 2 Sumn. 206, 21 Fed. Cas. No. 12,342.

34. *Scull v. Raymond*, 18 Fed. 547.

35. *The Conde Wifredo*, 77 Fed. 324, 23 C. C. A. 187.

36. *The Slingsby*, 120 Fed. 748, 57 C. C. A. 52, holding that the libellant having a lien upon one ship is under no obligation to keep track of the movements of other ships of a foreign owner.

37. *The Bolivar*, Olc. Adm. 480, 3 Fed. Cas. No. 1,610; *The Blenheim*, 5 Sawy. 192, 3 Fed. Cas. No. 1,539. See also *The Slingsby*, 120 Fed. 748, 57 C. C. A. 52.

38. *The Nikita*, 62 Fed. 936, 10 C. C. A. 674; *The Robert Gaskin*, 9 Fed. 62; *The Utility*, Blatchf. & H. Adm. 218, 28 Fed. Cas. No. 16,806; *The Buckeye*, Newb. Adm. 111, 23 Fed. Cas. No. 13,445; *The Harriet Ann*, 6 Biss. 13, 11 Fed. Cas. No. 6,101; *The Bolivar*, Olc. Adm. 474, 3 Fed. Cas. No. 1,609. See fully the title "*Maritime Liens*."

Effect of Covenant of Warranty.—In *The Little*, 168 Fed. 393, the lapse of several years was held not to constitute laches, although several witnesses had disappeared and the details of the collision had faded from the memory of others, and though the claimant urged that he was a *bona fide* pur-

chaser without notice. It appeared that sufficient evidence remained to definitely place the fault and that the claimant when he purchased received a warranty bill of sale, and that the vendors were able to respond in damages for breach of the warranty to the extent of the claims established in the action, and that they were actively engaged in defending the case. "There are certainly no equitable circumstances in this case which could prevent the injured parties from recovering their damages."

39. *The Lyndhurst*, 48 Fed. 839; *The D. M. French*, 1 Low. 43, 7 Fed. Cas. No. 3,938. See the title "*Maritime Liens*."

40. *The Carrie*, 46 Fed. 796 (delay of between two and three years); *The Argo*, 7 Ben. 304, 1 Fed. Cas. No. 515.

41. *The Alfred J. Murray*, 60 Fed. 296.

42. *The Columbia*, 27 Fed. 704.

43. *The Southwark*, 128 Fed. 149; *Nesbit v. The Amboy*, 36 Fed. 925; *Saunders v. Backup*, Blatchf. & H. 264, 21 Fed. Cas. No. 12,373; *Jay v. Allen*, 1 Spr. 130, 13 Fed. Cas. No. 7,235; *Hall v. Hudson*, 2 Spr. 65, 11 Fed. Cas. No. 5,935.

Distinction Between Suits In Personam and In Rem.—It would seem that, while such a distinction is not expressly made in the cases, the rule stated in the text is strictly applicable

will not require a suit to be filed before the legal period has expired,<sup>44</sup> nor will they permit suits to be instituted thereafter,<sup>45</sup> unless there has been a sufficient acknowledgment to take the debt out of the statute,<sup>46</sup> or the defendant has been absent from the jurisdiction.<sup>47</sup>

(III.) Pleading.—Laches must be pleaded,<sup>48</sup> as must the fact that the respondent is a *bona fide* purchaser.<sup>49</sup> But the failure to proceed on a cause of action created by state statute, within the time limited therein, need not be pleaded.<sup>50</sup>

4. **Contributory Negligence.**—Contributory negligence is not an absolute defense in admiralty as it is at common law,<sup>51</sup> except in suits for wrongful death under state statutes.<sup>52</sup> It will, however, diminish the amount of the recovery, the extent of the reduction in personal-injury cases resting to some extent in the discretion of the court in view of all the circumstances.<sup>53</sup> In this class of cases, in analogy with the rule in collision cases dividing the damages where both parties are at fault,<sup>54</sup> the courts frequently award the libellant one-half the amount of his damages.<sup>55</sup>

U. HEARING OR TRIAL, AND REFERENCE.—1. **Generally.**—After a cause is at issue and ready for trial the manner in which it is brought

only to actions *in personam*, in which the state and federal courts have concurrent jurisdiction (see *Reed v. Merchants' Mut. Ins. Co.*, 95 U. S. 23, 33, 24 L. ed. 348), and that in actions *in rem* other considerations operate tending to shorten the period of limitations. See *The Key City*, 14 Wall. (U. S.) 653, 660, 20 L. ed. 896, and the title "*Maritime Liens.*"

44. *Bailey v. Sundberg*, 49 Fed. 583, 1 C. C. A. 387; *The Frank Moffat*, 2 Flip. 291, 9 Fed. Cas. No. 5,060.

45. *The Southwark*, 128 Fed. 149; *Scull v. Raymond*, 18 Fed. 547.

"In those cases where it is held that respondents must show that some special interest has been prejudiced by the delay, in order to avail of the defense of staleness, it will be found that the delay was for less than the period prescribed by the local statute in common law actions." *Southard v. Brady*, 36 Fed. 560.

46. *Jay v. Allen*, 1 Spr. 130, 13 Fed. Cas. No. 7,235.

47. See *Stern v. La Compagnie Gen. Trans.*, 110 Fed. 996.

48. *The Shady Side*, 23 Fed. 731; *The Platina*, 3 Ware 180, 19 Fed. Cas. No. 11,210; *Jones v. The Richmond*, 13 Fed. Cas. No. 7,492. See the *Melissa*, *Brown Adm.* 476, 16 Fed. Cas. No. 9,400; *The Columbia*, 13 Blatchf. 521, 6 Fed. Cas. No. 3,036; *The Chusan*, 2 Story 455, 5 Fed. Cas. No. 2,717.

49. *The Carrie*, 46 Fed. 796; *The*

*Melissa*, *Brown Adm.* 476, 16 Fed. Cas. No. 9,400.

50. *Stern v. La Compagnie Gen. Trans.*, 110 Fed. 996.

51. *The Max Morris*, 137 U. S. 1, 11 Sup. Ct. 29, 34 L. ed. 586; *The City of Rome*, 49 Fed. 392; *The Daylesford*, 30 Fed. 633; *The Explorer*, 20 Fed. 135 (deducing from the authorities the rule that courts of admiralty in the exercise of a conscientious discretion will give or withhold damages upon enlarged principles of justice). But see *The Serapis*, 51 Fed. 91, 2 C. C. A. 102, reversing 49 Fed. 393.

52. *Quinnette v. Bisso*, 136 Fed. 825, 69 C. C. A. 503, 5 L. R. A. (N. S.) 303; *Robinson v. Detroit*, etc. *Nav. Co.*, 73 Fed. 883, 20 C. C. A. 86; *The City of Norwalk*, 55 Fed. 98; *The A. W. Thompson*, 39 Fed. 115. Compare *Stern v. La Compagnie Gen. Trans.*, 110 Fed. 996; *supra*, II, T, 3, a; II, C, 5.

53. *The Max Morris*, 137 U. S. 1, 11 Sup. Ct. 29, 34 L. ed. 586; *Johnson & Co. v. Johansen*, 86 Fed. 886, 30 C. C. A. 675; *The Nathan Hale*, 48 Fed. 698; *The Mystic*, 44 Fed. 398; *Olson v. Flavel*, 13 Sawy. 232, 34 Fed. 477. See *The Valencia*, 110 Fed. 221.

54. See the title "*Collision.*"

55. *Smith v. The City of Shakopee*, 103 Fed. 240, 44 C. C. A. 1; *Johnson v. Johansen*, 86 Fed. 886, 30 C. C. A. 675; *Anderson v. The Ashebrooke*, 44 Fed. 124; *The Truro*, 31 Fed. 158. See also



to a hearing is governed largely by local district rules, the usual practice being to file a note of issue with the clerk, thus placing the case upon the trial calendar.<sup>56</sup> Either party may notice a cause for hearing.<sup>57</sup> And causes are heard in the order in which they are brought up.<sup>58</sup>

2. **Jury Trial.**—a. *Generally.*—The constitutional right to trial by jury extends only to suits at common law, and does not therefore include proceedings in admiralty.<sup>59</sup> In the absence of statute a court of admiralty has no power to try cases by jury.<sup>60</sup>

b. *Penalties and Forfeitures.*—A jury trial cannot be demanded in suits *in rem* for the enforcement of a penalty or forfeiture where the seizure was made on navigable water,<sup>61</sup> since such cases are within the admiralty jurisdiction.<sup>62</sup> But if the seizure is upon the land,<sup>63</sup> or if the suit is *in personam*,<sup>64</sup> the proceeding is one at common law and must be conducted in accordance with the procedure in such cases.

c. *By Act of Congress.*—As an incident to its power to regulate the method of procedure in admiralty courts the congress may grant or withhold the right to trial by jury.<sup>65</sup> Pursuant to this right an act of congress has provided that in certain classes of cases arising upon the lakes and navigable waters connecting them, "the trial of issues of fact shall be by jury when either party require it."<sup>66</sup> The courts have criticized this act,<sup>67</sup> and some of them have held that the verdict

The Max Morris, 137 U. S. 1, 11 Sup. Ct. 29, 34 L. ed. 586.

56. See Rule C of Calendar Rules for the Southern and Eastern Districts of New York.

57. See The Mariel, 6 Fed. 831.

58. The Fanny, 2 Low. 508, 8 Fed. Cas. No. 4,638.

59. The Sarah, 8 Wheat. (U. S.) 391, 5 L. ed. 644; The La Vengeance, 3 Dall. (U. S.) 297, 1 L. ed. 610; United States v. The Steamship The Queen, 4 Ben. 237, 27 Fed. Cas. No. 16,107, *affirmed*, 11 Blatchf. 416, 27 Fed. Cas. No. 16,108.

60. Lee v. Thompson, 3 Woods 167, 15 Fed. Cas. No. 8,202. "But there is no reason why it should not either on its own motion or at the desire of the parties, submit any question of fact to commissioners, or referees, for their opinion and advice, and the number of those commissioners may be twelve as well as any other number." *Per* Bradley, J.

The ancient practice apparently sanctioned the calling of a jury. The Western States, 151 Fed. 929.

In England certain courts with admiralty jurisdiction may in their discretion permit a jury trial (The Temple Bar, L. R. 11 Prob. Div. 6); others cannot. The Tynwald (1895), Prob. Div. 142. See also The Theo-

dora, L. R. (1897), Prob. Div. 279. But in actions for wrongful death under Lord Campbell's act, the parties are entitled to a jury to assess and apportion the damages. The Orwell, L. R. 13 Prob. Div. 80.

61. The Margaret, 9 Wheat. (U. S.) 421, 6 L. ed. 125; The Sarah, 8 Wheat. (U. S.) 391, 5 L. ed. 644; The Paolin S., 18 Blatchf. 315, 11 Fed. 171; The Meteor, 17 Fed. Cas. No. 9,948 (libel against vessel); Clark v. United States, 2 Wash. 519, 5 Fed. Cas. No. 2,837.

62. See *supra*, II, B.

63. See *supra*, I, B, 8, and The Sarah, 8 Wheat. (U. S.) 391, 5 L. ed. 644.

64. United States v. The Steamship The Queen, 4 Ben. 237, 27 Fed. Cas. No. 16,107, *affirmed*, 11 Blatchf. 416, 27 Fed. Cas. No. 16,108, holding where the master and the ship were joined the suit could not be dismissed as to the master because of his right to a jury trial. See *supra*, I, B, 9.

65. The Genesee Chief, 12 How. (U. S.) 443, 13 L. ed. 1059; The Western States, 159 Fed. 354, 86 C. C. A. 354.

66. U. S. Rev. St., § 566; The Western States, 159 Fed. 354, 86 C. C. A. 354; Gillet v. Pierce, 1 Brown's Adm. 553, 10 Fed. Cas. No. 5,437.

67. See cases following.

in such cases is merely advisory,<sup>68</sup> but the better authority holds that it is binding on the court to the same extent as in cases at common law.<sup>69</sup> The act applies only to matters of contract and tort<sup>70</sup> arising upon or concerning<sup>71</sup> vessels enrolled and licensed for the coasting trade,<sup>72</sup> and at the time engaged in interstate commerce<sup>73</sup> upon the lakes or navigable waters connecting them;<sup>74</sup> and the pleadings must show such a case.<sup>75</sup>

**3. Advisers to Court.**—The court may call in, as its advisers, nautical experts,<sup>76</sup> and refer to them questions of seamanship.<sup>77</sup> Their authority is purely advisory, but their opinions and advice are entitled to great weight.<sup>78</sup>

**4. Course of Proceedings in General.**—The course of proceedings on the hearing is similar to that followed in all trials before the court.<sup>79</sup> The evidence, if any, is introduced,<sup>80</sup> and the cause argued and

68. *The City of Toledo*, 73 Fed. 220; *The Empire*, 19 Fed. 558.

69. *The Western States*, 159 Fed. 354, 86 C. C. A. 354, reviewing the history of the provision and disapproving of contrary cases.

**Diminishing Verdict.**—Although the verdict is binding upon the court, the amount awarded may be diminished and a decree entered for a smaller sum where it appears to the court that the verdict was the result of passion, prejudice or misunderstanding. *The Western States*, 159 Fed. 354, 86 C. C. A. 354.

**70. Cases of pure salvage** are neither matters of contract nor tort, and it seems therefore that the statute would not apply to them. *The Erie Belle*, 20 Fed. 63.

**71. "Arising Upon or Concerning."** If two vessels are interested in a contract or involved in a tort, the cause of action concerns them both and the case is within the statute although but one of them comes within the class specified therein. *The Erie Belle*, 20 Fed. 63.

**72. *Gillet v. Pierce***, Brown's Adm. 553, 10 Fed. Cas. No. 5,437.

**73.** A vessel engaged wholly in foreign commerce (*The Erie Belle*, 20 Fed. 63; *Gillet v. Pierce*, Brown's Adm. 553, 10 Fed. Cas. No. 5,437), or in commerce entirely within the limits of a single state (*The City of Toledo*, 73 Fed. 220; *Bigley v. The Venture*, 21 Fed. 880) is not within the act.

**74. *Bigley v. The Venture***, 21 Fed. 880.

**75. *Gillet v. Pierce***, Brown's Adm. 553, 10 Fed. Cas. No. 5,437.

**76.** See *Bird v. Gibb*, 8 App. Cas.

(Eng.) 559; *The Kirby Hall*, L. R. 8 Prob. Div. (Eng.) 71, 75; *The Maid of Kent*, L. R. 6 Prob. Div. (Eng.) 178.

In *The Empire*, 19 Fed. 558, Brown, J., says: "We have for several years past, in analogy to the trinity master system obtaining in the English court of admiralty, adopted the practice of calling to the assistance of the court, in all difficult cases involving negligence, two experienced shipmasters, who sit with the judge during the argument and give their advice upon the questions of seamanship or the weight of testimony. I believe a somewhat similar practice has obtained in some of the other district courts. *The Emily*, Olcott 132. *The Rival*, 1 Spr. 128. The practice appears also to have received the sanction of the supreme court. *The Hypodame*, 6 Wall. 216-224; *The City of Washington*, 92 U. S. 31-38. I have frequently derived great assistance from the advice of nautical assessors myself, and have found this a most satisfactory and expeditious method of trying these cases."

**77. *The Brig Emily***, Olc. Adm. 132, 8 Fed. Cas. No. 4,453.

**78. *The Beryl***, L. R. 9 Prob. Div. (Eng.) 137.

**79.** See the title "Trial."

**80.** The libellant opens the case even though the defense is an affirmative one, such as inevitable accident. *The Bottle Imp*, 42 L. J. Adm. 48, 28 L. T. 286, 21 W. R. 600, 1 Asp. M. C. 571; *The Benmore*, L. R. 4 Adm. & Ecc. (Eng.) 132; *The Otter*, L. R. 4 Adm. & Ecc. (Eng.) 203.

He should introduce all the evidence necessary to make a case before resting. *The Guy C. Goss*, 53 Fed. 826.

submitted, usually upon briefs.<sup>81</sup> The findings and decision will be based upon the pleadings where no evidence is introduced,<sup>82</sup> or upon the report of the commissioner in so far as it covers the issues and is sustained.<sup>83</sup> The court may decide some of the issues or points involved and reserve others for further argument, but the reargument must be upon the pleadings and proof as they stood at the original hearing.<sup>84</sup> And in rendering its decision the court may reserve questions affecting the amount of the decree until the coming in of the commission's report.<sup>85</sup>

After decision and before the decree<sup>86</sup> the court may reopen the cause for further evidence,<sup>87</sup> or it may hold the cause open for this purpose.<sup>88</sup> But this will not usually be done for the purpose of admitting new evidence omitted through the neglect or mere oversight of counsel.<sup>89</sup>

**5. Evidence.**—The case may be heard upon oral and other evidence introduced at the hearing, or wholly upon depositions previously taken,<sup>90</sup> but in any event the testimony should be preserved for purposes of an appeal.<sup>91</sup> The court may require the testimony to be taken by a stenographer and tax the expense as costs,<sup>92</sup> and may itself question the witnesses.<sup>93</sup>

The rules as to the competency and relevancy of evidence and the manner of taking depositions will be found elsewhere.<sup>94</sup>

**6. Pleading and Proof.**—a. *Generally.*—Evidence in proof of matters which must be pleaded<sup>95</sup> is not admissible in the absence of appropriate averments,<sup>96</sup> and will not under such circumstances support a

81. Submission without argument or brief is a practice not to be encouraged. *The Honora Carr*, 31 Fed. 842.

82. See *McNally v. The Steam-Tug L. R. Dayton*, 4 Fed. 834.

83. See *infra*, II, U, 8.

84. *Abbey v. The Robert L. Stevens*, 22 How. Pr. (N. Y.) 78, *per Betts*, J.

85. *The Gilson*, 35 Fed. 333. See *infra*, II, U, 8.

86. See *The Steamship Francis Wright*, 7 Ben. 88, 101, 9 Fed. Cas. No. 5,044, and also *The Guy C. Goss*, 53 Fed. 826, 828.

87. *Devine v. The Tiverton*, 35 Fed. 529. See *infra*, II, W.

88. *Ingraham v. Albee, Blatchf. & H. Adm.* 289, 13 Fed. Cas. No. 7,044.

89. *The Steamship Francis Wright*, 7 Ben. 88, 101, 9 Fed. Cas. No. 5,044. See *The Guy C. Goss*, 53 Fed. 862, *Compare The Liverpool Packet*, 2 Spr. 37, 15 Fed. Cas. No. 8,407.

After the parties have rested and the argument has been concluded the case will not be reopened to permit the libellant to introduce depositions taken by the claimant and which the libellant could have introduced as part of his

own case. *The Persiana*, 158 Fed. 912.

90. See *The Guy C. Goss*, 53 Fed. 826; *The Wavelet*, 25 Fed. 733.

91. See *infra*, II, Y, 6, f; II, Y, 8, a.

Testimony objected to should nevertheless be received, subject to the objection if it is deemed by the court to be well taken—unless the evidence be so utterly irrelevant or immaterial that there could not possibly be any doubt about it. This practice should be followed to avoid the necessity of retaking the testimony on appeal. *Minnesota S. S. Co. v. Lehigh Val. Transp. Co.*, 129 Fed. 22, 30, 63 C. C. A. 672.

92. *Rogers v. Brown*, 136 Fed. 813.

93. Even though the questions are not in precise harmony with the theory upon which the parties are trying the case. *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 Fed. 180, 36 C. C. A. 135.

94. See *ENCYCLOPAEDIA OF EVIDENCE*, title "Admiralty."

95. See *supra*, II, G, 14, c.

96. *The Bertha*, 91 Fed. 272, 33 C. C. A. 509; *The William Harris*, 1 Ware 373, 29 Fed. Cas. No. 17,695; *The Rhode Island, Ole. Adm.* 505, 20 Fed. Cas. No. 11,745; *The Morton, Brown's*



decree,<sup>97</sup> or prevent a recovery.<sup>98</sup> There must also be substantial accuracy in pleading and the proof should conform thereto.<sup>99</sup> Proof of a cause of action different from that alleged is not permissible.<sup>1</sup> A libel *ex contractu* is not supported by proof of a tort,<sup>2</sup> and *vice versa*.<sup>3</sup> Nor can the libellant recover in a capacity different from that in which he claims,<sup>4</sup> unless the pleadings taken together exhibit facts sufficient to constitute a different cause of action.<sup>5</sup> A respondent pleading one ground of defense may not prove another.<sup>6</sup> And the separate answer of one defendant cannot be relied upon by a co-defendant.<sup>7</sup>

There are, however, no technical rules of variance or departure, in admiralty, like those at common law, and if the substantive facts are distinctly averred and the appropriate relief prayed for, the court may

Adm. 137, 17 Fed. Cas. No. 9,864; The Schooner Boston, 1 Sumn. 328, 3 Fed. Cas. No. 1,673.

Wages for a period antedating that stated in the libel cannot be allowed without an amendment. Pinkham v. Rutan, 31 Fed. 496.

Special damages cannot be proved without being alleged. Harrison v. Hughes, 119 Fed. 997.

97. The Pope Catlin, 31 Fed. 408; Jenks v. Lewis, 1 Ware 51, 13 Fed. Cas. No. 7,280.

"It is a cardinal rule in admiralty proceedings, that no decree can be rendered upon proofs alone, when the subject-matter of those proofs is not essentially alleged in the pleading." *Per* Betts, J., in Davis v. Leslie, Abb. Adm. 123, 7 Fed. Cas. No. 3,639.

98. The Camanche, 8 Wall. (U. S.) 448, 19 L. ed. 397; The Bertha, 91 Fed. 272, 33 C. C. A. 509.

A counter-claim not pleaded. White v. The Ranier, 45 Fed. 773.

Laches not pleaded cannot be urged as a defense. The Shady Side, 23 Fed. 731.

99. Palmer v. Merchants' & M. Transp. Co., 154 Fed. 683, 695; Barber v. Lockwood, 134 Fed. 985; The Alexandra, 104 Fed. 904; The Kendal, 56 Fed. 237; The M. M. Hamilton, 1 Hask. 489, 17 Fed. Cas. No. 9,685.

Substantial accuracy in pleading should be observed by the libellant and a departure from that requirement with intention to deceive may constitute a bar to a recovery unless the offending party is released from its consequence by this court. Defects of this kind when discovered should be cured by amendment in all cases where the imperfection is calculated to deceive or mislead. The Stephen Morgan, 94 U. S. 599, 24 L. ed. 266.

**Effect of Admissions in Answer.**—See *supra*, II, G, 17, e, (I).

1. Danace v. The Magnolia, 37 Fed. 367.

**Implied Contract — Quantum Meruit.** An averment that services were rendered at the request of the master and that by reason of the premises there became due to the libellants the sum claimed, does not import an implied contract from which *quantum meruit* arises, and evidence of an express contract is therefore not a variance. The Kendal, 56 Fed. 237.

Breach of implied warranty of seaworthiness cannot be proved under an allegation of negligence. McKinlay v. Morrish, 21 How. (U. S.) 343, 16 L. ed. 100.

2. Hays v. Pittsburg G. & B. Packet Co., 33 Fed. 552.

3. Davis v. Adams, 93 Fed. 977. where the libel alleges that libellant was enticed aboard against his will, and the evidence showed that he signed shipping articles but had received no wages.

4. The Sarah E. Kennedy, 29 Fed. 264, holding that one suing as mariner cannot recover as salvor.

5. The Rapid Transit, 52 Fed. 320, which was a libel *in rem* for breach of a contract of affreightment to recover damages to the cargo. The evidence failed to show any negligence of the vessel or owner, but inasmuch as the answer contained the additional facts necessary to a claim of general average, the court treated the case as a libel for average. See *supra*, II, G, 14, e.

6. The Earnwell, 68 Fed. 228; Turner v. The Ship Black Warrior, 1 McAll. 181, 24 Fed. Cas. No. 4,253. See The Camanche, 8 Wall. (U. S.) 448, 19 L. ed. 397.

7. Gardner v. Bibbins, Blatchf. & H. Adm. 356, 9 Fed. Cas. No. 5,222.

award any relief which the law warrants, notwithstanding some inaccuracy in the statement of subordinate facts or of the legal effect of the facts propounded.<sup>8</sup> A variance which cannot have surprised or injured the adverse party,<sup>9</sup> or which is not material,<sup>10</sup> will be disregarded. Unintentional errors of statement<sup>11</sup> or omission in the libel,<sup>12</sup> not resulting in embarrassment to the respondent, will not prevent recovery.

**Amendments** will be very liberally allowed at any stage of the case to conform the pleading to the proof, even though the variance would otherwise be fatal.<sup>13</sup>

b. *Objections.*—Variance to which a timely objection is not interposed is waived.<sup>14</sup>

**7. Motion To Dismiss Libel.**—A motion to dismiss the libel upon the evidence introduced by the libellant will not be entertained unless the claimant or respondent also rests his case.<sup>15</sup>

**8. Reference.**—a. *Generally.*—At the instance of the parties or

8. *The Gazelle*, 128 U. S. 474, 487, 9 Sup. Ct. 139, 32 L. ed. 496; *Dupont v. Vance*, 19 How. (U. S.) 162, 15 L. ed. 584; *Davis v. Adams*, 102 Fed. 520, 42 C. C. A. 493.

An allegation that the loss was due to a swell occasioned by a certain named steamer belonging to the party forced to intervene, does not prevent proof that the swell was caused by another unidentified steamer belonging to the same party. *The Gladys*, 159 Fed. 698, 86 C. C. A. 566.

In *The Cambridge*, 2 Low. 21, 4 Fed. Cas. No. 2,334, a suit for damages caused by collision, it is held that the libellant may prove and recover for faults not alleged. After discussing numerous English cases in which the contrary seems to be held, the court says: "It is the practice of our courts of admiralty rather to extract the truth, and found a decree upon it, whenever, by amendment or otherwise, justice can be fully done to both parties, than to follow any very strict rules of variance." See also *The Syracuse*, 12 Wall. (U. S.) 167, 173, 20 L. ed. 382. But see *the Werdenfels*, 150 Fed. 400; *The H. P. Baldwin*, 2 Abb. 257, 12 Fed. Cas. No. 6,811; *The Clement*, 2 Curt. 363, 367, 5 Fed. Cas. No. 2,879.

9. *The Syracuse*, 12 Wall. (U. S.) 167, 173, 20 L. ed. 382; *The Quickstep*, 9 Wall. (U. S.) 665, 19 L. ed. 767; *The Clement*, 2 Curt. 363, 5 Fed. Cas. No. 2,879.

Although a libel for charter hire claims only a month's hire, this is

sufficient to give the court jurisdiction over the entire contract and to inquire into all its breaches and of the damages suffered thereby, whether arising before or after the filing of the libel. *Gow v. William W. Brauer S. S. Co.*, 113 Fed. 672.

**Misnomer of Libellant.**—*Henry v. Curry*, Abb. Adm. 433, 11 Fed. Cas. No. 6,381.

10. *Dunstan v. The Steam-Tug Kirkland*, 3 Hughes 641, 8 Fed. Cas. No. 4,181.

11. *The Stephen Morgan*, 94 U. S. 599, 24 L. ed. 266.

12. *The Syracuse*, 12 Wall. (U. S.) 167, 173, 20 L. ed. 382; *The Quickstep*, 9 Wall. (U. S.) 665, 670, 19 L. ed. 767.

13. *Palmer v. Merchants' & M. Transp. Co.*, 154 Fed. 683, 695; *Davis v. Adams*, 102 Fed. 520, 42 C. C. A. 493, and *supra*, II, G, 21, c, (II), (B).

14. *Dunstan v. The Steam-Tug Kirkland*, 3 Hughes 641, 8 Fed. Cas. No. 4,181. See *ENCYCLOPAEDIA OF EVIDENCE*, Col. 9, pp. 52, 93, 106, 122.

15. *The Persiana*, 158 Fed. 912. But see *The Guy C. Goss*, 53 Fed. 826.

But a party who moves to dismiss a libel upon the evidence offered by the libellant without offering proofs in his own behalf does so at his own risk in case an appeal is taken from the order sustaining the motion, since the appellate court may upon a reversal of the ruling order the entry of a decree for the libellant. *Bull v. New York & P. R. S. S. Co.*, 167 Fed. 792, 9 C. C. A. 182.

on the court's own motion,<sup>16</sup> any matter arising during a suit may be referred to one or more commissioners appointed by the court.<sup>17</sup> The question of the amount of damages is usually referred.<sup>18</sup>

The reference may be to a regular commissioner of the court<sup>19</sup> or to some one specially appointed for the purpose.<sup>20</sup>

b. *The order of reference* may be separate or may be incorporated in the interlocutory decree.<sup>21</sup>

c. *A commissioner's powers* are the same as those of a master in chancery.<sup>22</sup> The matters he may consider or pass upon depend largely on the order of reference and he cannot exceed the scope thereof.<sup>23</sup>

16. See *Lee v. Thompson*, 3 Woods 167, 15 Fed. Cas. No. 8,202; *Holmes v. Dodge*, Abb. Adm. 60, 12 Fed. Cas. No. 6,637 (costs—how taxed).

**Reference by Consent.**—*Luckenbach v. Delaware, L. & W. R. Co.*, 168 Fed. 560. See also *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. ed. 289.

17. Adm. Rule 44; *Lee v. Thompson*, 3 Woods 167, 15 Fed. Cas. No. 8,202. See *Vermont Steamship Co. v. The Abby Palmer*, 10 Brit. Col. 380.

**For Settling Accounts.**—*Shaw v. Collyer*, 4 Blatchf. 370, 21 Fed. Cas. No. 12,718; *Holmes v. Dodge*, Abb. Adm. 60, 12 Fed. Cas. No. 6,637.

**To Take and Report the Evidence.** *The Guy C. Goss*, 53 Fed. 826.

18. See *The Ship Shand*, 4 Fed. 925.

**On Default.**—See *supra*, II, I, 3.

19. *The E. C. Scranton*, 2 Ben. 81, 8 Fed. Cas. No. 4,271, holding that a reference to a commissioner may be given to any regular commissioner.

**Reference to Registrar.**—See *The Immacolata Concezione*, 53 L. J. Adm. 19, 9 P. D. 37, 50 L. T. 539, 32 W. R. 705, 5 Asp. M. C. 208 (statement by him of a case for the opinion of the court before proceeding to the reference); *The John Bellamy*, L. R. 3 Adm. & Ecc. 129; *The Parisian*, L. R. 13 Prob. Div. (Eng.) 16.

20. See *The Isaac Newton*, Abb. Adm. 588, 13 Fed. Cas. No. 7,090, where the reference was to commissioners to be named by the parties and approved by the court.

**To Nautical Experts.**—See *supra*, II, U, 3, and *Murray v. The Charming Betsy*, 2 Cranch (U. S.) 64, 116, 2 L. ed. 208, where the reference was to the clerk with directions to associate with himself two merchants of the district.

**The clerk may be appointed without any special reasons therefor being recited in the order.** *The Wavelet*, 25 Fed. 733.

21. See *infra*, II, V.

**Form of Order by Consent.**—In *Luckenbach v. Delaware, L. & W. R. Co.*, 168 Fed. 560, the following order of reference was made: "The above-entitled action being called for trial on the 11th day of June, 1907, it was consented by the proctors for the respective parties that all the issues raised in said action be referred to Herbert Green, Esq., as United States Commissioner. Now on motion of Peter S. Carter, proctor for the libelants, it is ordered that the above-entitled action be referred to Herbert Green, Esq., United States Commissioner, to hear and determine the issues in dispute, raised by the libel and answer, and to ascertain the amount due, if any, to the libelants, and to report to this court with all convenient speed."

**Modification of Order.**—See *Holmes v. Dodge*, Abb. Adm. 60, 12 Fed. Cas. No. 6,637.

22. Adm. Rule 44; *The North Star*, 151 Fed. 168, 80 C. C. A. 536; *The Elton*, 83 Fed. 519, 31 C. C. A. 496; *The E. C. Scranton*, 2 Ben. 81, 8 Fed. Cas. No. 4,271. See the title "Reference."

23. *Mitchell v. Kelsey*, 17 Fed. Cas. No. 9,663, holding that an order made by consent of parties after default of the respondent, that the cause be referred to a commissioner to ascertain and report the amount due the libelants, does not reopen the issues of the case and authorize the commissioner to find thereon, nor does it entitle him to allow interest on the amount due. See *The Itasca*, 117 Fed. 885 (where the commissioner refused to allow interest, leaving the question to the determination of the court); *The Baltic*, 3 Ben. 195, 2 Fed. Cas. No. 824.

The parties may consent to a reference to hear and determine all the issues raised by the pleadings. See



The fact that the order of reference may have improperly incorporated a specific matter does not furnish ground of exception to the consideration of the same by the commissioner,<sup>24</sup> since he is bound by the decision and order of the court.<sup>25</sup> But incidental statements by the court in its decision upon the question of liability, regarding the extent of the damage, do not affect the power of the commissioner to hear any evidence upon the latter question and to determine it in accordance therewith.<sup>26</sup>

d. *Notice of the hearing* before the commissioner must be given to the adverse party.<sup>27</sup>

e. *Proceedings Upon.* — (I.) *Generally.* — The proceedings before such a commissioner are conducted in the same manner as proceedings before a master in chancery,<sup>28</sup> in so far as not specially regulated by rule or statute.<sup>29</sup> The fact that the commissioner sat outside the territorial jurisdiction of the court does not invalidate his findings.<sup>30</sup>

(II.) *Objections to the evidence*<sup>31</sup> and to the rulings<sup>32</sup> of the commissioner must not be deferred until his report is filed. An immediate decision of the court may be obtained during the course of the reference by having the commissioner certify his ruling.<sup>33</sup> But objections to evidence made before the commissioner may be the subject of exceptions to his report.<sup>34</sup>

f. *Findings and Report.* — (I.) *Generally.* — The commissioner should report his findings and conclusions upon the matter referred to him, rather than the evidence introduced.<sup>35</sup> They should be in numbered paragraphs to facilitate the making of exceptions and review by the court.<sup>36</sup>

The report must be in accordance with and upon the matters set forth in the order of reference.<sup>37</sup>

Unless a demand therefor has been made it need not set out the particular items of the total amount found to be due,<sup>38</sup> but an award of

Luckenbach v. Delaware, L. & W. R. Co., 168 Fed. 560.

24. The Rhode Island, Abb. Adm. 100, 20 Fed. Cas. No. 11,740a.

25. Brookman v. Sixty Barrels of Molasses, 4 Fed. Cas. No. 1,941a.

26. The Ship Shand, 4 Fed. 925.

27. The Lively, 1 Gall. 315, 15 Fed. Cas. No. 8,403.

28. The E. C. Scranton, 2 Ben. 81, 8 Fed. Cas. No. 4,271. See fully the title "Reference."

29. See local rules, and The Parisian, L. R. 13 Prob. Div. (Eng.) 16, affidavits of witnesses and cross-examination by the registrar.

30. The William H. Bailey, 103 Fed. 799, affirmed by memo, decision, 111 Fed. 1006, 50 C. C. A. 76.

31. The Bulgaria, 83 Fed. 312; The Schooner Transit, 4 Ben. 138, 24 Fed. Cas. No. 14,138. See also The William H. Bailey, 103 Fed. 799.

But hearsay testimony though not

objected to at the reference will be disregarded by the court as having no probative force. The Anson M. Bangs, 129 Fed. 103, 63 C. C. A. 605.

Failure to object at the trial to the non-production of the best evidence is a waiver of the right to object to secondary evidence as to the same matter at the reference. The Trial, Blatchf. & H. Adm. 94, 24 Fed. Cas. No. 14,170.

32. The E. C. Scranton, 4 Ben. 127, 8 Fed. Cas. No. 4,272.

33. The Beaver, 8 Ben. 594, 3 Fed. Cas. No. 1,200.

34. The Beaver, 8 Ben. 594, 3 Fed. Cas. No. 1,200.

35. The Trial, Blatchf. & H. Adm. 94, 24 Fed. Cas. No. 14,170.

36. The Itasca, 117 Fed. 885.

37. The Baltic, 3 Ben. 195, 2 Fed. Cas. No. 824. See The Isaac Newton, Abb. Adm. 588, 13 Fed. Cas. No. 7,090; and *supra*, II, U, 8, c.

38. Mitchell v. Kelsey, 17 Fed. Cas.

damages in a gross sum which fails to show upon what principle the sum was assessed is insufficient even in the absence of an exception.<sup>39</sup> The filing of the report and notice thereof are regulated by local district rules.<sup>40</sup>

(II.) **Exceptions.**—(A.) **GENERALLY.**—Objections to the report must be taken by exceptions,<sup>41</sup> which may be interposed by either or both parties.<sup>42</sup> The practice with respect to exceptions is analogous to that in equity.<sup>43</sup>

(B.) **TIME FOR.**—The time for filing them is usually regulated by local rule. It may be extended by the court.<sup>44</sup> If not filed within the required time they are waived.<sup>45</sup> Exceptions cannot be made for the first time on appeal.<sup>46</sup>

(C.) **SUBJECT-MATTER.**—Exceptions to a commissioner's report can not properly be employed to question irregularities extraneous to the report and the proceedings before him.<sup>47</sup> They are not a proper method of attacking the decree of the court,<sup>48</sup> or of objecting to matters determined thereby,<sup>49</sup> or to the legality or propriety of the order

No. 9,663. See also *The Isaac Newton*, Abb. Adm. 588, 13 Fed. Cas. No. 7,090.

The specific amount of the costs need not be stated where the commissioner awards costs to the libellant. *The Liverpool Packet*, 2 Spr. 37, 15 Fed. Cas. No. 8,407.

39. *Murray v. The Charming Betsy*, 2 Cranch (U. S.) 64, 124, 2 L. ed. 203. But see *The Ship Transit*, 4 Ben. 138, 24 Fed. Cas. No. 14,138.

40. See rules of the several districts.

41. *Howe v. The Lexington*, 12 Fed. Cas. No. 6,767b (by argument merely). See *The Cayuga*, 59 Fed. 483, 8 C. C. A. 188; *The Edmond*, Lush. (Eng.) 211.

If a surplus of proceeds remains after the satisfaction of claims, the decree disposing of this surplus does not follow the commissioner's report as a matter of course for want of exceptions. *Harper v. New Brig*, Gilp. 536, 11 Fed. Cas. No. 6,090.

42. See *Merritt etc. Co. v. Morris etc. Co.*, 132 Fed. 154.

43. See *The North Star*, 151 Fed. 168, 80 C. C. A. 536.

"Admiralty rule 44 contemplates that proceedings before commissioners shall be under the rules which govern masters in chancery in equity proceedings; but, without regard to rule 44, it would be assumed that practice in respect to a report of a commissioner in an admiralty proceeding would be in accordance with practice in equity, unless otherwise expressly regulated by the rules of admiralty." *The Eliza Lines*, 114 Fed. 307, 52 C. C. A. 195.

44. *The Thyatira*, 49 L. T. N. S. 713. See also *Gowan v. Sprott*, 51 L. T. N. S. 266.

45. *The Eliza Lines*, 114 Fed. 307, 52 C. C. A. 195.

46. *The Eliza Lines*, 114 Fed. 307, 52 C. C. A. 195; *Brauer v. Campania Nav. La Flecha*, 66 Fed. 776, 14 C. C. A. 88; *The Cayuga*, 59 Fed. 483, 8 C. C. A. 188. See also *The Virgin*, 8 Pet. (U. S.) 538, 8 L. ed. 1036; *Harris v. Wheeler*, 8 Blatchf. 1, 11 Fed. Cas. No. 6,129. *Contra*, *Ross v. Southern Cotton Oil Co.*, 41 Fed. 152. And see *Farrell v. Campbell*, 7 Blatchf. 158, 8 Fed. Cas. No. 4,682.

But a manifest error in computation which, though not formally excepted to, was called to the attention of but not rectified by the court below, may be corrected on appeal. *The Eliza Lines*, 132 Fed. 242, 65 C. C. A. 538.

47. *The Columbus*, Abb. Adm. 37, 6 Fed. Cas. No. 3,041, holding that a motion rather than exceptions should be used to question an alleged irregularity in filing two reports.

48. *Sun Mut. Ins. Co. v. Mississippi Val. Transp. Co.*, 16 Fed. 800; *Waterman v. Morgan*, 29 Fed. Cas. No. 17,259; *Burton v. The Commander-in-Chief*, 4 Fed. Cas. No. 2,215.

49. *The New Jersey*, Olc. Adm. 444, 18 Fed. Cas. No. 10,162 (the right of the owner of the vessel to recover for cargo lost); *Hovey v. The Sarah E. Brown*, 12 Fed. Cas. No. 6,744; *Brookman v. Sixty Barrels of Molasses*, 4 Fed. Cas. No. 1,941a.

of reference,<sup>50</sup> nor of presenting matters which should have been pleaded defensively to the suit.<sup>51</sup>

Objections made before the commissioner may be the basis of exceptions to his report.<sup>52</sup> But matters which could have been, but were not so objected to, cannot be excepted to.<sup>53</sup> Nor can the credibility of witnesses be questioned by exceptions unless the objections rest wholly on questions of law.<sup>54</sup>

(D.) FORM.—Exceptions must be specific<sup>55</sup> and must be accompanied with such portion or portions of the evidence,<sup>56</sup> and must state or specifically refer to such facts<sup>57</sup> as it is necessary to look to for their proper determination. But in the absence of a rule otherwise providing,<sup>58</sup> a general objection to the findings as not supported by the evidence is sufficient where all the evidence accompanies the report of the commissioner.<sup>59</sup>

(III.) Conclusiveness.—The court is not absolutely bound by the findings of the commissioner,<sup>60</sup> except where the reference is by agreement of the parties.<sup>61</sup> But in analogy with the rule applied to the report of a master in chancery,<sup>62</sup> where the evidence is conflicting or uncertain the findings thereon will not be overturned unless clearly erroneous.<sup>63</sup> And a similar rule is applied on appeal after the commissioner's findings have been approved, on exceptions, by the district

50. *The Rhode Island*, Abb. Adm. 100, 20 Fed. Cas. No. 11,740a.

51. *Brookman v. Sixty Barrels of Molasses*, 4 Fed. Cas. No. 1,941a, another suit pending.

52. *The Beaver*, 8 Ben. 594, 3 Fed. Cas. No. 1,200.

53. See *supra*, II, U, 8, e, (II); and *The William H. Bailey*, 103 Fed. 799; *The Prinzess Helena*, Lush. (Eng.) 190.

54. *In re Burton*, 9 Ben. 324, 4 Fed. Cas. No. 2,214. See *infra*, II, U, 8, f, (III).

55. *The Commander-in-Chief*, 1 Wall. (U. S.) 43, 17 L. ed. 609; *The William H. Bailey*, 103 Fed. 799.

56. *The Waiontha*, 122 Fed. 719.

So where witnesses testify over objection to their incompetency the exceptions must show their names, their testimony, and the grounds of their incompetency. *The Commander-in-Chief*, 1 Wall. (U. S.) 43, 17 L. ed. 609.

57. An exception to the method adopted by the commissioner for ascertaining the damages is insufficient where the report does not show and the exception does not state what that method was. *The Ship Transit*, 4 Ben. 138, 24 Fed. Cas. No. 14,138.

58. *Merritt, etc. Co. v. Morris, etc. Co.*, 132 Fed. 154, amending district rule 52 to avoid the effect of the

decision in *The Paquete Habana, infra*.

59. *The Paquete Habana*, 189 U. S. 453, 23 Sup. Ct. 593, 47 L. ed. 901, followed in *Merritt, etc. Co. v. Morris, etc. Co.*, 132 Fed. 154 (reversed on other grounds, 137 Fed. 780, 70 C. C. A. 356).

60. *Sturgis v. Clough*, 1 Wall. (U. S.) 269, 17 L. ed. 580; *The Ida G. Farnen*, 127 Fed. 766. See *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. ed. 289; *The Englishman*, 38 L. T. N. S. (Eng.) 756; and the title "Reference."

61. *Luckenbach v. Delaware, L. & W. R. Co.*, 168 Fed. 560. See *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. ed. 289; *La Bourgogne*, 144 Fed. 781, 75 C. C. A. 647. Compare *The Elton*, 83 Fed. 519, 31 C. C. A. 496.

62. *The Cayuga*, 59 Fed. 483, 8 C. C. A. 188.

63. *The Oceanica*, 156 Fed. 306; *The North Star*, 151 Fed. 168, 80 C. C. A. 536; *Appeal of Cahill*, 124 Fed. 63, 59 C. C. A. 519; *The Elton*, 83 Fed. 519, 31 C. C. A. 496; *The Minnehaha*, 151 Fed. 782; *The Mobila*, 147 Fed. 882; *Watts v. United States*, 129 Fed. 222; *The John McDermott*, 109 Fed. 90; *The Isaac Newton*, Abb. Adm. 588, 13 Fed. Cas. No. 7,090; *The Cylde*, Swabey (Eng.) 23.



court.<sup>64</sup> This rule, however, being based upon the better opportunity of the commissioner to judge of the credibility of the witness, has little application where the testimony or the major portion of it is not given before the commissioner.<sup>65</sup> And in any case where the finding is manifestly wrong the court will change it.<sup>66</sup>

*g. Re-reference.*—(I.) Generally.—The court in its discretion may re-commit the case to the commissioner.<sup>67</sup>

(II.) Effect of Amendment of Pleadings.—Where upon the hearing of exceptions to the commissioner's report an amendment of the pleadings is allowed, a new reference may be ordered as to new issues thereby raised.<sup>68</sup>

V. DECREE.—1. Generally.—Decrees in admiralty may be interlocutory or final.<sup>69</sup> Where it is necessary that a reference or further hearing be had to determine the amount of the recovery an interlocutory decree may be made fixing the rights and liabilities of the parties and the principles upon which the final award shall be made.<sup>70</sup> But even where the report of a commissioner is conclusive the final decree must be rendered by the court.<sup>71</sup> It must be in accordance with the pleadings and the proof,<sup>72</sup> and its substance will therefore be governed by the nature of the suit, the rights involved and the issues raised.<sup>73</sup>

64. Appeal of Cahill, 124 Fed. 63, 59 C. C. A. 519; The Providence, 98 Fed. 133, 38 C. C. A. 670; The Ohio, 91 Fed. 547, 33 C. C. A. 667. See *infra*, II, Y, 8, e.

65. The Sovereign of the Seas, 139 Fed. 812. See *infra*, II, Y, 8, e.

66. The Cayuga, 59 Fed. 483, 8 C. C. A. 188; Lee v. Thompson, 3 Woods 167, 15 Fed. Cas. No. 8,202. See *infra*, II, Y, 8, e.

67. The Liverpool Packet, 2 Spr. 37, 15 Fed. Cas. No. 8,407, holding that it would be an abuse of discretion to recommit to allow libellant's counsel to call to the commissioner's attention a matter which might have influenced his decision if his attention had been directed to it. The New Jersey, Olc. Adm. 444, 18 Fed. Cas. No. 10,162. See The Minnetonka (1904), L. R. Prob. Div. (Eng.) 202; The Alfred, 3 W. Rob. (Eng.) 232.

68. Harrison v. Hughes, 119 Fed. 997.

69. As to when a decree is interlocutory and when final, see *infra*, II, Y, 3, e.

70. See *supra*, II, U, 8.

Upon Default.—See *supra*, II, I, 3.

71. Luckenbach v. Delaware, L. & W. R. Co., 168 Fed. 560.

72. The Hoppet v. United States, 7 Cranch (U. S.) 389, 3 L. ed. 380; Ward v. The Fashion, Newb. Adm. 41, 6 Mc-

Lean 195, 29 Fed. Cas. No. 17,155; and *supra*, II, U, 6; and *infra*, II, V, 2, b. Effect of Prayer for General Relief. See *supra*, II, G, 14, b, (IV).

73. See Ward v. The Fashion, Newb. Adm. 41, 6 McLean 195, 29 Fed. Cas. No. 17,155, and the titles "Decrees;" "Judgment."

But in an action against two defendants, one of them cannot by admitting in its answer the averments of the libel as to the fault of the other, deprive the libellant or the other defendant of the right to a decree placing the fault where the evidence shows that it belongs. The Volunteer, 149 Fed. 723, 79 C. C. A. 429, which was a libel against a tug and the owners of another vessel alleging negligence of the latter in failing to maintain a light. The tug in its answer admitted this allegation and contended that by reason of such admission the libellants were precluded from recovery, upon the theory that the light was burning, which fact would place the fault upon the tug. The court held that the tug by admitting the allegation of the libel as to the fault of the owners of the other vessel could not preclude the latter from proving their freedom from fault, and this having been done it was the duty of the court to make its decree in accordance with the facts as proved.

Division of Damages.—See the titles "Collision;" "Shipping."

Collateral matters embraced in the court's opinion, but not in issue, should not be incorporated in the decree.<sup>74</sup> But in determining its validity the decision upon which it is based may be consulted.<sup>75</sup> If the liability is joint and several the decree, as at common law, may go against one or more of the defendants.<sup>76</sup>

2. *As Affected by Nature of Suit.* — a. *In Proceedings by Foreign Attachment.* — Since in a suit *in personam* by foreign attachment, where the defendant has not been served with process and has not appeared, the judgment binds only the property attached, it will go merely against such property and not the persons.<sup>77</sup>

b. *In Suits In Rem.* — *Decree In Personam.* — Although the process *in rem* contains a notice to all persons claiming an interest in the *res* to appear and defend such interest, an appearance for this purpose and the interposition of a defense on the merits does not give the court jurisdiction to render a decree *in personam* against persons so appearing.<sup>78</sup> But where the suit has been properly changed from one *in personam* to one *in rem* a decree appropriate to the change may be rendered.<sup>79</sup> So where the party appearing has signed a stipulation he can be held personally responsible thereon.<sup>80</sup> And in some cases the court has rendered a personal judgment without requiring any change in the pleadings or process,<sup>81</sup> especially where the record clearly shows a personal liability.<sup>82</sup>

3. *Signing.* — In the absence of a rule or statute it is not absolutely essential that a decree be signed by the judge, although such is the invariable practice.<sup>83</sup> A decree signed by one whose resignation

**Limitation of Liability.** — See the title "Shipping."

**Where Suits Are Consolidated.** — See *supra*, II, M, 1.

74. *Ward v. The Brig Fashion*, Newb. Adm. 41, 6 McLean 195, 29 Fed. Cas. No. 17,155.

75. *Sturgis v. Clough*, 1 Wall. (U. S.) 269, 17 L. ed. 580.

76. *Thorp v. Hammond*, 12 Wall. (U. S.) 408, 20 L. ed. 419.

77. *Boyd v. Urquhart*, 1 Spr. 423, 3 Fed. Cas. No. 1,750.

78. *The Lowlands*, 147 Fed. 986; *The Monte A*, 12 Fed. 331.

Where a mate proceeds *in rem* for his wages he cannot have a decree against the owners personally for extra compensation as acting master. *The Leonidas*, Olc. Adm. 12, 15 Fed. Cas. No. 8,262.

Rule 21 does not give a right to a personal judgment against a claimant in an action *in rem* who has not signed the stipulation. *Atlantic Mut. Ins. Co. v. Alexandre*, 16 Fed. 279.

Where proceedings *in rem* and *in personam* have been properly joined and

there is no prayer in the libel for a monition and personal judgment against the owner and there has been no service of monition on him or attachment on his property for the purpose of bringing him into court, his appearance to answer the libel *in rem* and to defend the *res* does not give the court jurisdiction to render a personal judgment against him. *The Ethel*, 66 Fed. 340.

79. See *supra*, II, C, 3, g; II, G, 21, d, (II), (B); and *The Steamship Zodiac*, 5 Fed. 220.

80. See *supra*, II, K; and *Atlantic Mut. Ins. Co. v. Alexandre*, 16 Fed. 279.

81. *The Dictator* (1892), Prob. Div. (Eng.) 304, exhaustively reviewing the English cases on this matter and the history of the remedies *in personam* and *in rem*, noting that the latter is an outgrowth of the former. See also *Reed v. Hussey*, Blatchf. & H. Adm. 525, 20 Fed. Cas. No. 11,646, *per Betts*, J.

82. 118 *Sticks of Timber*, 10 Ben. 86, 18 Fed. Cas. No. 10,519; *The Enterprise*, 2 Curt. 317, 8 Fed. Cas. No. 4,497.

83. *The City of Lincoln*, 19 Fed. 460. But see the title "Judgment."

has not been acted upon but who continues to act as judge is not invalid.<sup>84</sup>

**4. Entry and Enrollment.**<sup>85</sup>—The entry of judgment may be stayed where the circumstances or equities render it proper or necessary.<sup>86</sup> Where suits have been consolidated<sup>87</sup> or where independent claims have been filed,<sup>88</sup> separate decrees may be entered on each cause of action or claim. Decrees are deemed to have been enrolled as of the term at which they were made.<sup>89</sup>

**5. Amending and Vacating or Reopening.**—a. *Generally.*—The powers of a court of admiralty over its decrees and the limitations thereon are the same as in the case of other courts.<sup>90</sup>

b. *Libel of Review.*—The proper method of opening a decree after the term at which it was entered is a libel of review.<sup>91</sup> Relief may be granted under such a libel in the sound discretion of the court where a decree has been entered through inadvertence or its equivalent and the libellant is free from negligence and laches.<sup>92</sup>

**6. Enforcement.**—a. *Generally.*—In all cases of final decree for the payment of money the libellant is entitled to a writ of execution in the nature of a *pieri facias* against the goods and chattels, lands and tenements or other real estate of the defendant or stipulators.<sup>93</sup> In suits *in rem* or by attachment the decree is satisfied out of the attached property or the proceeds thereof, or the stipulation substituted therefor.<sup>94</sup>

b. *Decree of Another Court.*—A suit may be filed upon an admi-

84. *Northrop v. Gregory*, 2 Abb. 503, 18 Fed. Cas. No. 10,327.

85. **Entry and Enrollment Distinguished.**—See the titles "Decrees;" "Equity."

86. See *The Ciampa Emilia*, 39 Fed. 126, and *supra*, II, T, 1.

87. See *supra*, II, M, 1, d.

88. See *supra*, II, J, 8.

89. *The New England*, 3 Sumn. 495, 18 Fed. Cas. No. 10,151. Compare *Goelet v. Lansing*, 6 Johns. Ch. (N. Y.) 75.

90. *The Sparkle*, 7 Ben. 528, 533, 22 Fed. Cas. No. 13,207. See *infra*, II, W; and the title "Judgment," and also *Carroll v. Davidson*, 152 Fed. 424, 81 C. C. A. 566; *Pettit v. One Steel Lighter*, 104 Fed. 1002; *The Illinois*, *Brown's Adm.* 13, 12 Fed. Cas. No. 7,003.

The court of its own motion or upon application seasonably made may open a decree rendered under a misapprehension as to the facts, or upon papers improperly filed. *The Eva D. Rose*, 166 Fed. 101, 92 C. C. A. 85.

91. *The Madgie*, 31 Fed. 926. See *The New England*, 3 Sumn. 495, 18 Fed. Cas. No. 10,151.

But a petition may be treated as an application for leave to file such a libel and the appropriate relief granted thereon. *The Madgie*, 31 Fed. 926. See also *Hall v. Chisholm*, 117 Fed. 807, 55 C. C. A. 31; *The Sparkle*, 7 Ben. 528, 22 Fed. Cas. No. 13,207.

92. *Hall v. Chisholm*, 117 Fed. 807, 55 C. C. A. 31; *Munks v. Jackson*, 66 Fed. 571, 13 C. C. A. 641; *The Columbia*, 100 Fed. 890 (reviewing the authorities); *Snow v. Edwards*, 2 Low. 273, 22 Fed. Cas. No. 13,145 (reviewing authorities); *Northwestern Car Co. v. Hopkins*, 4 Biss. 51, 18 Fed. Cas. No. 10,334; *McGrath v. Candalero*, *Bee Adm.* 64, 16 Fed. Cas. No. 8,810; *Janvrin v. Smith*, 1 Spr. 13, 13 Fed. Cas. No. 7,220. See the title "Bill of Review."

93. *Adm. Rule* 21.

Against debts due defendant. *Lee v. Thompson*, 3 Woods 167, 15 Fed. Cas. No. 8,202.

**Execution Against Stipulators.**—See *supra*, II, K, 8, e.

94. See *supra*, II, K, 8, e; and *infra*, II, X; and *Boyd v. Urquhart*, 1 Spr. 423, 3 Fed. Cas. No. 1,750.



rality decree of another district or county<sup>95</sup> without presenting letters rogatory.<sup>96</sup>

**7. Satisfying.**—The court may entertain a motion to enter a satisfaction of a decree, upon notice and a showing of payment.<sup>97</sup>

**8. Effect.**—*a. Generally.*—In accordance with principles and rules hereinbefore noticed, an admiralty decree is conclusive on parties and privies as to the matters therein adjudicated, but no farther.<sup>98</sup> In suits *in rem* where notice has been given, all persons are deemed to be parties, and the judgment against the *res* is binding on the world.<sup>99</sup> The mere seizure of the *res* is sufficient notice,<sup>1</sup> unless a publication is required by rule or statute.<sup>2</sup>

*b. Foreign decrees* in admiralty are given the same effect as other foreign judgments.<sup>3</sup>

*c. As Lien on Lands.*—Decrees *in personam* in admiralty operate as a lien upon the lands of the debtor to the same extent as decrees in equity.<sup>4</sup>

W. NEW TRIAL AND REHEARING.—**1. Generally.**—While the court has power to entertain and grant a timely motion for a new trial or rehearing,<sup>5</sup> such a motion will not ordinarily be granted,<sup>6</sup> except in

95. See *Otis v. The Rio Grande*, 1 Woods 279, 18 Fed. Cas. No. 10,613; *The Centurion*, 1 Ware 490, 5 Fed. Cas. No. 2,554.

**Levy in Another District.**—See Rev. St., §§ 985, 986, and the title “**Execution.**”

96. *Pennsylvania R. Co. v. Gilhooley*, 9 Fed. 618.

97. See *Carroll v. Davidson*, 152 Fed. 424, 81 C. C. A. 566.

98. See *supra*, II, T, 2; and *Erie R. Co. v. Erie & W. Transp. Co.*, 204 U. S. 20, 27 Sup. Ct. 246, 51 L. ed. 450; *Morris v. Bartlett*, 108 Fed. 675, 47 C. C. A. 578; *Oregon R. & Nav. Co. v. Balfour*, 90 Fed. 295, 33 C. C. A. 57; *Card v. Hines*, 35 Fed. 598; *The Boston*, 8 Fed. 628; *Otis v. The Rio Grande*, 1 Woods 279, 18 Fed. Cas. No. 10,613; *The Navarro, Okl. Adm.* 127, 17 Fed. Cas. No. 10,059; *The Mary Anne*, 1 Ware 99, 16 Fed. Cas. No. 9,195.

99. *Penhallow v. Doane's Admrs.*, 3 Dall. (U. S.) 54, 1 L. ed. 507; *Bailey v. Sundberg*, 49 Fed. 583, 1 C. C. A. 387; *The James G. Swan*, 106 Fed. 94; *Daily v. Doe*, 3 Fed. 903.

1. *Daily v. Doe*, 3 Fed. 903, 912.

2. *Bailey v. Sundberg*, 49 Fed. 583, 1 C. C. A. 387.

But in *Daily v. Doe*, 3 Fed. 903, reviewing the authorities, the failure to publish the notice required by rule was held an irregularity justifying setting aside a default, but not impairing the

conclusive effect of the decree against the whole world.

3. See the title “**Judgment,**” and the following cases: *U. S.*—*Williams v. Armroyd*, 7 Cranch 423, 3 L. ed. 392; *The Garland*, 16 Fed. 283; *Peters v. Warren Ins. Co.*, 3 Sumn. 389, 19 Fed. Cas. No. 11,035. *Conn.*—*Stewart v. Warner*, 1 Day 142, 2 Am. Dec. 61. *La.*—*Zeno v. Louisiana Ins. Co.*, 2 La. 533; *Cucullu v. Orleans Ins. Co.*, 6 Mart. (N. S.) 11; *Cucullu v. Louisiana Ins. Co.*, 5 Mart. (N. S.) 464, 16 Am. Dec. 199. *New York.*—*Ocean Ins. Co. v. Francis*, 2 Wend. 64, 19 Am. Dec. 549. *S. C.*—*Campbell v. Williamson*, 2 Bay 237.

4. *Ward v. Chamberlain*, 2 Black (U. S.) 430, 17 L. ed. 319.

5. *Miller v. The Ship Resolution*, 2 Dall. (U. S.) 19, 1 L. ed. 271; *The Havilah*, 39 Fed. 333; *The Madgie*, 31 Fed. 926; *The Georg* (1894), Prob. Div. (Eng.) 330, and cases following.

6. See *Burdett v. Williams*, 29 Fed. 542; *The Vaderland*, 19 Fed. 527; *Greigg v. Reade*, *Crabbe* 64, 10 Fed. Cas. No. 5,804; *The Georg* (1894), Prob. Div. (Eng.) 330; *The Fortitudo*, 2 Dods. (Eng.) 58, 70.

The fact that an alleged prior contrary decision of a circuit court in another district was not called to the attention of the court does not warrant setting aside a decree and granting a retrial. *Thomassen v. Whitwell*,

cases of a decree by default,<sup>7</sup> since the aggrieved party has a remedy by an appeal, upon which the case is tried *de novo* and new evidence admitted.<sup>8</sup> Especially is this true where the rehearing is merely to take additional testimony omitted through the mistake or oversight of counsel,<sup>9</sup> or which would not change the result,<sup>10</sup> or which by proper diligence could have been obtained prior to the trial.<sup>11</sup> The motion must be made before the expiration of the term in which the final decree is entered,<sup>12</sup> unless the parties stipulate otherwise.<sup>13</sup> It should be supported by affidavits showing the facts relied upon.<sup>14</sup> A refusal to grant a rehearing is not reviewable on appeal.<sup>15</sup>

In cases tried by jury<sup>16</sup> the court may grant a new trial for causes which would justify a new trial in similar cases at common law.<sup>17</sup>

**2. In Appellate Court.**—The matter of a rehearing in the appellate court is treated elsewhere in this title.<sup>18</sup>

**X. SALE AND DISPOSITION OF PROPERTY.**<sup>19</sup>—**1. Generally.**—The court may, in its discretion, at any stage of the case order the sale of arrested property liable to injury by detention,<sup>20</sup> or of a ship for the release of which no stipulation has been given.<sup>21</sup> For the purpose of satisfying a decree for the payment of money, attached property may be sold.<sup>22</sup> And where the right to satisfaction out of the property has

9 Ben. 458, 23 Fed. Cas. No. 13,930.

**Newly Discovered Evidence.**—“Where very important facts are discovered after trial, and there is either no dispute about them, or substantially little dispute, it is better that this court, as I have held, should reconsider the case, the same as where there has been an important misapprehension or mistake as to the testimony or facts proved; but not so, I think, where the opening of the cause would renew the same controversy upon a new field of evidence, evidently with contradictory witnesses, all of which must be weighed in connection with the evidence previously considered.” *The Havilah*, 39 Fed. 333.

7. See *supra*, II, I, d.

8. *Mainwaring v. The Bark Carrie Delap*, 1 Fed. 880; *The John Cooker*, 10 Ben. 488, 13 Fed. Cas. No. 7,337; *The Francis Wright*, 7 Ben. 88, 9 Fed. Cas. No. 5,044. See *infra*, II, Y, 8.

9. *Merchants' Bkg. Co. v. Cargo of the Afton*, 134 Fed. 727, 67 C. C. A. 618; *The Francis Wright*, 7 Ben. 88, 9 Fed. Cas. No. 5,044. See *The Fortitudo*, 2 Dods. (Eng.) 58, 70; *The Vrouw Mina*, 1 Dods. (Eng.) 234.

10. *The Newport*, 38 Fed. 669, testimony of witness who has already made contradictory affidavits.

11. *The Iron Chief*, 63 Fed. 289, 11 C. C. A. 196; *Hatch v. The Newport*, 44 Fed. 300.

12. *Pettit v. One Steel Lighter*, 104 Fed. 1002; *Hatch v. The Newport*, 44 Fed. 300; *The Annex No. 3*, 38 Fed. 620; *The Comfort*, 32 Fed. 327; *The Madgie*, 31 Fed. 926; *Petty v. Merrill*, 12 Blatchf. 11, 19 Fed. Cas. No. 11,051; *The New England*, 3 Sumn. 495, 18 Fed. Cas. No. 10,151; *The Martha, Blatchf. & H. Adm.* 151, 16 Fed. Cas. No. 9,144.

13. See *The Martha, Blatchf. & H. Adm.* 151, 16 Fed. Cas. No. 9,144.

14. *Kenney v. Blake*, 125 Fed. 672, 60 C. C. A. 362.

15. *Cape Fear Towing, etc. Co. v. Pearsall*, 90 Fed. 435, 33 C. C. A. 161. See also *Kenney v. Blake*, 125 Fed. 672, 60 C. C. A. 362.

16. See *supra*, II, U, 2.

17. *The Western States*, 159 Fed. 354, 358, 86 C. C. A. 354.

18. See *infra*, II, Y, 10.

19. **On Appeal.**—See *infra*, II, Y, 8, b.

20. *Adm. Rule* 10. See *supra*, II, V, and *The Nevada*, 85 Fed. 681, on motion of claimant, the libellant not objecting.

21. *Adm. Rule* 11. See *supra*, II, V.

22. *Sanders v. The Sea Fowl*, 21 Fed. Cas. No. 12,296a.

**On Default Decree.**—*Boyd v. Urquhart*, 1 Spr. 423, 3 Fed. Cas. No. 1,750; *Read v. Owen*, 9 Port. (Ala.) 180. See *The Boston*, 1 Blatchf. & H. Adm. 309, 3 Fed. Cas. No. 1,669.

been established the court has no discretion to refuse or postpone the order of sale.<sup>23</sup>

2. Notice of the proposed sale must be given in the manner prescribed,<sup>24</sup> though it has been held that the failure to publish the required notice is an irregularity merely which is not fatal to the validity of the sale in a suit *in rem*.<sup>25</sup>

3. Confirmation by the court is essential to the consummation of the sale.<sup>26</sup> The court has a judicial discretion in this regard which is generally exercised in accordance with the rules which control courts of equity.<sup>27</sup>

4. Rights and Liabilities of Purchaser. — a. *Generally*. — The purchaser acquires only the property actually sold.<sup>28</sup> As in other judicial sales<sup>29</sup> there is no express or implied warranty in a sale in admiralty.<sup>30</sup>

b. *Enforcing Payment*. — Payment of the price bid may be enforced by attachment of the person of the purchaser,<sup>31</sup> or he may be compelled to pay any deficiency resulting from a resale,<sup>32</sup> unless unlawful conditions have been imposed on his right to consummate the sale.<sup>33</sup>

c. *Title*. — In proceedings *in rem* a judicial sale of the *res*, whether in a domestic or foreign admiralty court, gives to the purchaser a title discharged of all previously existing liens of every kind, even though of such a character that the court had no jurisdiction to adjudicate

23. *Davis v. A New Brig, Gilp*, 473, 7 Fed. Cas. No. 3,643.

24. *The Hornet, Abb. Adm.* 57, 12 Fed. Cas. No. 6,704. See *The Nevada*, 85 Fed. 681.

25. *Daily v. Doe*, 3 Fed. 903. But see *Bailey v. Sundberg*, 49 Fed. 583, 1 C. C. A. 387.

26. *The Sue*, 137 Fed. 133; *The New Hampshire*, 23 Int. Rev. Rec. 311, 18 Fed. Cas. No. 10,160 (holding that a purchaser at an unconfirmed sale who bestows labor on the property which is afterwards resold is not entitled to recover therefor).

27. Gross inadequacy of price such as would shock the conscience and be of itself evidence of fraud may be sufficient grounds to set aside a sale, but where there has been no fraudulent conduct on the part of the purchaser, no evidence of any combination to restrict the bidding, where the sale was open and public and after being duly advertised and no lack of attendance of buyers, the court should not refuse to confirm the sale merely because the price is inadequate. *The Planter*, 163 Fed. 667, where it appeared that after the sale interested parties offered double and treble the amount of the bid, but gave no reason why they did not attend the sale. But in *The Sue*, 137 Fed. 133, confirmation

was refused because in the meantime a higher bid had been received. The court says: "The bid of a purchaser at a judicial sale under a decree of the court is in legal effect only an offer to take the property at that price, and the acceptance or rejection of that offer is within the sound discretion of the court, to be exercised with due regard to the special circumstances of the case and to the stability of judicial sales."

28. *The Kate Williams*, 2 Flip. 50, 14 Fed. Cas. No. 7,623, where the notice of sale advertised the vessel, her boats, tackle, apparel, furniture and appurtenances, but she was sold "as she is," the purchaser cannot refuse to complete the sale because he did not get everything that formerly belonged to the vessel.

29. See the title "Judicial Sales."

30. *The Monte Allegre*, 9 Wheat. (U. S.) 616, 6 L. ed. 174.

31. *The Kate Williams*, 2 Flip. 50, 12 Fed. Cas. No. 7,623. See also *The Phebe*, 1 Ware 368, 19 Fed. Cas. No. 11,066.

32. *The John E. Mulford*, 18 Fed. 455.

33. *The John E. Mulford*, 18 Fed. 455, refusing him the right to draw his own deed and illegally demanding payment of an auctioneer's fee.



them.<sup>34</sup> But where in a suit *in personam* property seized under process of foreign attachment is sold, it is taken subject to all the liens, maritime and non-maritime, with which it may be burdened.<sup>35</sup>

d. *Setting Aside Sale*.—A sale after confirmation may be set aside for lack of jurisdiction of the subject-matter,<sup>36</sup> fraud and collusion participated in by the vendee,<sup>37</sup> inadequacy of price such as to indicate fraud or unfairness,<sup>38</sup> and irregularity in the conduct of the sale.<sup>39</sup> The petition should set forth the facts<sup>40</sup> and should be filed before the lapse of such time as to constitute laches.<sup>41</sup>

5. **Disposition of Proceeds.**—a. *Generally*.—The proceeds of a sale must be paid into the registry,<sup>42</sup> and cannot lawfully be disbursed without an order of the court.<sup>43</sup> The officer making the sale has no authority to pay any claim against them, even his fees and expenses.<sup>44</sup> Such proceeds are subject to the costs of prior proceedings constituting a lawful charge against them.<sup>45</sup> Before they are applied to the satisfaction of the libellant's claim he must furnish affirmative proof of his right to them.<sup>46</sup> All moneys paid into court must be deposited in some bank in the name of the court.<sup>47</sup>

b. *Intervention by Other Claimants*.—Other claimants may intervene to obtain satisfaction of their claims against the proceeds.<sup>48</sup>

Y. **APPEAL AND REVIEW.**—1. **Generally.**—The proper method of reviewing orders and decrees in admiralty is by an appeal rather than by writ of error.<sup>49</sup>

34. *The Trenton*, 4 Fed. 657; *Daily v. Doe*, 3 Fed. 903; *The Syracuse*, 9 Ben. 348, 23 Fed. Cas. No. 13,716. See also *The Garland*, 16 Fed. 283; *Stewart v. Fagan*, 2 Woods 215, 23 Fed. Cas. No. 13,716), even though the purchaser Tatum, 33 Mo. 461, 84 Am. Dec. 57; *The Fayette*, 10 Mo. 612.

Such liens are transferred to the proceeds (*The Trenton*, 4 Fed. 657; *The Syracuse*, 9 Ben. 348, 23 Fed. Cas. No. 13,716) even though the purchaser is also the lienor. *The Syracuse*, *supra*.

35. *Cole v. The Brandt*, 6 Fed. Cas. No. 2,978; *Boyd v. Urquhart*, 1 Spr. 423, 3 Fed. Cas. No. 1,750.

36. *The Trenton*, 4 Fed. 657.

37. *The Columbia*, 100 Fed. 890; *The Garland*, 16 Fed. 283; *The Trenton*, 4 Fed. 657; *The Sparkle*, 7 Ben. 528, 22 Fed. Cas. No. 13,207.

38. *The Ruby*, 38 Fed. 622; *The Sparkle*, 7 Ben. 528, 22 Fed. Cas. No. 13,207. See *The Columbia*, 100 Fed. 890; and *supra*, II, X, 3.

39. *The Ruby*, 38 Fed. 622; *Daily v. Doe*, 3 Fed. 903 (failure to give the requisite notice).

40. *The Kaloolah*, Brown's Adm. 55, 14 Fed. Cas. No. 7,602, as to fraud.

41. *United States v. The Austin*, 9

Ben. 350, 24 Fed. Cas. No. 14,479; *Seaver v. The Carroni*, 21 Fed. Cas. No. 12,593; *Pease v. The Napoleon*, 1 Newb. Adm. 37, 19 Fed. Cas. No. 10,883.

42. Adm. Rule 41; *The Phebe*, 1 Ware 360, 19 Fed. Cas. No. 11,065.

43. *The Collector*, 6 Wheat. (U. S.) 194, 5 L. ed. 239.

44. *The Phebe*, 1 Ware 360, 19 Fed. Cas. No. 11,065.

45. **Cost of Bankruptcy Proceedings.**

Where a vessel in the custody of a bankruptcy court as part of the property of the bankrupt is with the permission of the bankruptcy court allowed to be sold in admiralty for the purpose of paying maritime liens on the vessel, the costs of the bankruptcy proceedings must by virtue of the bankrupt act be first paid from the proceeds of the sale. *In re Hughes*, 170 Fed. 809.

46. *The Boston*, 1 Blatchf. & H. Adm. 309, 3 Fed. Cas. No. 1,669. See also *Roston v. The Water Witch*, 44 Fed. 95.

47. Adm. Rule 42.

48. See *supra*, II, L, 5.

49. *The San Pedro*, 2 Wheat. (U. S.) 132, 4 L. ed. 202; *Providence Wash. Ins. Co. v. Wager*, 37 Fed. 59. See the title "Appeal."

2. **Jurisdiction.**—As hereinbefore shown<sup>50</sup> the jurisdiction of appeals in admiralty is by the act of March 3, 1891,<sup>51</sup> vested in the circuit court of appeals and the supreme court of the United States.

3. **Appealable Orders and Decrees.**—a. *Generally.*—An appeal may not be taken from interlocutory orders or decrees, but only those which are final in their nature are appealable.<sup>52</sup> Interlocutory orders may, however, be reviewed upon an appeal properly taken from a final decree.<sup>53</sup> The agreement of the parties as to the facts making the decree final, subsequent to the appeal, cannot confer jurisdiction upon the appellate court.<sup>54</sup>

b. *Decree in Suit for Penalty or Forfeiture.*—A final decree in a suit for a penalty or to enforce a forfeiture is appealable by either party, since such a suit is a civil rather than a criminal proceeding.<sup>55</sup>

c. *What Is Final Decree.*—(I.) *Generally.*—A decree is not final for the purposes of an appeal unless it disposes of the entire controversy as between the parties.<sup>56</sup> Any doubt as to the character of the decree in this respect will be resolved in accordance with the action of the lower court and the view taken by the parties themselves.<sup>57</sup> It may

50. See fully *supra*, I, B, "Jurisdiction."

51. U. S. Rev. St., Vol. 1, p. 547; 26 Stat. at L. 826. For a transcript of this act and amendments thereto, see 150 Fed. V.

52. *Montgomery v. Anderson*, 21 How. (U. S.) 386, 16 L. ed. 160; *Carroll v. Davidson*, 152 Fed. 424, 81 C. C. A. 566; *The Elmira*, 16 Fed. 133; *Cushing v. Laird*, 15 Blatchf. 219, 6 Fed. Cas. No. 3,510. See the title "Appeal." But see *The New England*, 3 Sumn. 495, 18 Fed. Cas. No. 10,151.

A *pro forma* decree is appealable. *The Steamer Oregon v. Rocca*, 18 How. (U. S.) 570, 15 L. ed. 515; *Contra*, *Hendley v. The Wellington*, 12 Fed. Cas. No. 6,513.

An appeal directly to the supreme court can only be taken from a final judgment. *Bowker v. United States*, 186 U. S. 135, 22 Sup. Ct. 802, 46 L. ed. 1090.

53. *La Bourgogne*, 139 Fed. 433, 71 C. C. A. 489; *Dennis v. Slyfield*, 117 Fed. 474, 54 C. C. A. 520.

54. *Montgomery v. Anderson*, 21 How. (U. S.) 386, 16 L. ed. 160; *Mordcaï v. Lindsay*, 19 How. (U. S.) 199, 15 L. ed. 624.

55. *The Ben R.*, 134 Fed. 784, 67 C. C. A. 290.

From a decree on an informer's petition for his share of the proceeds of a sentence of condemnation for violation of the revenue laws, an appeal will lie. *Westcott v. Bradford*, 4 Wash. C. C. 492, 29 Fed. Cas. No. 17,429.

56. *Deslions v. La Compagnie Generale Trans.*, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. ed. 973; *The Chief*, 142 Fed. 349, 73 C. C. A. 459. See *Loring v. Illsley*, 1 Cal. 24, and the title "Appeal."

The refusal to order the sale of a vessel upon the petition of one of two equal owners is a final decree. *Davis v. The Seneca*, Gilp. 34, 7 Fed. Cas. No. 3,651.

An order sustaining exceptions to the libel and granting leave to amend is not final if the libellant avails himself of the permission (*Dennis v. Slyfield*, 117 Fed. 474, 54 C. C. A. 520); but if he waives his right to amend the order becomes final and appealable. *The Three Friends*, 166 U. S. 1, 17 Sup. Ct. 495, 41 L. ed. 897.

**Decree Pro Confesso.**—See *infra*, II, Y, 3, c, (IV).

57. *Deslions v. La Compagnie Generale Trans.*, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. ed. 973, holding that in a proceeding for limitation of liability involving both the right to a limitation of liability and the nature and amount of the claims which were to be allowed against the fund, a decree determining merely the question as to the right to limitation of liability, the sum of the pending freight and certain other questions of a generic character, but remitting for proof all questions concerning the other claims, was merely interlocutory, especially in view of the fact that it had been so treated by the court and the parties.

be final as to certain parties where it completely determines the controversy as between them, although as between other parties certain matters are left undetermined.<sup>58</sup> But where it fails to determine all of the issues between the same parties it is not appealable.<sup>59</sup>

Where the amount of the decree is yet to be determined it is not final,<sup>60</sup> and does not become so in case of a reference until the report of the commissioner has been acted upon.<sup>61</sup> But where rights of the parties are completely determined and the amount of the recovery fixed, the fact that the decree provides for proceedings yet to be taken for its enforcement,<sup>62</sup> or that the costs allowed have not been taxed,<sup>63</sup> does not prevent it from being final.

(II.) As to funds or proceeds remaining in the custody of the court the only final order is one which terminates that custody.<sup>64</sup>

(III.) A decree or order of dismissal if it is not on the merits and does not prevent the filing of a new suit is not final and therefore not appealable.<sup>65</sup> And a decree dismissing a cross-libel can only be reviewed on an appeal from a final decree disposing of the whole case.<sup>66</sup> But where the libel is dismissed upon exceptions the order or decree is final and may be appealed from.<sup>67</sup>

58. *The Alert*, 61 Fed. 113, 9 C. C. A. 390, where the decree was final as between libelants and claimants although the right of indemnity as between the respondents was left for further adjudication. See also *Withenbury v. United States*, 5 Wall. (U. S.) 819, 18 L. ed. 613.

Sureties cannot appeal from a decree against the respondents alone but only from a judgment which is against themselves as well. *Ex parte Sawyer*, 21 Wall. (U. S.) 235, 22 L. ed. 617. See also *Perriam v. Pacific Coast Co.*, 133 Fed. 140, 66 C. C. A. 206, and *infra*, 11, Y, 4, a.

59. *Dayton v. United States*, 131 U. S. Lxxx, appendix, 18 L. ed. 169, holding that where a libel seeks condemnation of both cargo and vessel a decree disposing of the vessel but not the cargo is not final. See also *Bowker v. United States*, 186 U. S. 135, 22 Sup. Ct. 802, 46 L. ed. 1090.

60. *Montgomery v. Anderson*, 21 How. (U. S.) 386, 16 L. ed. 160; *Chace v. Vasquez*, 11 Wheat. (U. S.) 429, 6 L. ed. 511; *The Yuba*, 4 Blatchf. 314, 30 Fed. Cas. No. 18,192; *The New England*, 3 Sumn. 495, 18 Fed. Cas. No. 10,151.

61. *The Palmyra*, 10 Wheat. (U. S.) 502, 6 L. ed. 376.

62. *The Eugene*, 87 Fed. 1001, 31 C. C. A. 345, in which the decree besides awarding damages in a fixed sum further decreed that the vessel be sold and the proceeds be paid into the registry

to await the further order of the court in respect to their distribution.

63. *Craig v. The Hartford, McAll.* 91, 6 Fed. Cas. No. 3,333; *The Sloop Leonede*, 1 Wash. Ter. 153.

64. *Canoe v. United States*, 5 Hughes 490, 25 Fed. Cas. No. 14,718. See also *Montgomery v. Anderson*, 21 How. (U. S.) 386, 16 L. ed. 160; *Cushing v. Laird*, 15 Blatchf. 219, 6 Fed. Cas. No. 3,510. But see *The Eugene*, 87 Fed. 1001, 31 C. C. A. 345.

65. *The Delaware*, 33 Fed. 589 (on motion at the hearing for failure to produce any evidence); *The Merchant*, 4 Blatchf. 105, 17 Fed. Cas. No. 9,436 (dismissal for failure to prosecute diligently).

The dismissal of a petition of intervention under rule 43 by the claimant of the libeled vessel for the summary adjudication of petitioner's claim on the proceeds of its sale is not a final and appealable order. *The Chief*, 142 Fed. 349, 73 C. C. A. 459.

But an order dismissing the libel if not amended within a given time becomes a final order of dismissal if an appeal is taken from it before the time for amendment has elapsed. *The Three Friends*, 166 U. S. 1, 49, 17 Sup. Ct. 495, 41 L. ed. 897.

66. *Decree Dismissing Cross-Libel.*—*Bowker v. United States*, 186 U. S. 135, 22 Sup. Ct. 802, 46 L. ed. 1090.

67. *Dennis v. Slyfield*, 117 Fed. 474, 54 C. C. A. 520.



(IV.) **Orders on Collateral Motions.**—An order denying a merely collateral motion is not a final decision determining the rights of the parties and is therefore not appealable.<sup>68</sup>

(V.) **Decrees on Default.**—Neither the interlocutory decree *pro confesso*<sup>69</sup> nor the final decree rendered on a default,<sup>70</sup> is appealable, unless the respondent has contested the amount of the damages, in which event the decree may be appealed from on that ground only.<sup>71</sup>

(VI.) **Discretionary Matters.**—(A.) **GENERALLY.**—Orders made during the progress of the cause, upon matters resting in the discretion of the court, are not appealable.<sup>72</sup>

The allowance of interest, being discretionary, is not reviewable.<sup>73</sup>

(B.) **COSTS.**—No appeal lies from a decree relating merely to costs and expenses, the allowance or disallowance of which are discretionary with the court.<sup>74</sup> But where some question of principle or some positive rule of law is involved, although concerning costs alone, an appeal may be taken.<sup>75</sup>

4. **Parties.**—a. *Who May Appeal.*—Any party to the suit who considers himself aggrieved by the decision may appeal therefrom, although the controversy is one solely between himself and a co-party.<sup>76</sup> But the appellant must be either a party or privy to the suit.<sup>77</sup>

68. *Carroll v. Davidson*, 152 Fed. 424, 81 C. C. A. 566, holding that an order denying a motion to set aside or satisfy a decree was merely a ruling upon a collateral motion and in no sense conclusive in respect to the controversy tendered, and *citing* *The Elmira*, 16 Fed. 133, as stating the rule applicable to proceedings after final decree. In that case the appeal was to the circuit court from an order of the district court—under the statutory provisions then existing—denying a motion to quash and satisfy the execution issued under a decree. It was held that the decree terminated the litigation and fixed the rights of the parties; that the process of the court, in execution of the decree, was “under its control, exercising a discretion under the law;” and that denial of such a motion was not an appealable decision under the authorities there cited and reviewed.

Decisions upon motions and auxiliary proceedings are incident to the progress of the cause but do not decide or dispose of its merits. *The Chief*, 142 Fed. 349, 73 C. C. A. 459.

69. *The Lopez*, 43 Fed. 95.

70. *Farrell v. Campbell*, 7 Blatchf. 158, 8 Fed. Cas. No. 4,682.

71. *Farrell v. Campbell*, 7 Blatchf. 158, 8 Fed. Cas. No. 4,682.

72. *The Chief*, 142 Fed. 349, 73 C. C. A. 459. See also *The Elmira*, 16 Fed. 133.

**Denial of Motion To Open Default.** *Cape Fear Tow., etc. Co. v. Pearsall*, 90 Fed. 435, 33 C. C. A. 161.

**Decision on Motion for Rehearing.**—*The Enterprise*, 3 Walk. Jr. 58, 8 Fed. Cas. No. 4,500.

73. *The Albert Dumois*, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. ed. 751.

74. *Cantler v. American & Ocean Ins. Co.*, 3 Pet. (U. S.) 307, 319, 7 L. ed. 688; *The Eva D. Rose*, 166 Fed. 101, 92 C. C. A. 85; *Taylor v. Woods*, 3 Woods 146, 23 Fed. Cas. No. 13,809. See also *The Caithnessshire*, 1 Abb. Adm. 164, 4 Fed. Cas. No. 2,294; *The Friedeberg*, 10 Prob. Div. (Eng.) 112; *The Consett*, L. R. 5 Prob. Div. (Eng.) 52.

75. *The City of Augusta*, 80 Fed. 297.

76. *Hume v. Frenz*, 150 Fed. 502, 80 C. C. A. 320.

77. *The William Bagaley*, 5 Wall. (U. S.) 377, 18 L. ed. 583; *Aiken v. Smith*, 54 Fed. 894, 4 C. C. A. 652; *The Spark v. Lee Choi Chum*, 1 Sawy. 713, 22 Fed. Cas. No. 13,206.

In a suit in rem where there was nothing in the record to show that certain appellants were parties or privies except the unsworn petition for appeal wherein they were styled “owners of the” libeled steamer, the appeal as to them was dismissed. *Aiken v. Smith*, 54 Fed. 894, 4 C. C. A. 652.

Where a surety's interest appears of record he may appeal,<sup>78</sup> but only from a judgment which is final as to him,<sup>79</sup> and where some question has arisen as to his obligation on the stipulation or bond.<sup>80</sup>

Where the rights of co-parties are distinct and are severally determined one cannot appeal from the decree in regard to the claim of another.<sup>81</sup>

**Libeled Res.** — An appeal must be taken by some person or corporation rather than in the name of the libeled *res*.<sup>82</sup>

b. *Effect of Misjoinder.* — The dismissal of the appeal as to parties improperly joined does not affect the appeal as to the remaining parties.<sup>83</sup>

c. *Necessary Parties.* — Where there is a joint judgment against several parties jointly interested, all must join in the appeal or there must be a summons and severance or equivalent proceeding.<sup>84</sup> But where their interests or liabilities are several they are not required to be joined in the appeal, even though the decree be joint in form.<sup>85</sup> Thus where separate and independent claims are interposed,<sup>86</sup> or where several suits have been consolidated,<sup>87</sup> or where parties with separate rights have been compelled to join or intervene in the same suit,<sup>88</sup> an appeal may be taken by one claimant or by one of the several parties suing or defending upon separate rights, without joining the others. So although a decree is against a party and his sureties jointly the latter are not necessary or proper parties to an appeal unless some question has arisen as to their obligation on the stipulation or bond.<sup>89</sup>

78. *Aiken v. Smith*, 54 Fed. 894, 4 C. C. A. 652. See also *The City of Naples*, 69 Fed. 794, 16 C. C. A. 421.

79. *Ex parte Sawyer*, 21 Wall. (U. S.) 235, 22 L. ed. 617. See *supra*, II, Y, 3, c.

80. *Perriam v. Pacific Coast Co.*, 133 Fed. 140, 66 C. C. A. 206.

81. *Oliver v. Alexander*, 6 Pet. (U. S.) 143, 8 L. ed. 349.

82. *The Burns*, 9 Wall. (U. S.) 237, 19 L. ed. 620.

A libeled vessel or a partnership cannot appeal as such. *The Spark v. Lee Choi Chum*, 1 Sawy. 713, 22 Fed. Cas. No. 13,206.

83. *Aiken v. Smith*, 54 Fed. 894, 4 C. C. A. 652.

84. *Consumers' Cotton Oil Co. v. Nichol*, 120 Fed. 818, 57 C. C. A. 321; *Aiken v. Smith*, 54 Fed. 894, 4 C. C. A. 652. See *Thomas v. Lane*, 2 Sumn. 1, 23 Fed. Cas. No. 13,902.

"Formerly a formal writ or summons and judgment of severance was required. Now it is enough to show that the parties had been notified in writing by due service, and notwithstanding do not join." *The Glide*, 72 Fed. 200, 18 C. C. A. 504.

**Effect of Appearance by Omitted Party on Appeal.** — See *infra*, II, Y, 4, e.

85. *The Columbia*, 73 Fed. 226, 19 C. C. A. 436, reversing 67 Fed. 942, 15 C. C. A. 91; *Thomas v. Lane*, 2 Sumn. 1, 23 Fed. Cas. No. 13,902.

86. See *supra*, II, J, 8; and *Stratton v. Jarvis*, 8 Pet. (U. S.) 4, 8 L. ed. 846; *Mason v. Marine Ins. Co.*, 110 Fed. 452, 49 C. C. A. 106, 54 L. R. A. 700; *Thomas v. Lane*, 2 Sumn. 1, 23 Fed. Cas. No. 13,902.

87. See *supra*, II, M, 1, d; II, M, 2.

88. *The Columbia*, 73 Fed. 226, 19 C. C. A. 436, reversing 67 Fed. 942, 15 C. C. A. 91. This was a proceeding for a limitation of liability in which several parties with distinct claims intervened. It was held that their interests being separate the decree, though joint in form, should be treated as several in its operation, and that an intervening claimant was not a necessary party to an appeal by another.

89. *Perriam v. Pacific Coast Co.*, 133 Fed. 140, 66 C. C. A. 206; *The New York*, 104 Fed. 561, 44 C. C. A. 38; *The Glide*, 72 Fed. 200, 18 C. C. A. 504. See *supra*, II, Y, 4, a.

d. *Rights of Non-Appealing Parties.*—A party who fails to appeal<sup>90</sup> or to join in an appeal<sup>91</sup> is bound by the decree below and cannot be heard in opposition thereto. But all parties interested in the decree may be heard in its support,<sup>92</sup> and where a decree below is modified or reversed, the effect on the rights of non-appealing parties depends upon the effect of the appeal and whether it necessitates a reconsideration or review of the whole controversy or only a distinct portion thereof.<sup>93</sup> A libellant who appeals does so in view of the fact that the appellate court, upon a rehearing *de novo*, may reduce the amount awarded him,<sup>94</sup> or may dismiss his libel altogether,<sup>95</sup> even though no cross-appeal is taken. And it has been held that on appeal by a claimant the award to a non-appealing libellant may be increased.<sup>96</sup>

e. *Adding New Parties.*—After the time for appeal has expired new parties cannot be added by amendment,<sup>97</sup> but prior thereto persons entitled to join in the appeal may become parties by petition.<sup>98</sup> And it has been held that if a necessary party be improperly omitted from the appeal, the omission is cured by his actual appearance in the appellate court,<sup>99</sup> though there is authority to the contrary.<sup>1</sup>

5. *When Taken.*—The appeal may be taken at any time within six months after the entry of the decree or order appealed from,<sup>2</sup> ex-

90. *The Stephen Morgan*, 94 U. S. 599, 24 L. ed. 266; *The Quickstep*, 9 Wall. (U. S.) 665, 19 L. ed. 767; *The William Bagaley*, 5 Wall. (U. S.) 377, 18 L. ed. 583; *McDonough v. Dannery*, 3 Dall. (U. S.) 188, 1 L. ed. 563; *Vaccarezze v. Molasses*, 161 Fed. 543, 88 C. C. A. 543; *Shotter Co. v. Larsen*, 134 Fed. 705, 67 C. C. A. 259; *The J. & J. McCarthy*, 61 Fed. 516, 9 C. C. A. 600; *The F. W. Vosburgh*, 50 Fed. 239, 1 C. C. A. 508; *Leary v. Talbot*, 151 Fed. 355; *Shaw v. Folsom*, 40 Fed. 511; *The Maggie P.*, 25 Fed. 202; *The Peytona*, 2 Curt. 21, 27, 19 Fed. Cas. No. 11, 058; *Bush v. The Alonzo*, 2 Cliff. 548, 4 Fed. Cas. No. 2,223; *Acrey v. Merrill*, 2 Curt. 8, 1 Fed. Cas. No. 115.

A cross-appeal should be taken by the libellant if he is dissatisfied with the amount of damages awarded below. *The Peytona*, 2 Curt. 21, 27, 19 Fed. Cas. No. 11,058.

91. *Stratton v. Jarvis*, 2 Pet. (U. S.) 4, 8 L. ed. 846.

92. *The Galileo*, 29 Fed. 538.

93. See *infra*, II, Y, 8, a, and *Munson S. S. Line v. Miramar S. S. Co.*, 167 Fed. 960, 93 C. C. A. 360; *The Roarer*, 1 Blatchf. 1, 20 Fed. Cas. No. 11,876.

Where several separate and distinct claims have been adjudicated by the decree, an appeal by one of the claimants does not affect the decree as to the rights of the others (*Mason v. Marine Ins. Co.*, 110 Fed. 452, 49 C. C. A.

106, 54 L. R. A. 700), unless the fund is insufficient to pay the claims of all. *The Lillie Laurie*, 50 Fed. 219.

But in a collision suit against two vessels where one only has been held liable, if on appeal by the other the liability is placed equally upon both vessels, the libellant, though not appealing, is entitled to a decree against both vessels for their respective shares of the damage, without costs of the appeal. *The Umbria*, 59 Fed. 489, 8 C. C. A. 194; *The Galileo*, 29 Fed. 538.

94. *The Hesper*, 122 U. S. 256, 7 Sup. Ct. 1177, 30 L. ed. 1175; *distinguished* in *Shaw v. Folsom*, 40 Fed. 511.

95. *Gilchrist v. Chicago Ins. Co.*, 104 Fed. 566, 44 C. C. A. 43; *The Saratoga v. 438 Bales of Cotton*, 1 Woods 75, 21 Fed. Cas. No. 12,356.

96. *Munson S. S. Line v. Miramar S. S. Co.*, 167 Fed. 960, 93 C. C. A. 360, holding that there is an irreconcilable conflict in the decisions of the supreme court as to the effect of the decree below on non-appealing parties.

97. *Mason v. Ervine*, 27 Fed. 240.

98. A surety may, by petition, become a party to a pending appeal. *The City of Naples*, 69 Fed. 794, 16 C. C. A. 421.

99. *The Columbia*, 73 Fed. 226, 19 C. C. A. 436.

1. *Consumers' Cotton Oil Co. v. Nichol*, 120 Fed. 818, 57 C. C. A. 818.

2. Act of March 3, 1891, U. S. Rev.



cept in those cases where the law prescribes a different time.<sup>3</sup> The filing and serving of the notice of appeal constitutes the taking of an appeal within the meaning of this rule.<sup>4</sup>

**6. Method of Appealing.**—a. *Generally.*—The method of taking an appeal is governed largely by the rules<sup>5</sup> and practice<sup>6</sup> of the court and is not the same in all circuits. The existing practice was not changed by the act creating the circuit court of appeals.<sup>7</sup>

The method prescribed in some circuits is to file with the clerk and serve on the adverse party's proctor a notice of appeal signed by the appellant or his proctor, and addressed to the proctor of the adverse party and the clerk of the court.<sup>8</sup> Where it is desired to limit the appeal to certain questions this may be done by specifically stating in the notice the questions upon which the appeal is taken.<sup>9</sup> In other circuits an appeal is instituted by a petition of appeal, which is presented to the district or an appellate judge for allowance.<sup>10</sup>

b. *Bonds.*—(1.) *Generally.*—Appellant must file a cost bond<sup>11</sup> and,

St., Vol. 1, p. 552; *Gilchrist v. Chicago Ins. Co.*, 104 Fed. 566, 44 C. C. A. 43; *The New York*, 104 Fed. 561, 44 C. C. A. 38; *The City of Naples*, 69 Fed. 794, 16 C. C. A. 421. See the title "Appeal."

But if a stay of proceedings is desired the appeal must be taken within the time required by local rule. See Rule 62, Southern District of New York, and also Rule 2, C. C. A., Adm. Rules of Second Circuit.

**Practice Previous to Act of 1891.**—See *The S. S. Osborne*, 105 U. S. 447, 26 L. ed. 1065; *Norton v. Rich*, 3 Mason 443, 18 Fed. Cas. No. 10,352; *The New England*, 3 Sumn. 495, 18 Fed. Cas. No. 10,151; *The Lone Fisherman*, 3 Wash. Ter. 316, 13 Pac. 617; *The Steamboat Zephyr v. Brown*, 2 Wash. Ter. 44, 3 Pac. 186. The appeal was required to be taken to the next term of the appellate court. *The S. S. Osborne*, 105 U. S. 447, 26 L. ed. 1065; *The Canary No. 2*, 22 Fed. 536; *The Oriental*, 2 Flip. 37, 18 Fed. Cas. No. 10,570; Adm. Rule 45.

Adm. Rule 45 in so far as inconsistent with the Act of Mar. 3, 1891, is repealed thereby. *The City of Naples*, 69 Fed. 794, 16 C. C. A. 421.

3. Act of Mar. 3, 1891, U. S. Rev. St., Vol. 1, p. 552. See the title "Appeal."

In prize causes the appeal must be taken within thirty days after the rendition of the decree. Rev. St., U. S. § 1,009. See *The Nuestra Señora De Regla*, 17 Wall. (U. S.) 29, 21 L. ed. 596.

4. C. C. A. Adm. Rules, 1.

5. See C. C. A. Adm. Rules (150 Fed. XXV, *et seq.*); Sup. Ct. Rules; *The S. S. Osborne*, 105 U. S. 447, 26 L. ed. 1065, and local district rules.

6. *Oris v. Rio Grande*, 1 Woods 593, 18 Fed. Cas. No. 10,614. See *The Brantford City*, 32 Fed. 324.

7. See *Gilchrist v. Chicago Ins. Co.*, 104 Fed. 566; Act of Mar. 3, 1891, § 11, U. S. Rev. St., Vol. 1, p. 552; and also the title "Appeal."

8. See Rule 1, Adm. Rules of 2nd and 9th Circuits; 121 Fed. iii; *The Ellen*, 4 Blatchf. 107, 8 Fed. Cas. No. 4,375.

Where an order substituting appellant for an intervenor, his assignor, has been made the notice to appeal need not be served on such intervenor. *Brown v. Merchants' Marine Ins. Co.*, 144 Fed. 85, 75 C. C. A. 243.

9. Rule 3, C. C. A. Adm. Rules of 2nd Circuit.

10. See C. C. A. Adm. Rule 11; *The Spark v. Lee Choi Chum*, 1 Sawy. 713, 22 Fed. Cas. No. 13,206, and also *The S. S. Osborne*, 105 U. S. 447, 26 L. ed. 1065.

**Form of Petition.**—See *The Spark v. Lee Choi Chum*, 1 Sawy. 713, 2 Fed. Cas. No. 13,206.

11. See C. C. A. Adm. Rules, and *Providence Wash. Ins. Co. v. Wager*, 37 Fed. 59; *Hayford v. Griffith*, 3 Blatchf. 34, 11 Fed. Cas. No. 6,263.

But where an appeal has been taken by petition and citation and the appellee has appeared, it will not be dismissed merely because the required cost

if he wishes to stay the execution of the decree, a bond for that purpose.<sup>12</sup> The amount of these bonds and the number and character of sureties are regulated by rules of court.<sup>13</sup> Where a bond given below for the release of the property involved binds the sureties to answer a decree in the appellate court a new bond is necessary only to cover the costs on appeal and possible damages for delay in the enforcement of the decree.<sup>14</sup> The bond should name all of the appellees for whose protection it is intended,<sup>15</sup> should be signed by the obligors named in it,<sup>16</sup> and may be taken before a United States commissioner.<sup>17</sup> It should be filed within the time prescribed by rule,<sup>18</sup> unless such time is extended by the court.<sup>19</sup>

(II.) **Justification.** — Sureties may be required to justify as provided by court rule,<sup>20</sup> and where a bond previously given stands on appeal a rejustification of sureties may be required.<sup>21</sup>

(III.) **Enforcement of Liability On.** — Liability on appeal bonds is enforced by summary proceedings<sup>22</sup> in accordance with the principles hereinbefore discussed.<sup>23</sup> Where the cause has been remitted for final proceedings the appeal bond follows it to the court below and must be enforced there.<sup>24</sup>

*c. Appeals in Forma Pauperis.* — Appeals in *forma pauperis* are proper only when authorized by statute,<sup>25</sup> and the federal statute governing suits in *forma pauperis* does not apply to appeals.<sup>26</sup> And where an appeal bond is given in such a suit to answer all costs and damages, it covers the cost in both the district and appellate courts.<sup>27</sup>

bond has not been filed, though the court may still require the filing of such a bond. *The Natchez*, 27 Fed. 309.

12. See C. C. A. Adm. Rules, and Adm. Rule 62 for Southern District of New York; *The Infanta*, Abb. Adm. 327, 13 Fed. Cas. No. 7,031; *Dutcher v. Woodhull*, 7 Ben. 313, 8 Fed. Cas. No. 4,204.

To prosecute the appeal with effect and to pay all costs and damages awarded against the appellant are two distinct conditions of the bond. *Smith v. Pendergast*, 82 Fed. 504.

Approved by the clerk rather than by the judge, is not sufficient. *Freeman v. Clay*, 48 Fed. 849, 1 C. C. A. 115.

13. *The Infanta*, Abb. Adm. 327, 13 Fed. Cas. No. 7,031; C. C. A. Adm. Rule 2, Second Circuit. See *supra*, II, K.

14. *The Brantford City*, 32 Fed. 324.

15. *Mason v. Ervine*, 27 Fed. 240; *The City of Lincoln*, 19 Fed. 460. But see *The Natchez*, 27 Fed. 309.

16. See *Ex parte Sawyer*, 21 Wall. (U. S.) 235, 22 L. ed. 617.

17. *The Canary No. 2*, 22 Fed. 536. See *supra*, II, K, 6.

18. *The Canary No. 2*, 22 Fed. 536.

**To Stay Execution.** — See C. C. A. Adm. Rule 2, of Second Circuit.

19. *Dutcher v. Woodhull*, 7 Ben. 313, 8 Fed. Cas. No. 4,204, the approval of a supersedeas bond not filed within the required time amounts to an extension of time by the court.

20. See *supra*, II, K, 8, b, and *The Infanta*, Abb. Adm. 327, 13 Fed. Cas. No. 7,031.

21. *The Brantford City*, 32 Fed. 324.

22. *Smith v. Pendergast*, 82 Fed. 504.

23. See *supra*, II, K, 8, e; and *Braithwaite v. Jordan*, 5 N. D. 196, 65 N. W. 701, 31 L. R. A. 238.

**Enforcement in State Court.** — See *Braithwaite v. Jordan*, 5 N. D. 196, 65 N. W. 701, 31 L. R. A. 238.

24. *Smith v. Pendergast*, 82 Fed. 504.

25. *The Presto*, 93 Fed. 522, 35 C. C. A. 394. See the title "Appeal."

26. *Bradford v. Southern R. Co.*, 195 U. S. 243, 25 Sup. Ct. 55, 49 L. ed. 178; *The Presto*, 93 Fed. 522, 35 C. C. A. 394. See *The Joseph B. Thomas*, 158 Fed. 559.

27. *The Joseph B. Thomas*, 158 Fed. 559.

d. *Assignment of Errors.* — (I.) **Generally.** — An assignment of errors must be filed,<sup>28</sup> particularly specifying the errors relied upon.<sup>29</sup> Errors not so assigned will not ordinarily be considered,<sup>30</sup> though the court may notice plain errors not included in the assignment,<sup>31</sup> especially in the interest of seamen.<sup>32</sup> Matters not presented to the court below cannot be made the basis of an assignment of error,<sup>33</sup> nor can alleged errors not shown by the record.<sup>34</sup>

(II.) **Additional Assignments in Appellate Court.** — The appellate court may on motion allow additional assignments of error to be filed.<sup>35</sup>

e. *Citation.* — Where an appeal is taken by petition,<sup>36</sup> and the order allowing the same has not been made in open court,<sup>37</sup> a citation must be issued.<sup>38</sup> It is directed to the appellee, requiring him to appear in the appellate court within the time stated, and is signed by a judge or justice of either court.<sup>39</sup> But where appeal

28. C. C. A. Adm. Rule 11, 121 Fed. iii; Chicago Ins. Co. v. Graham, 108 Fed. 271, 47 C. C. A. 320.

It should be entitled in the district and not in the appellate court, though a mistake in this regard is not fatal. Church Cooperage Co. v. Pinkney, 170 Fed. 266, 95 C. C. A. 462.

29. The Wyandotte, 145 Fed. 321, 75 C. C. A. 114 (in which an assignment as follows: "the court erred in dismissing the libel with costs," was held insufficient as being a mere expression of counsel's opinion as to the duty of the court); Lafourche Packet Co. v. Henderson, 94 Fed. 871, 36 C. C. A. 519; The Natchez, 78 Fed. 183, 24 C. C. A. 49. See Keyser & Co. v. Jurevicius, 122 Fed. 218, 58 C. C. A. 664.

30. The Philadelphia, 60 Fed. 423, 9 C. C. A. 54; Brauer v. Compania Navegacion La Flecha, 66 Fed. 776, 14 C. C. A. 88. See The Vaughen & Telegraph, 14 Wall. (U. S.) 258, 20 L. ed. 807; The Three Friends, 85 Fed. 424, 29 C. C. A. 244.

31. Briggs v. Taylor, 84 Fed. 681, 38 C. C. A. 518 (*dictum*). See also United States v. Tennessee, etc. R. Co., 176 U. S. 242, 20 Sup. Ct. 370, 44 L. ed. 452; Chicago Ins. Co. v. Graham, 108 Fed. 271, 47 C. C. A. 320 (by rule of court); The Eliza Lines, 132 Fed. 242, 65 C. C. A. 538.

32. The Chattahoochee, 74 Fed. 899, 21 C. C. A. 162.

33. Paaahua Sug. Plant. Co. v. Palapala, 127 Fed. 920, 62 C. C. A. 552; The New York, 104 Fed. 561, 44 C. C. A. 38; The Armonia, 81 Fed. 227, 26 C. C. A. 338; The State of Missouri, 76 Fed. 376, 22 C. C. A. 239; Brauer v.

Compania Navegacion La Flecha, 66 Fed. 776, 14 C. C. A. 88; The Ping-On v. Blethen, 11 Fed. 607; Meagher v. The Lizzie, 2 Woods 243, 16 Fed. Cas. No. 9,377; Harris v. Wheeler, 8 Blatchf. 1, 11 Fed. Cas. No. 6,129. See The Commander-in-Chief, 1 Wall. (U. S.) 43, 17 L. ed. 609.

**Exceptions to Commissioner's Report.** See *supra*, II, U, 8, f, (II).

34. The Natchez, 78 Fed. 183, 24 C. C. A. 49.

35. Cory v. Penco, 76 Fed. 997, 22 C. C. A. 675. See also The Armonia, 81 Fed. 227, 26 C. C. A. 338.

36. See *supra*, II, Y, 6, a.

**Appeal From District to Supreme Court.** — See *infra*, II, Y, 11.

37. The Spark v. Lee Choi Chum, 1 Sawy. 713, 22 Fed. Cas. No. 13,206.

38. Tazaymon v. Twombly, 5 Sawy. 79, 23 Fed. Cas. No. 13,810; The Spark v. Lee Choi Chum, 1 Sawy. 713, 22 Fed. Cas. No. 13,206.

39. Freeman v. Clay, 48 Fed. 849, 1 C. C. A. 115; Zephyr v. Brown, 2 Wash. Ter. 44, 3 Pac. 186.

Where appellees are partners the citation should be directed to them individually rather than to the firm. United States v. Hopewell, 51 Fed. 798, 2 C. C. A. 510.

**It is returnable within thirty days.** Freeman v. Clay, 48 Fed. 849, 1 C. C. A. 115.

An appearance by appellee without objection to defects in the citation is a waiver of them. United States v. Hopewell, 51 Fed. 798, 2 C. C. A. 510; Freeman v. Clay, 48 Fed. 849, 1 C. C. A. 115. See Penhallow v. Doane Admrs., 3 Dall. (U. S.) 54, 1 L. ed. 507.



is taken by notice to the adverse party no citation is necessary.<sup>40</sup>

f. *The Apostles or Record*.—The record on appeal is called the "apostles" and is made up by the clerk of the court below in accordance with the rules prescribing its form and contents.<sup>41</sup> It must be certified by the clerk and returned to the appellate court within the prescribed time.<sup>42</sup> He may be compelled to do this by writ of certiorari.<sup>43</sup> But where an appeal has been allowed, the failure to send up the record within the time allowed does not defeat the appellate jurisdiction.<sup>44</sup> Except where the parties otherwise stipulate,<sup>45</sup> it must include the whole case below.<sup>46</sup> The appellate court will not review the case *de novo* or consider it upon the merits unless all the evidence taken below is contained in the record.<sup>47</sup> Nor will it remand the case for a new trial because the testimony below was not preserved and incorporated in the record.<sup>48</sup> Such a defect, however, is not ground for a dismissal of the appeal.<sup>49</sup>

g. *Amendment of Appeal Process*.—Appeal process lacking an essential requisite cannot be corrected by amendment in the appellate court,<sup>50</sup> unless by consent.<sup>51</sup>

h. *Cross-appeals* must be prosecuted like other appeals.<sup>52</sup>

**7. Dismissal of Appeal.**—a. *Generally*.—Failure to appeal<sup>53</sup> or to perfect an appeal<sup>54</sup> within the required time deprives the appellate court of jurisdiction and necessitates the dismissal of the appeal.

b. *Motion to Dismiss*.—A motion to dismiss the appeal must be made in the appellate court.<sup>55</sup> On such a motion only the jurisdiction of the court to deal with the subject-matter of the appeal can be con-

40. The *Ellen*, 4 Blatchf. 107, 8 Fed. Cas. No. 4,375. See *supra*, II, Y, 6, a.

41. See Adm. Rule 52; C. C. A. Adm. Rule 4, 2nd Circuit.

42. The *Margaret B. Roper*, 106 Fed. 740, 45 C. C. A. 577.

43. The *Margaret B. Roper*, 106 Fed. 740, 45 C. C. A. 577, compelling the clerk to amend his certified record to include documents used in evidence.

44. The *S. S. Osborne*, 105 U. S. 447, 26 L. ed. 1065; The *Chatham*, 52 Fed. 396, 3 C. C. A. 161.

45. The *Alijandro*, 56 Fed. 621, 6 C. C. A. 54. See C. C. A. Adm. Rule 4, § 3, 2nd Circuit.

46. The *Margaret B. Roper*, 106 Fed. 740, 45 C. C. A. 577.

47. The *Edward H. Blake*, 92 Fed. 202, 34 C. C. A. 299; *Nelson v. White*, 83 Fed. 215, 32 C. C. A. 166; The *Glide*, 72 Fed. 200, 18 C. C. A. 504; The *Philadelphian*, 60 Fed. 423, 9 C. C. A. 54; The *Alijandro*, 56 Fed. 621, 6 C. C. A. 54 (sufficiency of evidence to sustain findings); *Gloucester Ins. Co. v. Younger*, 2 Curt. 322, 10 Fed. Cas. No. 5,487. See The *Wyandotte*, 145 Fed. 321, 75 C. C. A. 117.

It should appear which witnesses testified in the presence of the court. The *Gypsum Prince*, 67 Fed. 612, 14 C. C. A. 573.

48. The *McDonald*, 112 Fed. 681, 50 C. C. A. 423. See The *Glide*, 72 Fed. 200, 18 C. C. A. 504.

49. *Brown v. Merchants' Marine Ins. Co.*, 144 Fed. 85, 75 C. C. A. 243.

50. *Mason v. Ervine*, 27 Fed. 240; The *City of Lincoln*, 19 Fed. 460. See also The *Natchez*, 27 Fed. 309. But see *Freeman v. Clay*, 48 Fed. 849.

51. *United States v. Hopewell*, 51 Fed. 798, 2 C. C. A. 510.

52. The *S. S. Osborne*, 105 U. S. 447, 26 L. ed. 1065.

**Cross-Appeals.—Necessity of Perfecting.**—See The *Steamer City of Panama v. Phelps*, 1 Wash. 518, 3 Pac. 204.

53. See *supra*, II, Y, 5; and *United States v. Five Thousand One Hundred Dollars In Specie*, 1 Woods 14, 25 Fed. Cas. No. 15,119.

54. See The *Josephine*, Abb. Adm. 481, 13 Fed. Cas. No. 7,545.

55. The *Josephine*, Abb. Adm. 481, 13 Fed. Cas. No. 7,545.

sidered, or in other words, whether the appeal has been properly taken and perfected.<sup>56</sup>

**8. Effect of and Proceedings on Appeal.**—a. *Generally.*—An appeal in admiralty carries the matter appealed from to the appellate court for a hearing *de novo* upon both the facts and the law.<sup>57</sup> The

56. *Brown v. Merchants' Marine Ins. Co.*, 144 Fed. 85. See *The Natchez*, 27 Fed. 309.

57. *The Western States*, 159 Fed. 354, 86 C. C. A. 354; *The San Rafael*, 141 Fed. 270, 72 C. C. A. 388; *Gilchrist v. Chicago Ins. Co.*, 104 Fed. 566, 44 C. C. A. 43; *Cleveland v. The Steamer William Chisholm*, 90 Fed. 431, 33 C. C. A. 157; *The Sirius*, 54 Fed. 188, 4 C. C. A. 273; *The Havilah*, 48 Fed. 684, 1 C. C. A. 77 (this case and the note in C. C. A. review the previous authorities). See *The Louisville v. Halliday*, 154 U. S. 657, 14 Sup. Ct. 1190, 25 L. ed. 771; *Irvine v. The Hesper*, 122 U. S. 256, 7 Sup. Ct. 1117, 30 L. ed. 1175; *The Glide*, 72 Fed. 200, 18 C. C. A. 504.

**Review of Authorities and Changes in Legislation.**—In *Munson S. S. Line v. Miramar S. S. Co.*, 167 Fed. 960, 93 C. C. A. 360, the court says: "A very interesting and difficult question is to be determined, upon which the decisions even of the same courts are not harmonious. From 1789 to 1891 decrees of the District Court in Admiralty were reviewed by appeal to the Circuit Court. Section 631, Rev. St. U. S. Such appeals were trials *de novo*. The libellant opened and closed the case in the Circuit Court, just as he had in the District Court. Either party could take new proofs in the Circuit Court at will (Supreme Court Admiralty Rules 49 and 50) and could put in new pleadings (The *Charles Morgan*, 115 U. S. 69, 75, 76, 5 Sup. Ct. 1172, 29 L. ed. 316). The Circuit Court entered its own decree and executed it. The *Lucille*, 19 Wall. 73, 22 L. ed. 64; *The Saratoga*, 1 Woods 75, 21 Fed. Cas. No. 12,356. . . . In this circuit, however, proofs taken in the Circuit Court which could have been taken in the District Court might be suppressed. The *Saunders* (C. C.) 23 Fed. 303; *The Stonington* (C. C.) 25 Fed. 621. This is quite consistent with the trial being *de novo*. But the matter of reviewing decrees in admiralty causes of the Circuit Court in the Supreme Court has been the subject of great changes in legislation. From 1789 to 1803 the review was by writ of error,

and the Supreme Court had, as in actions at common law, the power to consider questions of law only. This was the result of the construction given by the majority of the court in the case of *Wiscart v. D'Auchy*, 3 Dall. 321, 1 L. ed. 619, to sections 21 and 22 of the judiciary act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 83, 84). Subsequently Act March 3, 1803, c. 40, 2 Stat. 244 (sec. 692, Rev. St. U. S.), gave the Supreme Court the right to review admiralty causes by appeal, and from that time down to 1875 the court was authorized to pass upon the facts as well as the law. Unlike the Circuit Court, however, it did not enter or execute its own decree, but remanded the cause for further proceedings to the Circuit Court. Rev. St. U. S. § 701. New evidence might be taken in admiralty and prize causes, though not in equity causes. Rev. St. U. S. § 698 (U. S. Comp. St. 1901, p. 568). This is strong evidence that admiralty appeals were to be new trials. Otherwise new proofs would be useless. In 1817 a rule was adopted (2 Wheat. vii) whereby new evidence could only be taken by leave of the court. Supreme Court Rule 12; *The Mabey*, 10 Wall. 419, 19 L. ed. 963. Notwithstanding these regulations the appeal in the Supreme Court remained a new trial. As Judge Wallace, speaking for this court, said in *The Havilah*, 48 Fed. 684, 1 C. C. A. 77: 'Prior to the act of February 16, 1875 (18 Stat. 315, c. 77 [U. S. Comp. St. 1901, p. 525]), to facilitate the disposition of cases in the Supreme Court and for other purposes, neither special findings of facts nor exceptions were a necessary part of the record upon an appeal in an admiralty cause, and the hearing in the Supreme Court and in the Circuit Court was a trial *de novo*.' " [The court here discusses and quotes from *Yeaton v. United States*, 5 Cranch (U. S.) 281, 3 L. ed. 101; *Hobart v. Drogan*, 10 Pet. (U. S.) 108, 119, 9 L. ed. 363; *Post v. Jones*, 19 How. (U. S.) 150, 15 L. ed. 618; *The Camanche*, 8 Wall. (U. S.) 448, 479, 19 L. ed. 397.] "In the case of *The*

numerous changes in the law and in the jurisdiction of the courts have resulted in some uncertainty and apparent inconsistency in the practice on appeal, so that while the rule just stated seems to be now generally recognized in the various circuits, the practice is not wholly consistent with the idea of a trial or hearing *de novo*.<sup>58</sup> The rule is laid down that an appeal brings up the whole decree below,<sup>59</sup> unless

Connemara (1882), 108 U. S. 352, 360, 2 Sup. Ct. 754, 759, 27 L. ed. 751, Mr. Justice Gray recognized that before the act of 1875, to be presently considered, the Supreme Court had full jurisdiction of facts and law on admiralty. . . . Then came Act Feb. 16, 1875, c. 77, 18 Stat. 315, which again restricted the power of the Supreme Court to the narrow limits prevailing between 1789 and 1803. The Francis Wright, 105 U. S. 381, 26 L. ed. 1100. . . . The next legislation was Act March 3, 1891, c. 517, 26 Stat. 826 (U. S. Comp. St. 1901, p. 549), which distributed all appeals between the Supreme Court (section 5) and the Circuit Court of Appeals (section 6). We think the first section of the act of 1875 must be regarded as repealed by necessary implication by the act of 1891. The Paquete Habana, 175 U. S. 677, 684, 685, 20 Sup. Ct. 290, 44 L. ed. 320. All appellate jurisdiction having been taken from the Circuit Court, the judges of that court could certainly not thereafter make special finding of fact and conclusions of law; and, all appeals in admiralty causes having been restricted to the Circuit Court of Appeals, such conclusions of law and fact could not be reviewed by the Supreme Court. Under the authority conferred by section 2 of the act of 1891 this court adopted rule 11, requiring assignments of error to accompany the petition of appeal, and rule 14, requiring all the testimony in the District Court to be included in the transcript of record, as required by Supreme Court admiralty rule 52. This was no more than was required upon appeal to the Supreme Court by sections 997 and 1012, Rev. St. U. S. (U. S. Comp. St. 1901, pp. 712, 716). Dufour v. Lang, 54 Fed. 913, 917, 4 C. C. A. 663. It further adopted special rules in admiralty, 1, 7, and 8. Rule 1 requires appeals to be heard on the pleadings and evidence in the district court, unless the court otherwise orders; rule 7, that the court or any judge thereof may allow either party, upon

sufficient cause shown, to make new allegations, pray different relief, interpose new defenses, or take new proofs. Finally, by section 10 of the act of 1891, this court does not, as the Circuit Court did, enter and execute its own decree, but remands the cause to the lower court for further proceedings. These rules and this practice, being inconsistent with a new trial as previously understood in the Circuit Courts, provoked a protest from many of the leading practitioners in admiralty, which may be seen *In re Hawkins*, 147 U. S. 486, 13 Sup. Ct. 512, 37 L. ed. 251. We are of opinion that this court stands with relation to the District Court exactly as the Supreme Court before the act of 1875 stood in relation to the Circuit Court. The appeal is still a new trial in this court, subject to the regulations before mentioned, and we have power to modify the decree of the district court as the Supreme Court had between 1803 and 1876. *The Western States*, 159 Fed. 354, 360, 86 C. C. A. 354. This case illustrates how completely an appeal to this court is a trial *de novo*." The court then notices and disapproves of the rule that one not appealing from a decree is bound by it (see *supra*, II, Y, 4, d), as inconsistent with the idea of a trial *de novo*.

The act of 1891 does not change the effect of an appeal in this respect. *Gilchrist v. Chicago Ins. Co.*, 104 Fed. 566, 44 C. C. A. 43, *per Harlan, J.*

58. See note preceding and the sections immediately following, and *supra*, II, Y, 6, d; II, Y, 6, f. See also *The Beeche Dene*, 55 Fed. 526, 5 C. C. A. 208.

59. *Gilchrist v. Chicago Ins. Co.*, 104 Fed. 566, 44 C. C. A. 43; *Cleveland v. The Chisholm*, 90 Fed. 431, 33 C. C. A. 157; *The Roarer*, 1 Blatchf. 1, 20 Fed. Cas. No. 11,876.

Proceedings in the court below may be stayed by a writ of inhibition where circumstances require it. Adm. Rule 12, 2nd Circuit. See also *Penhallow v. Doane's Admr.*, 3 Dall. (U. S.) 54, 1 L. ed. 507.



a portion only thereof is appealed from,<sup>60</sup> and that the appellate court may disregard it entirely and enter such a decree as it seems proper on the law and the facts.<sup>61</sup> Nevertheless it has been repeatedly held that a party to a decree who fails to join in appeal therefrom, or to institute a cross-appeal, is not entitled to any greater damages or rights than those accorded him by such decree, whatever may be the appellate court's views as to what he should have been awarded below.<sup>62</sup> Such decisions have been criticized as inconsistent with the rule above stated.<sup>63</sup> The decree below is stayed where a supersedeas bond has been filed.<sup>64</sup>

b. *On Custody of Property in Registry.*—Under the system of appeals from the district to the circuit court the *res* or proceeds in the registry followed the appeal to the latter court to be disposed of in accordance with its decree,<sup>65</sup> and remained there, notwithstanding a further appeal.<sup>66</sup> But under the circuit court of appeals act such property apparently remains in the custody and control of the district court.<sup>67</sup>

c. *New Evidence.*—Since an admiralty appeal is a trial or hearing *de novo*,<sup>68</sup> it follows that an appellate court may permit the introduction of new evidence not presented to the court below.<sup>69</sup> This was the

60. *The Roarer*, 1 Blatchf. 1, 20 Fed. Cas. No. 11,876, in which event the part not appealed from remains in full force and effect and becomes part of the decree of the appellate court. See also *Mason v. Marine Ins. Co.*, 110 Fed. 452, 49 C. C. A. 106, 54 L. R. A. 700.

61. *Gilchrist v. Chicago Ins. Co.*, 104 Fed. 566, 44 C. C. A. 43.

62. See *supra*, II, Y, 4, d, and *Munson S. S. Line v. Miramar S. S. Co.*, 167 Fed. 960, 964, 93 C. C. A. 360.

63. *Munson S. S. Line v. Miramar S. S. Co.*, 167 Fed. 960, 964, 965, 93 C. C. A. 360.

64. *Dutcher v. Woodhill*, 7 Ben. 313, 8 Fed. Cas. No. 4,204. See also *Yeaton v. United States*, 5 Cranch (U. S.) 281, 3 L. ed. 101, *supra*, II, Y, 6, b.

65. *Montgomery v. Anderson*, 21 How. (U. S.) 386, 16 L. ed. 160; *The Grotius*, 1 Gall. 503, 11 Fed. Cas. No. 5,844. See also *Jones v. Walker*, 13 Fed. Cas. No. 7,506; *Hayford v. Griffith*, 3 Blatchf. 34, 11 Fed. Cas. No. 6,263.

66. *The Collector*, 6 Wheat. (U. S.) 194, 5 L. ed. 239; *Hayford v. Griffith*, 3 Blatchf. 34, 11 Fed. Cas. No. 6,263.

67. *Mignano v. McAndrews*, 56 Fed. 300, 4 C. C. A. 4; *Calefarno v. McAndrews*, 51 Fed. 300.

68. See *supra*, II, Y, 8, a.

69. *Rose v. Himely*, Bee Adm. 313,

20 Fed. Cas. No. 12,045. See *The Marianna Flora*, 11 Wheat. (U. S.) 1, 38, 6 L. ed. 405; *The Brig James Wells v. United States*, 7 Cranch (U. S.) 22, 3 L. ed. 256.

Where the evidence is so uncertain and ambiguous as to make it impossible for the appellate court to reach a conclusion, further evidence may be taken (*The Samuel*, 1 Wheat. [U. S.] 9, 4 L. ed. 23), or the case may be remanded to the court below for the purpose of taking further evidence. *The Carbonero*, 106 Fed. 329, 45 C. C. A. 314.

New evidence contradicting the evidence already taken is not admissible. *Cushman v. Ryan*, 1 Story 91, 6 Fed. Cas. No. 3,515.

In Support of New Pleadings.—*The Boston*, 1 Sumn. 328, 3 Fed. Cas. No. 1,678. See *Smith v. Wood Transf. Co.*, 103 Fed. 685, 43 C. C. A. 347.

In Territorial Supreme Court.—*Phelps v. The S. S. City of Panama*, 1 Wash. Ter. 518.

A commission may issue to take the deposition of the witness (*Hawthorne v. The United States*, 7 Cranch [U. S.] 107, 3 L. ed. 284; *The London Packet*, 2 Wheat. [U. S.] 371, 4 L. ed. 264); but his testimony cannot be taken *de bene esse*. *The Beeche Dene*, 55 Fed. 526, 5 C. C. A. 208.

rule in the circuit court<sup>70</sup> under the former system of admiralty appeals, and a similar though modified rule is now followed in the circuit court of appeals.<sup>71</sup> The practice, however, is not encouraged by the appellate court,<sup>72</sup> which ordinarily requires a showing of the materiality of the testimony and a satisfactory reason why the witnesses were not produced and examined below.<sup>73</sup> But where substantial justice requires it, the taking of additional testimony may be allowed, although no sufficient excuse is given for its non-production below.<sup>74</sup>

The application to take new testimony must be made in the appellate court.<sup>75</sup>

**Weight.**—It has been said that new testimony on appeal is not entitled to the same weight as testimony introduced below.<sup>76</sup>

**d. New Pleadings.**—Within the limits prescribed by the rules and the practice, amended or supplementary pleadings may be filed in the appellate court.<sup>77</sup> But such pleadings filed without leave or compli-

70. *The Stonington*, 25 Fed. 621; *The Morning Star*, 14 Fed. 866; *Rose v. Himely*, Bee Adm. 313, 20 Fed. Cas. No. 12,045. See *The Venezuela*, 52 Fed. 873, 3 C. C. A. 319.

**Application Not Granted as a Matter of Course.**—*Sorensen v. Keyser*, 51 Fed. 30, 2 C. C. A. 92.

71. See *Chicago Ins. Co. v. Graham*, 108 Fed. 271, 47 C. C. A. 320; *The Philadelphia*, 60 Fed. 423, 9 C. C. A. 54; *The Beeche Dene*, 55 Fed. 526, 5 C. C. A. 208; *The Lisbonese*, 53 Fed. 293, 3 C. C. A. 539; *The Venezuela*, 52 Fed. 873, 3 C. C. A. 319.

Where testimony was erroneously rejected below it may be received on appeal. *The Sirius*, 54 Fed. 188, 4 C. C. A. 273.

72. See *Pacific Steam Whaling Co. v. Grismore*, 117 Fed. 68, 54 C. C. A. 454; *The Venezuela*, 52 Fed. 873, 3 C. C. A. 319.

Parties who have withheld evidence will not be permitted to introduce it on appeal. *The B. B. Saunders*, 23 Fed. 303.

73. *The Mabey*, 10 Wall. (U. S.) 419, 19 L. ed. 963; *The Glide*, 72 Fed. 200, 18 C. C. A. 504 (sickness of the party and consequent inability to appear at the hearing or advising with his proctor is sufficient excuse); *Red River Line v. Cheatham*, 60 Fed. 517, 9 C. C. A. 124; *The Beeche Dene*, 55 Fed. 526, 5 C. C. A. 208; *The Sirius*, 54 Fed. 188, 4 C. C. A. 273; *The Venezuela*, 52 Fed. 873, 3 C. C. A. 319 (reviewing the authorities); *The Generous*, 2 L. R. Adm. & Ecc. 57, 64. But see *Singlehurst v. La Compagnie Gen. Trans.*, 50 Fed. 104, 1 C. C. A. 487.

**Rules of court** usually regulate the matter of taking new testimony. See C. C. A. Adm. Rules and Rules of Supreme Court.

74. *Red River Line v. Cheatham*, 60 Fed. 517, 9 C. C. A. 124. See the *Philadelphia*, 60 Fed. 423, 9 C. C. A. 54.

75. *The Ocean Queen*, 6 Blatchf. 24, 18 Fed. Cas. No. 10,411.

76. *Taylor v. Harwood*, 1 Taney 437, 23 Fed. Cas. No. 13,794. See also *The Brig Busy Bee*, 2 Curt. 586, 4 Fed. Cas. No. 2,232; *Cushman v. Ryan*, 1 Story 91, 96, 6 Fed. Cas. No. 3,515.

77. *Chicago Ins. Co. v. Graham*, 108 Fed. 271, 47 C. C. A. 320. See *The Montana*, 22 Fed. 730, and fully *supra*, II, G, 21, f.

**Answering or Excepting to New Averments.**—In *Burrill v. Crossman*, 69 Fed. 747, 16 C. C. A. 381, the court says: "Leave was granted to the appellants by this court to make new allegations in their libel, and, the appellees having answered, the appellants have filed exceptions to several of the articles of the answer, upon the ground that the same are insufficient, in law, to constitute a defense. While there is no formal rule which sanctions this practice, the rules for appeals in admiralty only permitting new allegations in pleading and new proof, and while there are objections to a practice which may require an appellate tribunal to decide a cause in fragments, inasmuch as no objection has been made on the part of the appellees, and the exceptions raise important questions of law, the determination of which may relieve the parties from the delay and expense of introducing the

ance with the rules may, on motion, be stricken from the files.<sup>78</sup>

e. *Weight of Findings Below.*—(I.) **Generally.**—The findings of fact below made upon conflicting testimony taken before the court itself are entitled to great weight, and will not be reversed unless clearly erroneous,<sup>79</sup> even though the appellate court as an original proposition would have found otherwise.<sup>80</sup> But this rule being based upon the trial court's better opportunity of judging the credibility of the witnesses, does not apply where this personal element is not involved.<sup>81</sup> Thus where the evidence was taken before a commissioner the rule does not apply,<sup>82</sup> unless the findings are also made by the commissioner and concurred in by the court.<sup>83</sup> And in any event findings:

proofs, we proceed to examine the exceptions, but without intending to commit the court, when the question may hereafter arise, as to the propriety of the practice."

78. *The Thomas Melville*, 34 Fed. 350.

79. *Peterson v. Larsen* (C. C. A.), 177 Fed. 617; *Reed v. Weule* (C. C. A.), 176 Fed. 660; *Royal Exch. Assur. Co. v. Graham & M. Transp. Co.*, 166 Fed. 32, 92 C. C. A. 66; *Earn Line S. S. Co. v. Ennis*, 165 Fed. 633, 91 C. C. A. 611 (holding that the time when lay days commenced under a charter party was a question of fact); *Coast Wise Transp. Co. v. Baltimore S. Packet Co.*, 148 Fed. 837, 78 C. C. A. 527; *Jameson v. Lewis*, 131 Fed. 728, 65 C. C. A. 586; *Baker Whiteley Coal Co. v. Neptune Nav. Co.*, 120 Fed. 247, 56 C. C. A. 83; *Alaska Packers' Assn. v. Domenico*, 117 Fed. 99, 54 C. C. A. 485; *Jacobson v. Lewis Klondike Ex. Co.*, 112 Fed. 73, 50 C. C. A. 121; *Elphicke v. White Line Tow Co.*, 106 Fed. 945, 46 C. C. A. 56; *The Anaces*, 106 Fed. 742, 45 C. C. A. 596; *The City of Cleveland v. Chisholm*, 90 Fed. 431, 33 C. C. A. 157; *The Captain Weber*, 89 Fed. 957, 32 C. C. A. 452; *The Brandywine*, 87 Fed. 652, 31 C. C. A. 187; *Bixby v. Deemar*, 54 Fed. 718, 4 C. C. A. 559.

In *Supreme Court Prior and Subsequent to Act of 1875.*—See the *Connemara*, 108 U. S. 352, 2 Sup. Ct. 754, 27 L. ed. 751.

80. *Baton Rouge & B. S. Pack Co. v. George*, 128 Fed. 914, 63 C. C. A. 640.

**Salvage Award.**—Since the amount of a salvage award is largely discretionary it will not be readjusted in an appellate court where there has been no mistake of fact or application of an unwarranted rule of compensation in arriving at the award. *Perriam v. Pacific Coast Co.*, 133 Fed. 140, 66 C.

C. A. 206. See *Irvine v. The Hesper*, 122 U. S. 256, 7 Sup. Ct. 1177, 30 L. ed. 1175; *The Connemara*, 108 U. S. 352, 2 Sup. Ct. 754, 27 L. ed. 751; *Munson S. S. Line v. Miramar S. S. Co.*, 167 Fed. 960, 93 C. C. A. 360. But see *The Lamington*, 86 Fed. 675, 30 C. C. A. 271; *Compagnie Commercial, etc. v. Charente S. S. Co.*, 60 Fed. 921, 9 C. C. A. 292; *The Bay of Naples*, 48 Fed. 737, 1 C. C. A. 81. See the title "*Salvage, Suits For.*"

81. "When the district court has rejected the positive testimony of witnesses who were in the best position to know exactly what the truth was as to some disputed fact, and has accepted the testimony of others whose opportunity to know the truth was manifestly not as good, and does this on the express ground that the testimony rejected does not harmonize with some theory as to the movements of the vessels or with the inherent probabilities of the case, there is no reason why the appellate court should not review the testimony unembarrassed by the finding as to such fact. The 'personal equation' of the witnesses is of no assistance in determining what are or are not the probabilities of the case." *The Albany*, 81 Fed. 966.

82. *The Santa Rita* (C. C. A.), 176 Fed. 890; *The Edward Smith*, 135 Fed. 32, 67 C. C. A. 506; *The Sappho*, 94 Fed. 545, 36 C. C. A. 395; *The Joseph B. Thomas*, 86 Fed. 658, 30 C. C. A. 333, 46 L. R. A. 58; *The Glendale*, 81 Fed. 633, 26 C. C. A. 500. See also *Lazarus v. Barber*, 136 Fed. 534, 69 C. C. A. 310.

83. *La Bourgogne*, 144 Fed. 781, 75 C. C. A. 647; *Appeal of Cahill*, 124 Fed. 63, 59 C. C. A. 519; *The Providence*, 98 Fed. 133, 38 C. C. A. 670, 100 Fed. 1004, 40 C. C. A. 687 (applying the rule hereinafter stated as to the



below which are manifestly opposed to the weight of the evidence will not be concurred in on appeal;<sup>84</sup> the court will determine the facts in accordance with its own conclusions from an examination of the whole record.<sup>85</sup>

(II.) **Concurrent Findings by Two Courts** below will not be disturbed by the court unless so unwarranted as to be clearly erroneous.<sup>86</sup> Such findings, however, are not conclusive, and will be modified where the court is satisfied of their incorrectness.<sup>87</sup>

**9. Decree and Subsequent Proceedings.**—Since an appeal results in a hearing *de novo* the appellate court, while it may remand the case for a new trial,<sup>88</sup> does not ordinarily do so, but determines the case in accordance with its own views.<sup>89</sup> The decree below may be reversed in part,<sup>90</sup> as where only a portion of it was appealed from,<sup>91</sup> or where

effect of concurrent findings by two courts); *The Ohio*, 95 Fed. 547, 33 C. C. A. 667. See also *The Elton*, 83 Fed. 519, 31 C. C. A. 496. And see *Furrer v. Ferris*, 145 U. S. 132, 12 Sup. Ct. 821, 36 L. ed. 649.

But when clearly erroneous the commissioner's findings, though concurred in by the court below, will not be sustained on appeal. *The Columbian*, 100 Fed. 991, 41 C. C. A. 150; *The Cayuga*, 59 Fed. 483, 8 C. C. A. 188.

84. *The Gypsum Prince*, 67 Fed. 612, 14 C. C. A. 573.

"The preponderance of evidence must be such as would justify the granting of a new trial in a court of common law on the ground that the verdict was against the weight of the evidence." *The City of Naples*, 69 Fed. 794, 16 C. C. A. 421.

85. *The Columbian*, 100 Fed. 991, 41 C. C. A. 150.

86. *Deslions v. La Compagnie Generale Trans.*, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. ed. 973; *Workman v. New York*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. ed. 314; *The Carib Prince*, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. ed. 1181; *Compania de Navegacion la Flecha v. Brauer*, 168 U. S. 104, 18 Sup. Ct. 12, 42 L. ed. 398; *The Conqueror*, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. ed. 937; *The Quickstep*, 9 Wall. (U. S.) 665, 19 L. ed. 767; *Wilder's S. S. Co. v. Low*, 112 Fed. 161, 50 C. C. A. 473; *The Steamship Wilhelm*, 59 Fed. 169, 8 C. C. A. 72.

87. *The Ariadne*, 13 Wall. (U. S.) 475, 20 L. ed. 542. See also *The Lady Pike*, 21 Wall. (U. S.) 1, 22 L. ed. 499; *The Columbian*, 100 Fed. 991, 41 C. C. A. 150.

88. *The Glide*, 72 Fed. 200, 18 C. C. A. 504.

**For Amending the Pleadings and a New Trial.**—See *the Mary Ann*, 8 Wheat. (U. S.) 380, 5 L. ed. 641; *Smith v. Elmer E. Wood Transf. Co.*, 103 Fed. 685, 43 C. C. A. 347, and *supra*, "Amendments."

The case may be remanded for the taking of additional testimony where the evidence is too uncertain and insufficient to justify a decree by the appellate court. *The Carbonero*, 106 Fed. 329, 45 C. C. A. 314. But see *The McDonald*, 112 Fed. 681, 50 C. C. A. 423.

89. See *The McDonald*, 112 Fed. 681, 50 C. C. A. 423.

In *Bull v. New York & P. R. Co.*, 167 Fed. 792, which was an appeal from a ruling dismissing a libel on motion without the introduction of any testimony by the moving party, the appellate court reversed the action of the court below and directed the entry of a decree for the libellant, with costs, and the making of an order of reference to ascertain the damages. The court says: "It is well settled practice in the admiralty courts, certainly in this jurisdiction, for both parties to put in their evidence before submitting the case to the court for its decision."

The erroneous rejection of evidence below does not necessitate the remanding of the case for a new trial, since the rejected evidence may be admitted on appeal. *The Sirius*, 54 Fed. 188, 4 C. C. A. 273. But see *The Western States*, 159 Fed. 354, 86 C. C. A. 354.

90. See *The Willamette*, 72 Fed. 79, 18 C. C. A. 373, 31 L. R. A. 720.

91. *The Roarer*, 1 Blatchf. 1, 20 Fed. Cas. No. 11,876.

some of the parties affected by it have appealed and others have not.<sup>92</sup> The final decree is not entered in the appellate court, but the mandate directs the disposition which is to be made of the case by the trial court.<sup>93</sup> While the decision and mandate of the appellate court is binding upon the court below, the latter may consider and decide any matter left open by the mandate and opinion of the former.<sup>94</sup>

**10. Rehearing.** — Where the case is tried *de novo* on appeal, a rehearing may be allowed in accordance with the principles applied under similar circumstances below.<sup>95</sup> A rehearing of an appeal will not be granted to admit further evidence unless there is a satisfactory showing why the facts were not ascertained and proved while the case was regularly open for proof.<sup>96</sup>

**11. From District to Supreme Court.**<sup>97</sup> — An appeal from the district court directly to the supreme court is governed by the rules of the latter and is instituted by filing a petition accompanied by an assignment of errors.<sup>98</sup> The appeal may be allowed, the bond approved, citation issued and a stay granted, by the district judge or by a justice of the supreme court.<sup>99</sup> Where the appeal is based on the question of jurisdiction, a certificate by the district judge as to the jurisdictional question involved is essential,<sup>1</sup> except where the record on its face shows that the only question decided below was one of jurisdiction.<sup>2</sup>

**12. From Circuit Court of Appeals.** — The decision of the circuit court of appeals is final<sup>3</sup> except where the case is certified to the supreme court or reviewed by the latter on certiorari.<sup>4</sup>

92. See *supra*, II, Y, 4, d; II, Y, 8, a.

93. See *Mignano v. McAndrews*, 56 Fed. 300, 4 C. C. A. 4; *The State of California*, 54 Fed. 404, 4 C. C. A. 393; *The Sydney*, 47 Fed. 260 (where the appeal was dismissed).

An error in the decree of the appellate court in failing to include costs must be corrected by motion before the mandate issues. *The State of California*, 54 Fed. 404, 4 C. C. A. 393.

Liability on the appeal bond is enforced in the district court. *Smith v. Pendergast*, 82 Fed. 504.

Rules of court governing the issuance of mandate and taxing of costs. See C. C. A. Adm. Rules.

94. *Ex parte Union Steamboat Co.*, 178 U. S. 317, 20 Sup. Ct. 904, 44 L. ed. 1084. See *Fairgrieve v. Marine Ins. Co.*, 112 Fed. 364, 50 C. C. A. 286; *The Tommy*, 168 Fed. 563; *The Glenochil*, 128 Fed. 963; *The Sydney*, 47 Fed. 260.

Where the decree of the district court has been entered upon the mandate of the supreme court, it is reviewable on appeal to the circuit court of appeals as to matters left open or not covered by the mandate and decision of the

supreme court. *The New York*, 104 Fed. 561, 44 C. C. A. 38.

95. See *Miller v. The Ship Resolution*, 2 Dall. (U. S.) 19, 1 L. ed. 271; *Merchants' Bkg. Co. v. Cargo of the Afton*, 134 Fed. 727, 67 C. C. A. 618; *The Iron Chief*, 63 Fed. 289, 11 C. C. A. 196; *Hatch v. The Newport*, 44 Fed. 300, and *supra*, II, W, 1.

96. *Merchants' Bkg. Co. v. Cargo of the Afton*, 134 Fed. 727, 67 C. C. A. 618; *The Iron Chief*, 63 Fed. 289, 11 C. C. A. 196. See the title "Appeal," and *supra*, II, W.

97. See *supra*, I, B, 3; and the title "Appeal."

98. Sup. Ct. Rule 35.

99. Sup. Ct. Rule 36.

1. *The Bayonne*, 159 U. S. 687, 16 Sup. Ct. 185, 40 L. ed. 306 (must be made during the term at which the decree was rendered). See the title "Appeal."

2. *The Jefferson*, 215 U. S. 130, 30 Sup. Ct. 54, 54 L. ed. 54.

3. *Oregon R. & N. Co. v. Balfour*, 179 U. S. 55, 21 Sup. Ct. 28, 45 L. ed. 82.

4. See fully the titles "Appeal;" "Certiorari."

**13. In Territories** an appeal from the district to the supreme court is governed by the usages and practice in admiralty rather than by the territorial statutes, unless the latter are clearly intended to apply to admiralty cases.<sup>5</sup> The general admiralty rules, however, do not, as such, apply to territorial courts.<sup>6</sup>

**14. Frivolous Appeal.**—Where an appeal has been taken without reasonable grounds therefor the appellate court may allow the appellee damages for the delay in the enforcement of the decree.<sup>7</sup>

**Z. FEES AND COSTS.—1. Fees Generally.**—The fees chargeable in admiralty are regulated almost entirely by act of congress,<sup>8</sup> and, inasmuch as they are taxable as costs, are fully considered in that connection.<sup>9</sup> But no adjustment or balancing of the costs as between the parties,<sup>10</sup> nor any extra-judicial settlement by the parties,<sup>11</sup> will deprive an officer of the court of the right to collect his fees taxable as costs.

**2. What Taxable As.**—*a. Generally.*—The fees and expenses provided for by statute are properly taxable as costs.<sup>12</sup> But taxable costs are not limited to those matters expressly provided for by statute.<sup>13</sup> The court has power to allow as costs, disbursements which are reasonably necessary,<sup>14</sup> and expenses

**5. Braithwaite v. Jordan**, 5 N. D. 196, 65 N. W. 701, 31 L. R. A. 238 (see review of authorities in opinion of court and briefs of counsel). See *The Phelps v. City of Panama*, 1 Wash. Ter. 518, 3 Pac. 204. But see *The Sylvia Handy v. United States*, 143 U. S. 513, 12 Sup. Ct. 464, 36 L. ed. 246. *In re Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. ed. 232; *The Zephyr v. Brown*, 2 Wash. Ter. 44, 3 Pac. 186.

**6. Braithwaite v. Jordan**, 5 N. D. 196, 65 N. W. 701, 31 L. R. A. 238.

**7. The J. & J. McCarthy**, 61 Fed. 516, 9 C. C. A. 600 (allowing ten per cent. additional as damages); *Allan v. Hitch*, 2 Curt. 147, 1 Fed. Cas. No. 224.

**8. See** 10 Stat. at L. 161; U. S. Rev. St., §§ 823, 854; Act of May 28, 1896, c. 253, § 21.

**Fees not provided for by statute** are chargeable in some instances. See *infra*, II, Z, 2; and *The Alice Taintor*, 14 Blatchf. 225, 1 Fed. Cas. No. 196.

**Officer's deducting his fees from proceeds in his possession**, see *supra*, II, X, 5, a.

**9. See** sections following and *The L. F. Munson*, 127 Fed. 767.

**10. Aikin v. Smith**, 57 Fed. 423, 6 C. C. A. 414.

**A decree that neither party shall be allowed his costs does not prevent the clerk from collecting his fees.** *In re Stover*, 1 Curt. 201, 23 Fed. Cas. No. 13,507.

**11. See** *infra*, II, Z, 5.

**12. See** *supra*, II, Z, 1, sections following; and also *The Baltimore v. Rowland*, 8 Wall. (U. S.) 377, 19 L. ed. 463; *Sturgis v. The Joseph Johnson*, 23 Fed. Cas. No. 13,576a.

**13. The Advance**, 60 Fed. 422; *The F. Merwin*, 10 Ben. 349, 18 Fed. Cas. No. 10,369. See *The Oregon*, 133 Fed. 609, 68 C. C. A. 603; *The St. Johns*, 101 Fed. 469. But see *Pacific Mail S. S. Co. v. Iverson*, 154 Fed. 450, 83 C. C. A. 306.

**14. The Robert Dollar**, 116 Fed. 79. Expenses made necessary in order to defeat an attempt to defraud the court may be taxed and allowed. *Simpson v. 110 Sticks of Hewn Timber*, 7 Fed. 243, allowing the expense of searching for judgments against and conveyances by proposed sureties and the cost of appraising real estate claimed to be of value but found to be of little value.

**Expense of Stipulation or Bond.**—See *infra*, II, Z, 2, g.

**Disbursements in Caring for Attached Property.**—See *infra*, II, Z, 2, c.

**The cost of telegrams sent by counsel for his own convenience** will not be allowed. *Kelly v. The Topsy*, 45 Fed. 466; *Simpson v. 110 Sticks of Hewn Timber*, 7 Fed. 243 (requesting counsel in another state to attend an examination of witnesses).

**Cost of making map and survey of**



which are incurred under a lawful rule or order of court.<sup>15</sup>

But only actual disbursements can be recovered in any event.<sup>16</sup>

b. *The clerk's fees* allowed by statute are properly taxable,<sup>17</sup> as are also his fees for services not covered by the statute.<sup>18</sup>

c. *Fees and Expenses of Marshal.*—The statute regulates the fees of the marshal for various services performed by him.<sup>19</sup> But the statutory provision regulating his fee for keeping attached property<sup>20</sup> applies only to his compensation therefor and not to the disbursements made by him in caring for and protecting such property, which are properly taxable as costs.<sup>21</sup>

d. *Counsel and Proctor's Fees.*—(I.) **Generally.**—Counsel fees, though allowed and taxed as costs prior to the act of 1853,<sup>22</sup> are by virtue thereof abolished except as therein provided,<sup>23</sup> and in the case of claims against a fund in the registry, which are held not to be covered by that act.<sup>24</sup>

(II.) **Proctor's Fee.**—(A.) **GENERALLY.**—The statute provides for a proctor's fee of twenty dollars on a final hearing,<sup>25</sup> except where the

the locality of the collision, not allowed. The Vernon, 36 Fed. 113.

15. *Jacobsen v. Lewis, etc. Co.*, 112 Fed. 73, 80, 50 C. C. A. 121; *Rogers v. Brown*, 136 Fed. 813; *Simpson v. 110 Sticks of Hewn Timber*, 7 Fed. 243. See *Swan v. Wiley, etc. Co.*, 161 Fed. 236; *The Bencliff*, 158 Fed. 377; *The Willowdene*, 97 Fed. 509; *The Advance*, 60 Fed. 422.

**Expense of Stenographer.**—See *infra*, II, Z, 2, h.

The entry of a formal order is unnecessary; a direction made in open court is sufficient. *The E. Luckenbach*, 19 Fed. 847.

16. *The Robert Dollar*, 116 Fed. 79. See *The Sallie P. Linderman*, 22 Fed. 557.

17. See U. S. Rev. St., § 824; *The Schooner F. Merwin*, 10 Ben. 403; and also *The Thomas Fletcher*, 24 Fed. 481. **Commissions.**—See *Smith v. The Morgan City*, 39 Fed. 572; *The Vernon*, 36 Fed. 113.

18. *The Advance*, 60 Fed. 422; *The F. Merwin*, 10 Ben. 349, 18 Fed. Cas. No. 10,369. See also *Sancho v. Atwood*, 21 Fed. Cas. No. 12,291a.

19. U. S. Rev. St., § 829.

**Marshal's Commission.**—*The Vernon*, 36 Fed. 113.

20. *The F. Merwin*, 10 Ben. 349, 18 Fed. Cas. No. 10,369.

The marshal may provide a keeper for an attached vessel and the \$2.50 per day allowed by statute and paid to such keeper may be taxed as costs.

*The Robert R. Kirkland*, 153 Fed. 863, 83 C. C. A. 45.

21. *The F. Merwin*, 10 Ben. 349, 18 Fed. Cas. No. 10,369 (wharfage). See also *The Robert R. Kirkland*, 153 Fed. 863, 83 C. C. A. 45, cost of pumping to keep vessel afloat.

22. *The Baltimore*, 8 Wall. (U. S.) 377, 19 L. ed. 463; *The Apollon*, 9 Wheat. (U. S.) 362, 6 L. ed. 111; *Sturgis v. The Joseph Johnson*, 23 Fed. Cas. No. 13,576a; *The Connestoga*, 2 Wall. Jr. 116, 16 Fed. Cas. No. 9,070.

In England counsel fees are allowed. See *The Bremen*, 94 L. T. N. S. (Eng.) 380; *The Metropolis*, 81 L. T. N. S. (Eng.) 236; *The Longford*, L. R. 6 Prob. Div. (Eng.) 60.

23. *The Steamship Baltimore v. Rowland*, 8 Wall. (U. S.) 377, 19 L. ed. 463; *Sturgis v. The Joseph Johnson*, 23 Fed. Cas. No. 13,576a. But see *The Wreath*, 9 Phila. 467, 30 Fed. Cas. No. 18,061.

But in salvage cases, the court in determining what is a proper award may include a reasonable counsel fee. *The Ship Liverpool Packet*, 2 Spr. 37, 15 Fed. Cas. No. 8,407.

24. *Trustees v. Greenough*, 105 U. S. 527, 26 L. ed. 1157; *The Jordon Campbell*, 131 Fed. 963. See *The St. Johns*, 101 Fed. 469.

25. U. S. Rev. St., § 824; *The Bencliff*, 158 Fed. 377; *The L. F. Munson*, 127 Fed. 767; *The Mount Eden*, 87 Fed. 483.

One who has been recognized as proctor, though he has not entered an appearance as such in accordance with

recovery is less than fifty dollars, in which event the fee is ten dollars.<sup>26</sup> Where suits are consolidated<sup>27</sup> or heard together,<sup>28</sup> but one fee will be allowed as costs.<sup>29</sup> And though an appeal is taken, two such fees cannot be taxed,<sup>30</sup> there being but one final hearing in such case, namely, the hearing on appeal.<sup>31</sup>

**A final hearing** within the meaning of the statute is the submission of a case for determination upon its merits, or the submission of some question, the disposition of which finally ends the case.<sup>32</sup> A hearing on exceptions may or may not be final, depending upon whether the exceptions go to the form of the pleadings or to the merits of the suit.<sup>33</sup>

**The Property of Proctor.**—The allowance, although taxable as a cost, is strictly a fee<sup>34</sup> and the individual property of the proctor rather than of the party to whom costs are adjudged.<sup>35</sup>

(B.) **FOR TAKING DEPOSITIONS.**—The statute allows the proctor a fee for each deposition taken and admitted in evidence.<sup>36</sup> The term "deposition" includes the testimony of a witness taken before a commissioner and used at the hearing,<sup>37</sup> but not answers to interroga-

the rules, must be treated as proctor in the award of costs. *Mellor v. Cox*, 46 Fed. 662.

26. *The Mount Eden*, 87 Fed. 483.

27. *The Stanley Dollar*, 160 Fed. 911, 88 C. C. A. 93; *The H. C. Grady*, 84 Fed. 226. See *The Oregon*, 133 Fed. 609, 68 C. C. A. 603.

28. See *The State of Missouri*, 76 Fed. 376, 22 C. C. A. 239; *The Julia*, 57 Fed. 233; and *infra*, II, Z, 3, c.

29. Where there are several petitions for the allowance of claims against a fund, counsel representing several petitioners is entitled to but one docket fee. *The Gordon Campbell*, 131 Fed. 963. See also *The Jeremiah*, 10 Ben. 338, 13 Fed. Cas. No. 7,290. But separate proctors representing different claimants may each be allowed a proctor's fee. *In re Norwich*, etc. *Transp. Co.*, 10 Ben. 193, 18 Fed. Cas. No. 10,361.

**Libel and Cross-Libel.**—See *The W. B. Castle*, 16 Fed. 927.

**Where an Appeal and Cross-Appeal Are Heard Together.**—*The Rabboni*, 84 Fed. 681, 28 C. C. A. 517.

30. *Healy v. Cox*, 46 Fed. 663; *Mellor v. Cox*, 46 Fed. 662. See also *Dedekam v. Vose*, 3 Blatchf. 77, 7 Fed. Cas. No. 3,730, 3 Blatchf. 153, 7 Fed. Cas. No. 3,731.

31. *The Lillie*, 42 Fed. 179.

32. *The Mount Eden*, 87 Fed. 483. See also *O'Flaherty v. Hamburg-American Packet Co.*, 168 Fed. 411; *Swan v. Wiley, Harker & Camp Co.*, 161 Fed. 236 (discussing earlier authorities); *The Bay City*, 3 Fed. 47.

**A proctor's docket fee is not taxable** unless a trial is held. *The Claverburn*, 148 Fed. 139; *Merritt, etc. Co. v. Catskill, etc. S. Co.*, 112 Fed. 442.

**A proceeding before a commissioner upon a reference is not a final hearing** entitling the proctor to a docket fee. *The Mount Eden*, 87 Fed. 483. See also *Kelly v. The Topsy*, 45 Fed. 486.

**A stipulation in open court as to facts and for the entry of a decree is a final hearing.** *The H. C. Grady*, 87 Fed. 483.

33. *The Anchoria*, 23 Fed. 669.

34. *The L. F. Munson*, 127 Fed. 767; they are usually understood to be included within the term "costs" where such word is used in an order. See *The Bencliff*, 158 Fed. 377.

35. *Aikin v. Smith*, 57 Fed. 423, 6 C. C. A. 414, holding that the costs on appeal could not be set off against the costs below so as to deprive the proctor of his fees.

36. *The Sallie P. Linderman*, 22 Fed. 557, two and a half dollars.

**Mileage to proctor in taking depositions** cannot properly be taxed as costs. *Pacific Mail S. S. Co. v. Iverson*, 154 Fed. 450, 83 C. C. A. 306.

37. *The Sallie P. Linderman*, 22 Fed. 557. See also *Missouri v. Illinois*, 202 U. S. 598, 26 Sup. Ct. 713, 50 L. ed. 1160.

**Testimony on a reference to a commissioner appointed to distribute a fund in the registry is not within this rule.** *James Dalzell's Sons Co. v. The Daniel Kaine*, 31 Fed. 746.

ories propounded in the pleadings,<sup>38</sup> or testimony taken in court though afterwards read in evidence on appeal.<sup>39</sup>

e. *A Commissioner's fees* are determined by statute,<sup>40</sup> or, in the absence thereof, a reasonable compensation is allowed.<sup>41</sup>

f. *Fees of Witnesses and Jurors.*—The fees of both witnesses<sup>42</sup> and jurors<sup>43</sup> are fixed by statute, as is the matter of mileage.<sup>44</sup> A party is not entitled to fees or mileage.<sup>45</sup> There must be proof of the actual payment to witnesses of their fees and mileage before such expense can be taxed as costs.<sup>46</sup> But it is not essential that the witness should have been called to testify at the hearing.<sup>47</sup>

The cost of detaining a witness for the purpose of securing his testimony is taxable in England.<sup>48</sup>

g. *Expense of Obtaining Bond.*—The reasonable expense of obtaining a required bond, whether executed by a surety company<sup>49</sup> or by individual bondsmen,<sup>50</sup> is properly taxable as costs. A similar rule has been applied to stipulations or bonds given to release attached property, since they benefit both parties by obviating the expense of detention and custody.<sup>51</sup> So, also, the expense reasonably incurred in showing the insufficiency of proposed sureties on a stipulation is taxable.<sup>52</sup> But no costs can be taxed for a bond for which nothing was

#### Must Be Introduced in Evidence.—

The Persiana, 158 Fed. 912.

38. The Serapis, 37 Fed. 436.

39. Dedekam v. Vose, 3 Blatchf. 77, 7 Fed. Cas. No. 3,730.

40. See Act of May 28, 1896, c. 252, § 21.

Where the witnesses are sworn and their depositions certified by the commissioner, he is entitled to his fees although the testimony, by stipulation, was not actually written down by him or in his presence. The F. Merwin, 10 Ben. 349, 18 Fed. Cas. No. 10,369.

His fee for a reference is taxable, notwithstanding the non-appearance of the parties. The Wavelet, 25 Fed. 733.

In proceedings by seamen before a commissioner he is not required to take or certify any depositions, and charges therefor are not taxable as costs (Kelly v. The Topsy, 45 Fed. 486), nor is he entitled to charge for issuing more than one summons. Kelly v. The Topsy, 45 Fed. 486.

41. See The Frisia, 27 Fed. 480, allowance to foreign commissioner for taking testimony.

42. U. S. Rev. St., §§ 848, 851. See also the title "Witnesses."

43. U. S. Rev. St., § 852. See more fully the title "Witnesses."

44. See the title "Witnesses;" and The Syracuse, 36 Fed. 830; The Vernon, 36 Fed. 113; The Leo, 5 Ben. 486, 15 Fed. Cas. No. 8,252.

Witness coming from a distance greater than 100 miles. See The Vernon, 36 Fed. 113.

45. The Elizabeth & Helen, 4 Ben. 101, 8 Fed. Cas. No. 4,354.

46. Leary v. The Miranda, 40 Fed. 607; The Sallie P. Linderman, 22 Fed. 557; Secor v. The Steamboat Highlander, 19 How. Pr. (N. Y.) 334, 343.

47. The Biddick, 38 L. J. Adm. (Eng.) 24. See the title "Witnesses."

48. The Bahia, L. R. 1 Adm. & Ecc. (Eng.) 15; The Karla, Brown & Lush, 367, 13 W. R. (Eng.) 295; The Olive, Swabey (Eng.) 292.

49. Jacobsen v. Lewis, etc. Co., 112 Fed. 73, 80, 50 C. C. A. 121; The Bencliff, 153 Fed. 377. See also The South Portland, 95 Fed. 295.

A rule providing for the taxing of such items as costs has been held to be an essential prerequisite to their allowance. The Willowdene, 97 Fed. 509.

50. See The Hurstdale, 171 Fed. 607.

51. The Hurstdale, 171 Fed. 607; The John D. Dailey, 158 Fed. 642; The South Portland, 95 Fed. 295. See also The Robert Dollar, 116 Fed. 79.

52. Simpson v. One Hundred and Ten Sticks of Hewn Timber, 7 Fed. 243, holding taxable the expense of examining into the titles of the property of proposed sureties and the notary's expenses of taking voluminous examinations of the several sureties.



paid, as where the bonding company is the real defendant.<sup>53</sup>

h. *Stenographer's Charges*.—Where the employment of a stenographer to take and transcribe testimony at the hearing or on reference is authorized by the court, the cost thereof is properly taxable.<sup>54</sup>

i. *Depositions*.—Costs incident to the taking of depositions are provided for by statute,<sup>55</sup> but are not taxable unless the deposition is introduced in evidence.<sup>56</sup>

j. *The expense of printing* provided for by statute or rendered necessary by rule or order of court is a legitimate item of costs.<sup>57</sup>

3. *Allowance or Award Of*.—a. *Generally*.—In admiralty, as in equity, the prevailing party is generally entitled to costs;<sup>58</sup> but they do not necessarily follow the decree, and are always within the sound discretion of the court to be allowed, withheld or divided according to the equities of the case.<sup>59</sup> The power of the court will be exercised

53. *The Robert Dollar*, 116 Fed. 79.

54. *Rogers v. Brown*, 136 Fed. 813; *The E. Luckenbach*, 19 Fed. 847. See also *The Elton*, 135 Fed. 446.

55. See *supra*, II, Z, 2, d, (II), (B); II, Z, 2, e; and also II, Z, 2, h.

56. *The Persiana*, 158 Fed. 912; *Kaempfer v. Taylor*, 78 Fed. 795, holding that the mere fact that the court by an order provides for the admission of the depositions in evidence in such suits as might thereafter be brought did not change the rule.

57. See *Rogers v. Brown*, 136 Fed. 813; *The Willowdene*, 97 Fed. 509 (holding that where the page is larger, more than the customary rate per page may be allowed); U. S. Rev. St., §§ 853, 854.

58. *The E. A. Shores, Jr.*, 79 Fed. 987; *The Leonard Richards*, 41 Fed. 818; *The Robert Jenkins*, 22 Fed. 797; *The Hercules*, 20 Fed. 205; *The Steamer Leipsic*, 5 Fed. 108; *The Ship Moslem*, Olc. Adm. 374, 17 Fed. Cas. No. 9,876; *The Isaac Newton*, Abb. Adm. 588, 13 Fed. Cas. No. 7,090; *The Steamship Cortes*, 6 Ben. 288, 6 Fed. Cas. No. 3,258.

"The rule is only deviated from under equitable considerations presenting reasonable ground for exempting the unsuccessful party from its operation." *The Buffalo*, Abb. Adm. 483, 4 Fed. Cas. No. 2,110, *per Betts, J.* See also *The Weatherby*, 49 Fed. 463; *Kegan v. The Amaranth*, 14 Fed. Cas. No. 7,646.

On Appeal.—See *The Margaret v. The Connestoga*, 2 Wall. Jr. 116, 16 Fed. Cas. No. 9,070, and *infra*, II, Z, 3, k.

59. *The Maggie J. Smith*, 123 U. S. 349, 8 Sup. Ct. 159, 31 L. ed. 175; *The Scotland*, 118 U. S. 507, 6 Sup. Ct. 1174,

30 L. ed. 153; *The Malek Adhel*, 2 How. (U. S.) 210, 11 L. ed. 239; *The W. A. Sherman*, 167 Fed. 976, 93 C. C. A. 228; *The Eva D. Rose*, 166 Fed. 101, 92 C. C. A. 85; *The Oregon*, 133 Fed. 609, 68 C. C. A. 603; *Union Ice Co. v. Crowell*, 55 Fed. 87, 5 C. C. A. 49; *The Charles Tiberghien*, 148 Fed. 1016; *The South Portland*, 95 Fed. 295; *The E. A. Shores*, 79 Fed. 987; *Simpson v. Caulkins*, 1 Abb. Adm. 539, 22 Fed. Cas. No. 12,880; *Shaw v. Thompson*, Olc. Adm. 144, 21 Fed. Cas. No. 12,726; *The Brig Oriole*, Olc. Adm. 67, 18 Fed. Cas. No. 10,573; *The Ship Moslem*, Olc. Adm. 374, 17 Fed. Cas. No. 9,876; *The Martha*, 1 Blatchf. & H. Adm. 151, 16 Fed. Cas. No. 9,144; *The Schooner Childe Harold*, Olc. Adm. 275, 5 Fed. Cas. No. 2,676.

*Against a Personal Representative*. See *The Buffalo*, 1 Abb. Adm. 483, 4 Fed. Cas. No. 2,110.

In case of division of damages because of mutual fault, the costs should be divided. *The America*, 92 U. S. 432, 23 L. ed. 724; *The Warren*, 23 Blatchf. 282, 25 Fed. 782; *The Hercules*, 20 Fed. 205.

*Equal Division Between All Parties Made*.—*Assante v. Charleston Bridge Co.*, 40 Fed. 765.

As against several respondents the costs may be apportioned in accordance with the amounts awarded against them. *The Rialto*, 15 Fed. 124.

*Dividing Proctor's Fee*.—Where the decree of the court divides the costs between the parties in stated proportions, the fee of the libellant's proctor must be included in the costs before the division. *The Bencliff*, 158 Fed. 377; *The L. F. Munson*, 127 Fed. 767.

for the purpose of discouraging vexatious litigation,<sup>60</sup> and decreasing the expense.<sup>61</sup> While no hard and fast rules can be laid down which will determine the action of the court in a particular case,<sup>62</sup> there are many facts and circumstances which have induced the courts to deny costs to the successful litigant.<sup>63</sup> Costs may even be awarded against the successful party.<sup>64</sup>

Where each party is successful upon some distinct branch of the case the costs incident thereto may be taxed against his adversary.<sup>65</sup>

b. *Misconduct of Parties*.—Where the prevailing party has been guilty of misconduct in the case the court may for that reason deny him costs or even award them to the adverse party.<sup>66</sup> And where both

60. *The Susan*, 3 Ware 222, 23 Fed. Cas. No. 13,631; *The Cabot*, 1 Abb. Adm. 150, 4 Fed. Cas. No. 2,277.

61. *The South Portland*, 95 Fed. 295. See *infra*, II, Z, 3, e.

62. *The Maurice*, 130 Fed. 634.

63. See *The Asiatic Prince*, 103 Fed. 676; *Hall v. Witter*, 93 Fed. 977; *The Robert L. Lane*, 1 Low. 388, 20 Fed. Cas. No. 11,892; *The Joshua Barker*, Abb. Adm. 215, 13 Fed. Cas. No. 7,547.

"When the litigation has arisen unnecessarily, either by haste before a settlement can be effected, or by unreasonable conduct *post litem*, rendering a settlement impracticable; or when there appears in the testimony such action on the part of the litigant as renders him obnoxious to the disapproval of the court; and sometimes when the question involved is of such a character that both parties are equally interested in the decision made,—in these instances, and in many others, varying sometimes with the case and sometimes with the disposition and temper of the judge, costs are divided, or apportioned, or put upon the successful party." *Forace v. Salinas*, 50 Fed. 284.

Where there was strong probable ground for suit, or a judicial investigation was necessary to bring out the facts. *The Olympia*, 52 Fed. 985, *affirmed* in 61 Fed. 120, 9 C. C. A. 393; *The Geneva*, 26 Fed. 647; *The Martha, Blatchf. & H. Adm.* 151, 16 Fed. Cas. No. 9,144; *The Eliza and Abby, Blatchf. & H. Adm.* 435, 8 Fed. Cas. No. 4,349.

*In Suits by Seamen*.—*The E. A. Shores*, 79 Fed. 987; *The Wanderer*, 20 Fed. 140; *Howland v. Conway*, Abb. Adm. 281, 12 Fed. Cas. No. 6,793.

The novelty of the question litigated may justify a refusal of costs. *In re Stover*, 1 Curt. 201, 23 Fed. Cas. No. 13,507; *The Leo*, 3 Ben. 569, 15 Fed. Cas. No. 8,250.

*Libel Prematurely Filed*.—*The Pioneer*, 53 Fed. 279; *The Papa*, 46 Fed. 576. See *supra*, II, D, 2.

*Delay in Giving Notice of Damage*. *The Massachusetts*, 10 Ben. 177, 16 Fed. Cas. No. 9,258. See also *The Komuk*, 50 Fed. 618.

Where claims for special damage were delayed until after the commencement of the trial, costs were denied the successful libellant. *The Benison*, 36 Fed. 793.

*Dismissal on dilatory plea joined with answer on merits*. *The Martha, Blatchf. & H. Adm.* 151, 16 Fed. Cas. No. 9,144.

*Where Libel is Dismissed on Grounds Not Pleading*.—*The Ocean Express*, 22 Fed. 176. See also *The Geneva*, 26 Fed. 647.

Where a party is entitled to nominal damages only, his suit may be dismissed without costs. *Munson v. Straits of Dover S. S. Co.*, 102 Fed. 926, 43 C. C. A. 57; *Herbst v. The Asiatic Prince*, 97 Fed. 343; *Barnett v. Luther*, 1 Curt. 434, 2 Fed. Cas. No. 1,025. See *In re California Nav. & Imp. Co.*, 110 Fed. 670.

64. *Union Ice Co. v. Crowell*, 55 Fed. 87, 5 C. C. A. 49; *The Wanderer*, 20 Fed. 140; *The Sebastian Bach*, 12 Fed. 172; *Folger v. The Robert G. Shaw*, 2 Woodb. & M. 531, 9 Fed. Cas. No. 4,899. See *The Elton*, 135 Fed. 446; *Thompson v. The Jachin*, 23 Fed. Cas. No. 13,959.

65. *The Leonard Richards*, 41 Fed. 818; *Thomas v. Gray*, 1 Blatchf. & H. Adm. 493, 23 Fed. Cas. No. 13,898; *Simpson v. Caulkins*, Abb. Adm. 539, 22 Fed. Cas. No. 12,800. See *The Child Harold*, Olc. Adm. 275, 5 Fed. Cas. No. 2,676. Compare *infra*, II, Z, 3, k.

66. *Pettie v. Boston Tow-Boat Co.*, 49 Fed. 464, 1 C. C. A. 314. See *The Ethel*, 66 Fed. 340, 13 C. C. A. 504;

parties have acted improperly or unreasonably, costs may be denied to both.<sup>67</sup> The making of an excessive or exaggerated claim in the libel is ground for denying costs,<sup>68</sup> although the court is not bound to do so.<sup>69</sup>

c. *Separate Suits Which Should Have Been Joined.*—Where suits are filed separately which should have been joined, the court will award only such costs as would have been proper in the joint suit.<sup>70</sup>

d. *On Dismissal for Lack of Jurisdiction.*—Where a libel is dismissed for lack of jurisdiction no costs can be allowed,<sup>71</sup> except where the lack of jurisdiction appears only after other proceedings have been taken or pleadings filed in the case.<sup>72</sup> The rule does not apply where the court has jurisdiction of both the parties and the subject-matter, but the libel is dismissed because the particular form of action

*Forace v. Salinas*, 50 Fed. 284; *Hoffman v. Yarrington*, 1 Lew. 168, 12 Fed. Cas. No. 6,580; *The Buffalo*, Abb. Adm. 483, 4 Fed. Cas. No. 2,110.

Where the misconduct of the prevailing party is responsible for increased costs, the increase may be taxed to him. *The Elton*, 135 Fed. 446.

The commencement of suit with undue haste and without allowing a reasonable opportunity for settlement. *The D. L. & W. No. 6*, 53 Fed. 284; *The Susan*, 3 Ware 222, 23 Fed. Cas. No. 13,631. See also *The Bark Edward Albro*, 10 Ben. 668, 8 Fed. Cas. No. 4,290.

*Filing Suit Without Demand or Notice.*—*The Atlantic*, 53 Fed. 607; *The Rapid Transit*, 52 Fed. 320; *The Rosedale*, 20 Fed. 447; *The L. B. Snow*, 15 Fed. 282; *The Moslem*, Olc. Adm. 374, 17 Fed. Cas. No. 9,876; *The Jack Jewett*, 2 Ben. 463, 13 Fed. Cas. No. 7,122. But see *The Dupuy de Lome*, 55 Fed. 93; *The Melissa*, Brown's Adm. 476, 16 Fed. Cas. No. 9,400.

67. *The Asiatic Prince*, 103 Fed. 676; *The O. C. DeWitt*, 59 Fed. 620. See *The Achland*, 19 Fed. 651; *The Swallow*, Olc. Adm. 4, 23, Fed. Cas. No. 13,664.

Where neither party offers to do what is substantially right in the case, costs may properly be withheld from both (*Shaw v. Thompson*, Olc. Adm. 144, 21 Fed. Cas. No. 12,726); as where both make exaggerated claims. *The David Morris*, Brown's Adm. 273, 7 Fed. Cas. No. 3,596.

68. *The O. C. DeWitt*, 59 Fed. 620; *The Stelvio*, 34 Fed. 431; *The Marinin S.*, 28 Fed. 664; *Atlas Steamship Co. v. Steamship Colon*, 4 Fed. 469; *The Gomez de Castro*, 10 Ben. 540, 10 Fed. Cas. No. 5,525. See also *Irzo v. Perkins*, 10 Fed. 779.

69. *The Weatherby*, 49 Fed. 463.

Where no injury results therefrom. *The Alexander*, 104 Fed. 904.

70. *The Sarah E. Kennedy*, 25 Fed. 672; *The Young Mechanic*, 3 Ware 58, 30 Fed. Cas. No. 18,182; *The R. P. Chase*, 3 Ware 294, 20 Fed. Cas. No. 12,099; *The Maryland*, 16 Fed. Cas. No. 9,218. See *The State of Missouri*, 76 Fed. 376, 22 C. C. A. 239.

*Suits by seamen for wages.* *The Cabot*, Abb. Adm. 150, 4 Fed. Cas. No. 2,277. See *supra*, II, F, 5, d.

The increased costs should be taxed to the subsequent libellant. *The Maryland*, 16 Fed. Cas. No. 9,218.

71. *Reliance Lbr. Co. v. Rothschild*, 127 Fed. 745; *The Lindrup*, 70 Fed. 718; *Williams v. Providence Wash. Ins. Co.*, 56 Fed. 159; *The Hungaria*, 41 Fed. 109; *Doolittle v. Knobeloch*, 39 Fed. 40; *Weuberg v. A Cargo of Mineral Phosphate*, 15 Fed. 285.

Where the libellant appeals from the whole decree dismissing the libel for lack of jurisdiction and awarding costs, no costs either above or below will be allowed either party upon the affirmation of the dismissal. *The McDonald*, 4 Blatchf. 477, 16 Fed. Cas. No. 8,756.

But the costs of the motion as distinguished from the costs of the suit may be allowed to the moving party. *Lowe v. The Benjamin*, 1 Wall. Jr. 187, 15 Fed. Cas. No. 8,565.

72. *Pile Driver E. O. A.*, 69 Fed. 1,005 (after answer and proofs); *The City of Florence*, 56 Fed. 236 (where after the filing of a cross-libel an amended libel was filed disclosing the lack of jurisdiction); *Lowe v. The Benjamin*, 1 Wall. Jr. 187, 15 Fed. Cas. No. 8,565.



cannot be sustained, as where no lien exists upon the vessel.<sup>73</sup>

e. *Failure To Invoke Remedy at Common Law.*—The failure to invoke a less expensive and equally effective remedy at common law for the enforcement of a small claim may be punished by denial of costs.<sup>74</sup> It should appear, however, that such remedy was available and effective,<sup>75</sup> or that the suit in admiralty was brought without good reason or with the intention of annoying the respondent.<sup>76</sup>

f. *Tender.*—A tender or offer to confess judgment, under circumstances hereinbefore discussed, destroys the right to costs subsequently accruing.<sup>77</sup> But even in such case the party accepting the offer is entitled to the costs necessarily incurred in availing himself thereof.<sup>78</sup> A tender, though legally unavailable because not properly made,<sup>79</sup> or not kept good as required by rule,<sup>80</sup> may nevertheless justify a denial of costs. But the court is inclined to tax costs against an unsuccessful litigant who has failed to make a tender.<sup>81</sup>

g. *On Amendment.*—The imposition of costs on amendment is treated elsewhere in this title.<sup>82</sup>

h. *As Condition to Setting Aside Default.*—The payment of costs may be imposed as a condition of setting aside a default.<sup>83</sup>

i. *Where a Third Party Is Brought in by Petition.*—The practice in the various districts with reference to the cost incurred by bringing in a third party by petition under or in analogy with rule 59 is not entirely uniform where the libel is dismissed. In some districts the view is taken that such proceedings being for the benefit of the claimant, he should stand the costs rather than the libellant.<sup>84</sup> In others, such costs are taxed to the libellant.<sup>85</sup>

73. *The Francesco Co.*, 118 Fed. 112; *The Monte A.*, 12 Fed. 331, 336. See also *Reliance Lbr. Co. v. Rothschild*, 127 Fed. 745.

74. *The Harriet*, Olc. Adm. 184, 11 Fed. Cas. No. 6,095; *The Boston*, Olc. Adm. 407, 3 Fed. Cas. No. 1,672 (especially where a vindictive spirit is evident); *The Bolivar*, 1 Olc. Adm. 474, 3 Fed. Cas. No. 1,609.

75. *The Harriet*, Olc. Adm. 184, 11 Fed. Cas. No. 6,095; *The Bolivar*, 1 Olc. Adm. 480, 3 Fed. Cas. No. 1,610.

76. *Jones v. Crowell*, 13 Fed. Cas. No. 7,459.

77. See *supra*, II, R.

78. *Swan v. Wiley, Harker & Camp Co.*, 161 Fed. 236, holding taxable the cost of filing an acceptance of the offer, cost bill and final decree.

79. An unanswered letter of the claimant is sufficient to place the costs upon the libellant, if, though "not in a strict legal sense an acknowledgment of liability, it clearly admits the liability for the purposes of an amicable settlement and asks only that further information be given in regard to cer-

tain lump charges." *The Glencairn*, 78 Fed. 379, in which, however, a sum sufficient to cover the amount of the decree had been paid into court.

But a mere attempt at negotiation or compromise will not operate as an equitable bar to costs. *The H. B. Foster*, Abb. Adm. 222, 11 Fed. Cas. No. 6,290.

80. *The Bark Brothers*, 10 Ben. 400, 4 Fed. Cas. No. 1,968.

81. See *The Rialto*, 15 Fed. 124; *The Tiger Lily*, 14 Fed. 591; *The Wexford*, 6 Ben. 119, 29 Fed. Cas. No. 17,472; *Johnson v. The Industry*, 13 Fed. Cas. No. 7,391; *The H. B. Foster*, Abb. Adm. 222, 11 Fed. Cas. No. 6,290.

82. See *supra*, II, G, 21, j, and *Olsen v. Schooner Edwin Post*, 6 Fed. 314, 317.

83. See *supra*, II, I, 3, d.

84. *The Charles Tiberghien*, 148 Fed. 1016.

If the third party is held not liable, he recovers his costs of the claimant and not of the libellant. *The John Cottrell*, 34 Fed. 907.

85. *The Maurice*, 130 Fed. 634.

j. *On Petition for Limitation of Liability.*—On a petition to limit liability the petitioner should stand the costs incurred for the purpose of availing himself of his limited liability.<sup>86</sup> The cost of presenting claims should be borne by the fund.<sup>87</sup> But if any issue is contested in the proceedings between the petitioner and the claimants, or any claimant, the costs should fall upon the losing party.<sup>88</sup>

k. *On Appeal.*—An appeal being a hearing *de novo*, the appellate court has complete control over the costs above and below and may deal with the matter as an original question.<sup>89</sup> In awarding costs the court on appeal exercises its discretionary power in accordance with the same principles that are applied by the trial court.<sup>90</sup>

The costs of the appeal ordinarily follow the decree<sup>91</sup> unless the latter is obtained by the introduction of new evidence or pleading which might have produced a different result if presented below.<sup>92</sup> But the court may refuse to allow such costs to either party<sup>93</sup> where neither is

86. The *W. A. Sherman*, 167 Fed. 976, 93 C. C. A. 228, such as cost of filing petition, and stipulations for costs and value, premium, if any, for stipulations, expense or appraisal or of bill of sale transferring the vessel, commissioner's report on appraisal, expert fees, etc. See the title "*Shipping*." But see *The Leonard Richards*, 41 Fed. 818.

87. *In re Norwich*, etc. *Transp. Co.*, 10 Ben. 193, 18 Fed. Cas. No. 10,361. See also *The Leonard Richards*, 41 Fed. 818.

88. See *The Leonard Richards*, 41 Fed. 818.

"They are such as witness fees, mileage, deposition fees, proctor's fee. The cost of bringing in the creditors, such as filing, issuing, and publishing the motion, should be paid out of the fund, on the principle that it should administer itself, and this duty to administer itself applies even when, the petitioner being held not liable, there is no other distribution than to return it to him. The result is especially equitable in a case like the present, where there was but one claimant and the petitioner might as well have pleaded his right to limit in the action in the said court." *The W. A. Sherman*, 167 Fed. 976, 93 C. C. A. 228.

89. *Pettie v. The Boston Towboat Co.*, 49 Fed. 464, 1 C. C. A. 314. See *The Scotland*, 118 U. S. 507, 6 Sup. Ct. 1174, 30 L. ed. 153; *United States v. The Brig Malek Adhel*, 2 How. (U. S.) 210, 11 L. ed. 239.

90. See *supra*, II, Z, 3, and notes following.

91. *Healy v. Cox*, 46 Fed. 663; *The*

*Margaret v. The Connestoga*, 2 Wall. Jr. 116, 16 Fed. Cas. No. 9,070. But see *Gonzales v. Minor*, 2 Wall. Jr. 348, 10 Fed. Cas. No. 5,530.

One who is forced to appeal to secure a proper modification of the decree below is entitled to the costs of the appeal. *The Umbria*, 59 Fed. 475, 8 C. C. A. 181. But see *The Shady Side*, 17 Blatchf. 132, 21 Fed. Cas. No. 12,692. But if the reduction is based upon objections which could have been but were not made below (*Western Assur. Co. v. Southwestern Transp. Co.*, 68 Fed. 923, 16 C. C. A. 65; *Ross v. Southern Cotton Oil Co.*, 41 Fed. 152), or if appellant seeks the reversal of the decree in toto (*The McDonald*, 4 Blatchf. 477, 16 Fed. Cas. No. 8,756), such costs may be disallowed.

In salvage cases in England, it is not the practice to award the appellant his costs merely because he reduces the award (*The Gypsy Queen* [1895], L. R. Prob. Div. 176), unless the reduction is considerable. *The Toscana* (1905), L. R. Prob. Div. 148; *The Prince Llewellyn* (1904), L. R. Prob. Div. 83.

The expression "with costs" means costs to the successful party on the appeal. *Healy v. Cox*, 46 Fed. 663; *Mellor v. Cox*, 46 Fed. 662.

92. *The Jefferson*, 31 Fed. 489; *The Margaret v. The Connestoga*, 2 Wall. Jr. 116, 16 Fed. Cas. No. 9,070; *Carri-gan v. The Charles Pitman*, 1 Wall. Jr. 307, 5 Fed. Cas. No. 2,444.

93. *Taylor v. Woods*, 3 Woods 146, 23 Fed. Cas. No. 13,809.

Where the record has been unnecessarily encumbered by both parties,

in fault,<sup>94</sup> or may award them to the unsuccessful party on appeal because of his adversary's misconduct,<sup>95</sup> or failure to properly conduct his case below.<sup>96</sup>

Where both parties appeal the cost thereof may be divided if both are partially successful,<sup>97</sup> or may be denied to either if both are unsuccessful.<sup>98</sup>

**4. Taxation.**—Costs are actually taxed by the clerk,<sup>99</sup> but his action is subject to review by the district court upon an appeal therefrom,<sup>1</sup> or upon exceptions<sup>2</sup> or motion to retax.<sup>3</sup> Unless it is excepted to, however, it must stand.<sup>4</sup>

Vouchers may be required by rule of court to support disbursements included in the cost bill.<sup>5</sup>

**5. Effect of Extra-Judicial Settlement.**—Where the parties have made an extra-judicial settlement without providing for the costs the proctor or other officer may continue the suit<sup>6</sup> upon proper notice<sup>7</sup> for the purpose of recovering the fees and costs due him.<sup>8</sup>

costs may be denied to either. *The Ashland*, 19 Fed. 651.

94. *The Oxford*, 66 Fed. 590, 13 C. C. A. 647.

95. *The Ethel*, 66 Fed. 340, 13 C. C. A. 504. See *supra*, II, Z, 3, b.

96. *Ross v. Southern Cotton Oil Co.*, 41 Fed. 152.

97. *The North Star*, 106 U. S. 17, 1 Sup. Ct. 41, 27 L. ed. 91; *The Western States*, 159 Fed. 354, 86 C. C. A. 354; *Donnell v. Amoskeag Mfg. Co.*, 118 Fed. 10, 55 C. C. A. 178; *The C. P. Raymond*, 36 Fed. 336. See *The Warren*, 23 Blatchf. 282, 25 Fed. 782.

98. *The Eleanora*, 17 Blatchf. 88, 8 Fed. Cas. No. 4,335.

99. See *The Liverpool Packet*, 2 Spr. 37, 15 Fed. Cas. No. 8,407, and cases in notes following.

1. See *Sancho v. Atwood*, 21 Fed. Cas. No. 12,291a; *The F. Merwin*, 10 Ben. 349, 18 Fed. Cas. No. 10,369.

2. See *The Sallie P. Linderman*, 22 Fed. 557.

3. See *The Robert Dollar*, 116 Fed. 79; *The Lillie*, 42 Fed. 179.

4. *The Claverburn*, 148 Fed. 139.

5. *The Sallie P. Linderman*, 22 Fed. 557, holding, under a rule requiring proper and genuine vouchers, that a proctor's affidavit that certain expenses had been actually incurred is insufficient. A receipt or the proctor's affidavit that the expense had been "actually paid" is necessary. See *Leary v. The Miranda*, 40 Fed. 607.

6. *Erratt v. Humphreys*, 102 Fed. 925; *The Ontonagon*, 19 Fed. 800; *The Victory*, Blatchf. & H. Adm. 443, 28 Fed. Cas. No. 16,937; *Trask v. The*

*Dido*, 24 Fed. Cas. No. 14,142; *The Sarah Jane*, Blatchf. & H. Adm. 401, 21 Fed. Cas. No. 12,348; *The Planet*, 1 Spr. 11, 19 Fed. Cas. No. 11,204; *The Ship Cabot*, Newb. Adm. 348, 16 Fed. Cas. No. 8,759; *Angell v. Bennett*, 1 Spr. 85, 1 Fed. Cas. No. 387. But see *The Bella*, 91 Fed. 540.

But in a suit for personal tort the rule has been held inapplicable. *Peterson v. Watson*, Blatchf. & H. Adm. 487, 19 Fed. Cas. No. 11,837.

7. The notice should specifically state that the hearing is for the purpose of obtaining costs and nothing more. *Peterson v. Watson*, Blatchf. & H. Adm. 487, 19 Fed. Cas. No. 11,037.

8. "When a proctor intends continuing a suit, to recover his costs, after the claim on which the suit is founded is satisfied to the mariner, it must be done on distinct notice to the party sought to be charged, that the suit is continued for the recovery of costs only. The Court will judge of the reasonableness of the notice, in determining whether costs shall ultimately be decreed. Without such notice previous to further prosecution of the suit, all proceedings subsequent to the settlement will be at the responsibility of the libellant and his proctor; and, at the instance of the claimant or respondent, security could be required from those for whose benefit the action should be continued, adequate to the costs they might create. The Court affords its protection to seamen against their proctors and advocates, as well as against masters and owners, and, if a suit is continued after notice of such



**6. Effect of Injunction.** — The enjoining of the further prosecution of suits in admiralty because of the pendency of proceedings to limit liability, does not prevent the collection of the costs allowed in such suits.<sup>9</sup>

**7. Stipulations and Bonds For.** — Stipulations and bonds for costs are discussed elsewhere in this title.<sup>10</sup>

settlement, upon grounds and reasons which are not ultimately sanctioned by the Court, the expenses must be borne by the proctors personally, and will not be imposed on the seamen." The *Sarah Jane*, 1 Blatchf. & H. Adm. 401, 21 Fed. Cas. No. 12,348.

Only the question of costs can be considered on a hearing held pursuant to such notice. *Angell v. Bennett*, 18 Spr. 85, 1 Fed. Cas. No. 387.

9. *In re Norwich, etc. Transp. Co.*, 10 Ben. 193, 18 Fed. Cas. No. 10,361.

10. See *supra*, II, K, 2.

# ADULTERATION

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### CROSS-REFERENCES:

Food;                      Intoxicating Liquors.

**I. DEFINITION.**—Adulteration means debasement by the mixture of foreign materials.<sup>1</sup>

**II. HOW PROSECUTED.**—A. GENERALLY.—The prosecution for adulteration<sup>2</sup> should be in the manner provided by law, whether by complaint,<sup>3</sup> indictment,<sup>4</sup> or information.<sup>5</sup> Actions for penalties imposed by statute are elsewhere discussed.<sup>6</sup>

B. WHO MAY COMPLAIN.—Complaint may be made, or prosecution instituted by any person.<sup>7</sup>

**III. JURISDICTION.**—Some statutes provide that the prosecution for the offense of adulteration may be in any court of competent jurisdiction. And where the statute confers jurisdiction of such cases upon a designated court, such court will not be considered as having exclusive jurisdiction unless such an intention on the part of the legislature appears in the statute.<sup>8</sup>

**IV. FORM AND SUFFICIENCY OF INDICTMENT OR COMPLAINT.**—A. GENERALLY.—The complaint, information or indictment must distinctly allege all the elements essential to the offense under the particular statute involved.<sup>9</sup> But an indictment or complaint

1. *Shivers v. Newton*, 45 N. J. L. 469, 472; *People v. West*, 44 Hun (N. Y.) 162.

For a discussion of the nature and sufficiency of the evidence to prove adulteration, see 1 *ENCYCLOPEDIA OF EVIDENCE*, 618-621.

2. For violations of food laws generally, see the title "Pure Food Laws."

3. See the title "Complaint and Petition in Code Pleading."

4. See the title "Indictment and Information."

Indictment.—Although a statute making it an offense to sell adulterated milk further provides for the recovery of the penalties provided "on complaint before any court of competent jurisdiction," the offense may be prosecuted by indictment in the superior court. *Com. v. Haynes*, 107 Mass. 194.

5. See *State v. Snow*, 81 Iowa 642, 47 N. W. 777, 11 L. R. A. 355, and the title "Indictment and Information."

6. See the title "Pure Food Laws."

7. *Com. v. Tobias*, 141 Mass. 129, 6 N. E. 217 (need not be made by an inspector); *Com. v. Arow*, 32 Pa. Super. 1 (by an agent of the department of agriculture); *Com. v. Spencer*, 28 Pa. Super. 1. See *Worthington v. Kyme*, 93 L. T. N. S. 546, 21 Cox C. C. 37.

Although the statute makes it the duty of the board of health to enforce its provisions, this does not prevent private individuals from making complaint. *Isenhour v. State*, 157 Ind. 517,

62 N. E. 40, 87 Am. St. Rep. 228.

8. La.—*State v. Fourcade*, 45 La. Ann. 717, 13 So. 187, 40 Am. St. Rep. 249, a prosecution for selling adulterated milk. Mass.—*Com. v. Haynes*, 107 Mass. 194. N. Y.—*People v. Harris*, 123 N. Y. 70, 25 N. E. 317.

The Pennsylvania Act of May 25, 1878, P. L. 144, made adulteration of milk a misdemeanor. By another statute jurisdiction to impose fines for the commission of misdemeanors was conferred upon the court of quarter sessions. It was held in *Com. v. May*, 24 Pa. Co. Ct. 546, that this excluded the jurisdiction of a justice of the peace.

9. *Com. v. Rowell*, 146 Mass. 128, 15 N. E. 154; *State v. Weeden*, 17 Wyo. 418, 100 Pac. 114.

**Adulterated by Whom.**—An affidavit prosecuting for having in possession with intent to sell, adulterated milk, that being an offense under the statute, need not allege by whom the milk was adulterated, though the same statute makes it an offense to adulterate milk. *Isenhour v. State*, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228.

**Form of Indictment.**—In *Com. v. Schaffner*, 146 Mass. 512, 16 N. E. 280, the following indictment was held sufficient: "The jurors for the Commonwealth of Massachusetts, on their oath present, that John V. Schaffner, of Boston aforesaid, on the fifteenth day of May, in the year of our Lord one thousand eight hundred and eighty-seven, at Boston aforesaid, unlawfully did



is sufficient if it charges the facts constituting the crime in the words of the statute and contains averments as to time, place, person, and other circumstances sufficient to identify the particular transaction.<sup>10</sup>

have in his possession milk to which a certain foreign substance had been added, to-wit, annatto coloring matter, a further description of which said jurors cannot give, with intent then and there unlawfully to sell the said milk within this Commonwealth."

For other forms, see *People v. Harris*, 54 Hun 638, 7 N. Y. Supp. 773, *affirmed* n 123 N. Y. 70, 25 N. E. 317; *State v. Hutchinson*, 55 Ohio St. 573, 45 N. E. 1043.

**Form of Complaint Approved.**—In *State v. Luther*, 20 R. I. 472, 40 Atl. 9, the complaint was under General Laws, R. I., c. 147, § 6, and was as follows: "That at said Providence, in said county, on the 24th day of July, A. D. 1897, with force and arms, William K. Luther of said Providence, laborer, did sell and exchange, and have in his possession, with intent to sell and exchange and offer for sale and exchange, adulterated milk, to-wit, milk which contained more than eighty-eight per centum of watery fluids and less than twelve per centum of milk solids, as shown by analysis of said milk, against the statute and the peace and dignity of the state."

In *Com. v. Rowell*, 146 Mass. 128, 15 N. E. 154, the complaint upon which a conviction was sustained alleged that defendants "did have in their possession a certain quantity, that is to say one pint, of milk, to which a certain foreign substance, to-wit, annatto coloring-matter, had been added, with intent then and there unlawfully to sell the said milk."

**Form of Affidavit Held Sufficient:**  
"The State, of Ohio, { ss.  
Washington County, {

Before me, B. E. Guyton, a justice of the peace in and for said county, personally came D. W. Dye, deputy inspector, who being duly sworn according to law deposes and says, that on or about the 5th of November, 1894, at the county of Washington aforesaid, one V. W. Haas sold to D. W. Dye, one-fourth of a pound of an article of food, to-wit, ground mustard, which was adulterated in the following respect, to-wit, starch had been added to it, thereby depreciating its strength, contrary to the statute in such case made

and provided, and against the peace and dignity of the state of Ohio; and further deponent saith not. D. W. Dye." *Haas v. State*, 2 Ohio Dec. 177. See also *Meyer v. State*, 2 Ohio Dec. 233.

A form of affidavit is also given in *Ishenhour v. State*, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228.

10. **Mass.**—*Com. v. Schaffner*, 146 Mass. 512, 16 N. E. 280; *Com. v. Keenan*, 139 Mass. 193, 29 N. E. 477. N. Y.—*People v. West*, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452, *affirming* 44 Hun 162, and *citing* Whart. Crim. Law, § 364. Ohio—*Haas v. State*, 2 Ohio Dec. 177. R. I.—*State v. Luther*, 20 R. I. 472, 40 Atl. 9.

See *Com. v. Kenneson*, 143 Mass. 418, 9 N. E. 761; *People v. Burns*, 53 Hun 274, 6 N. Y. Supp. 611.

An information in the language of the statute, so far as it is necessary to constitute the offense, is sufficient. *State v. Snow*, 81 Iowa 642, 47 N. W. 777, 11 L. R. A. 355. This case arose under a statute providing that "no manufacturer or other person or persons shall sell, deliver, prepare, put up, expose or offer for sale any lard, or any article intended for use as lard, which contains any ingredient but the pure fat of healthy swine, in any tierce, bucket, pail, package or other vessel or wrapper, or under any label bearing the words 'pure,' 'refined,' 'family' or either of said words, alone, or in combination with other words of like import, unless every tierce, bucket, pail, package or other vessel, wrapper or label, in or under which said article is sold, delivered, prepared, put up, exposed or offered for sale, bears on the top or outer side thereof, in letters not less than one-half inch in length, and plainly exposed to view, the words 'compound lard' and the name and proportion, in pounds and fractional parts thereof, of each ingredient contained therein." The court in holding the information sufficient said: "Although the statute is somewhat obscure in its meaning, it is quite plain that the penalty therein provided for is incurred if a person sells a bucket or package filled with an article intended for use as lard, which contains other ingredients than the pure fat of

A literal following of the words of the statute may be sufficient,<sup>11</sup> but is not necessary.<sup>12</sup> The offense should not be alleged disjunctively.<sup>13</sup>

Matters of defense need not be negated in the indictment.<sup>14</sup>

More surplusage does not vitiate an indictment and need not be proved.<sup>15</sup>

But matter descriptive of the offense must be proved though unnecessarily alleged.<sup>16</sup>

**B. DUPLICITY AND JOINDER.**—The ordinary rules<sup>17</sup> as to joinder<sup>18</sup> and duplicity<sup>19</sup> are applied to a complaint or indictment for adulteration.

A single count charging both selling and having in possession with intent to sell is not duplicitous, although the statute defines the offense disjunctively, since such acts are either regarded as constituting

healthy swine, and which bucket or package does not bear on the top or outer side thereof the name and proportion, in pounds and fractional parts thereof, of each ingredient contained therein. This is the substance of the information. If the bucket alleged to have been sold did not bear a statement of the ingredients, the offense was complete, no matter whether the package was stamped 'pure,' 'refined,' 'family,' or 'compound' lard."

11. *Com. v. McCarron*, 2 Allen (Mass.) 157.

12. *Sanchez v. State*, 27 Tex. App. 14, 10 S. W. 756.

13. *Ryan v. State*, 5 Ohio C. C. 486, holding insufficient an affidavit charging that the defendants kept for sale "an article and compound made, etc., by compounding with and adding to milk, cream or butter, animal fats or animal or vegetable oils," not produced from unadulterated milk or cream from the same, so as to produce an article or compound for human food in imitation of butter.

14. *People v. West*, 44 Hun (N. Y.) 162, affirmed in 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452, holding that an indictment charging the bringing of diluted milk to a cheese factory to be manufactured into cheese was not insufficient for failure to deny that the factory was a private factory used by the defendant alone, and that the cheese was not to be manufactured for the market; such facts being matters of defense even if they had been expected from the operation of the statute by its own terms. See *infra*, IV, C, "Exceptions in Statute."

15. *Com. v. Rowell*, 146 Mass. 128, 15 N. E. 154 (in which an averment that defendants were co-partners was

held surplusage); *Com. v. Farren*, 9 Allen (Mass.) 489 (averment of guilty knowledge); *Polinsky v. People*, 73 N. Y. 65.

16. *Com. v. Rowell*, 146 Mass. 128, 15 N. E. 154. See the title "Indictment and Information."

17. See the titles "Complaint and Petition in Code Pleading;" "Indictment and Information."

18. See *Polinsky v. People*, 73 N. Y. 65, which was prosecuted under a city ordinance, but where the indictment and Information."

an offense under the state law.

**Joinder.**—Counts in a complaint charging respectively that defendant sold adulterated milk and had adulterated milk in his possession with intent to sell, are properly joined since if they describe the same transaction they are for the same offense, and if they describe a different transaction they are for different offenses of the same kind. *Com. v. Tobias*, 141 Mass. 129, 6 N. E. 217.

19. An indictment is not duplicitous where it charges but a single transaction, although it alleges that such transaction took place on the third and fourth days of a particular month. *People v. Harris*, 54 Hun 638, 7 N. Y. Sup. 773, affirmed in 123 N. Y. 70, 25 N. E. 317.

**Violation of Ordinance and Statute.** A count in an indictment is not duplicitous as uniting a violation of an ordinance with a violation of a statute where it proceeds exclusively upon the ordinance and would not justify a conviction under the statute, although it contains averments which might sustain a count for the statutory offense. *Polinsky v. People*, 73 N. Y. 65.

a single offense<sup>20</sup> or as cognate offenses which may properly be set out in a single count.<sup>21</sup>

**C. EXCEPTIONS IN STATUTE.**—On a prosecution for adulteration the necessity for negating exceptions in the statute is governed by the general rule<sup>22</sup> that only those exceptions which enter into or form part of the definition of the offense, or qualify the language creating or defining it, need be negated in the indictment or complaint.<sup>23</sup>

**D. PARTICULAR AVERMENTS.**—1. **Generally.**—The necessity and form of particular averments depend upon the form of the statute<sup>24</sup>

20 *Com. v. Nichols*, 10 Allen (Mass.) 199, where an indictment charging that defendant "did unlawfully keep, offer for sale and sell" adulterated milk was held to charge but one offense, under a statute punishing "whoever sells or keeps or offers for sale adulterated milk," etc. See also *Com. v. Farren*, 9 Allen (Mass.) 489. These cases were approved in *Com. v. Tobias*, 141 Mass. 129, 6 N. E. 217.

Where the statute punishes one who "sells or keeps or offers for sale adulterated milk, or milk to which water or any foreign substance has been added," an indictment is not bad for duplicity which alleges that the defendant sold "adulterated milk to which a large quantity, to wit, four quarts of water, had been added." *Com. v. Farren*, 9 Allen (Mass.) 489.

An indictment charging in one count a selling and exposing for sale is not duplicitous where the statute provides that "no person or persons shall sell or exchange, or expose for sale or exchange," etc. *People v. Burns*, 53 Hun. 274, 6 N. Y. Supp. 611.

21. *State v. Luther*, 20 R. I. 472, 40 Atl. 9. See *People v. Burns*, 53 Hun. 274, 6 N. Y. Supp. 611.

22. See the titles "Complaint and Petition in Code Pleading;" "Indictment and Information."

23. *State v. Luther*, 20 R. I. 472, 40 Atl. 9. See also *People v. West*, 44 Hun (N. Y.) 162, affirmed in 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452.

Exceptions found in a separate substantive clause need not be negated. *N. J.—Vandegrift v. Meible*, 66 N. J. L. 92, 49 Atl. 16. *Ohio.—State v. Hutchinson*, 55 Ohio St. 573, 45 N. E. 1043. *Pa.—Com. v. Arow*, 32 Pa. Super. 1.

Exception in standard required for two months of the year. In *Com. v. Kenneson*, 143 Mass. 418, 9 N. E. 761,

the facts are set out in the language of the court as follows: "The quality required by the statute for the months of May and June is different from that for the rest of the year, and this distinction relates to the time when the milk is sold or kept in possession with intent to sell, and not to the time when the milk is obtained from the cow. As this complaint alleges that, on the first day of July, 1886, the defendant had in his possession 'one pint of milk not of good standard quality, that is to say, milk containing less than thirteen per cent. of milk solids, with intent then and there unlawfully to sell the same within this Commonwealth' it charges an offense within the statute. It is not necessary in the complaint to negative the exception of the months of May and June, because the allegation of time in the complaint is material, and of itself excludes the months of May and June."

24. See the statutes of the several states.

Where the statute provides in the disjunctive three conditions constituting adulteration, the complaint need not allege that the adulterated article fails to meet the requirements of the statute in all the particulars specified. *State v. Luther*, 20 R. I. 472, 40 Atl. 9.

**Standard of Purity.**—On a charge of having in possession, with intent to sell, milk adulterated with an injurious substance, an averment that a standard of purity had been prescribed is unnecessary, the character of the act upon which the prosecution was based not being determined by a standard. *Isenhour v. State*, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 223.

**To Be Used as Human Food.**—On a prosecution under an act making it unlawful to manufacture for sale, offer for sale or sell any adulterated drug or article of food, the indictment need not allege that the article adulterated



and the general principles applicable to criminal pleading.<sup>26</sup>

2. The Time of the offense should be alleged.<sup>26</sup>

3. Intent and Guilty Knowledge.—Where intent<sup>27</sup> and guilty knowledge<sup>28</sup> are essential elements of the offense they must be alleged, but under most statutes it is held that they need not be averred.<sup>29</sup>

An unnecessary averment of guilty knowledge will be treated as surplusage and need not be proved.<sup>30</sup>

4. Description of Thing Adulterated.—There must be a sufficiently specific description of the article adulterated.<sup>31</sup> The quantity need not be stated.<sup>32</sup>

5. Nature and Effect of Adulteration.—The nature of the alleged adulteration and the manner in which it was accom-

was sold to be used as human food. *State v. Kelly*, 54 Ohio St. 166, 43 N. E. 163.

An Article of Food.—An allegation that the article in question was "sold as and for pure milk, an article of food," sufficiently avers that the substance was sold as milk and that milk is an article of food. *Lansing v. State*, 73 Neb. 124, 102 N. W. 254.

Adulterated Wines.—In a prosecution for violation of the statute making it an offense to sell adulterated wines, an affidavit must allege that the liquor was sold for use as a beverage. *Vester v. State*, 2 Ohio Dec. 170. See the title "Intoxicating Liquors."

Adulteration by the defendant need not be averred where it is alleged that he had the adulterated article in his possession with intent to sell. *Isenhour v. State*, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228.

25. See the titles "Complaint and Petition in Code Pleading;" "Indictment and Information."

26. The precise time at which the crime was committed need not be stated, but it may be alleged to have been committed at any time before the finding of the indictment. *People v. Harris*, 54 Hun 638, 7 N. Y. Supp. 773, affirmed in 123 N. Y. 70, 25 N. E. 317.

27. Intent To Sell.—An indictment for adulterating milk by mixing it with water, under an act to prevent the adulteration of milk and to prevent the traffic in impure and unwholesome milk, must allege that the milk was adulterated with the intent to offer it for sale or exchange. *People v. Fauerback*, 5 Park. Cr. (N. Y.) 311.

28. *Sanchez v. State*, 27 Tex. App. 14, 10 S. W. 756, holding sufficient an allegation that the act was done "unlawfully and knowingly." See also

*Lansing v. State*, 73 Neb. 124, 102 N. W. 254.

Under Early Massachusetts Statute. *Com. v. Flannelly*, 15 Gray (Mass.) 195.

29. Ia.—See *State v. Schlenker*, 112 Iowa 642, 84 N. W. 698, 51 L. R. A. 347. Md.—*Fox v. State*, 94 Md. 143, 50 Atl. 700, 8 Am. St. Rep. 419. Neb.—*Lansing v. State*, 73 Neb. 124, 102 N. W. 254. N. J.—*Vandegrift v. Meible*, 66 N. J. L. 92, 49 Atl. 16. N. Y.—*People v. Kibler*, 106 N. Y. 321, 12 N. E. 795; *People v. Schaeffer*, 41 Hun 23; *People v. Eddy*, 12 N. Y. Supp. 628. But see *People v. Fulle*, 12 Abb. N. C. 196. Ohio.—*State v. Kelly*, 54 Ohio St. 166, 43 N. E. 163; *Strong v. State*, 3 Ohio Dec. 284; *Haas v. State*, 2 Ohio Dec. 177; *Altschul v. State*, 8 Ohio C. C. 214. R. I.—*State v. Smith*, 10 R. I. 258.

Where it is an offense to sell pure milk adulterated by pure water, guilty knowledge on the part of the seller need not be alleged or proved. *Com. v. Evans*, 132 Mass. 11; *Com. v. Waite*, 11 Allen (Mass.) 264, 87 Am. Dec. 711; *Com. v. Nichols*, 10 Allen (Mass.) 199.

30. *Com. v. Farren*, 9 Allen (Mass.) 489.

31. An indictment charging the defendant with adulterating "a certain substance intended for food, to wit, one pint of confectionery," does not sufficiently describe the substance alleged to have been adulterated, since the word "confectionery" is a generic term covering many different kinds of substances. *Com. v. Chase*, 125 Mass. 202.

Nature of Milk.—Where the statute penalizes the sale of milk, it is unnecessary to allege or prove that the milk was cow's milk. *Com. v. Farren*, 9 Allen (Mass.) 489.

32. *Com. v. Schaffner*, 146 Mass. 512, 16 N. E. 280.

plished should be set forth,<sup>33</sup> and under some statutes its effect.<sup>34</sup>

**6. Analysis.**—Neither the fact that an analysis was made of the alleged adulterated article<sup>35</sup> nor the character of the analysis<sup>36</sup> need

33. *Dorsey v. State*, 38 Tex. Crim. 527, 44 S. W. 514, 70 Am. St. Rep. 762, 40 L. R. A. 201. But see *Com. v. Keenan*, 139 Mass. 193, 29 N. E. 477, holding sufficient and unobjectionable for failure to state the manner and means by which the adulteration was made a complaint alleging that defendant at a time and place named did have in his "custody and possession a certain quantity, to-wit, one pint, of adulterated milk, to-wit, milk then and there containing less than thirteen per cent. of milk solids, with intent then and there unlawfully to sell the same." See also *Com. v. Kenneson*, 143 Mass. 418, 9 N. E. 761; *Rex v. Dixon*, 3 M. & S. (Eng.) 11.

An affidavit was held insufficient for failure to allege that the article sold contained "any added substance or ingredient which is poisonous," or "any added substance or ingredient injurious to health." The court says: "The rules of criminal pleading require that, in all statutory offenses the offense must be set out in substantially the words of the statute." *Strong v. State*, 3 Ohio Dec. 284.

34. *Dorsey v. State*, 38 Tex. Crim. 527, 44 S. W. 514, 70 Am. St. Rep. 762, 40 L. R. A. 201, reducing or injuriously affecting quality.

**Nature of the Adulterant.**—Where the affidavit of complaint charges that the defendant had in his possession, with intent to sell the same, "one pint of milk then and there adulterated with a certain substance injurious to health, to-wit, formaldehyde," an allegation that formaldehyde is either poisonous or injurious to health is not necessary. The descriptive words of the statute being, "any substance injurious to health." *Isenhour v. State*, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228.

**Concealment of Inferiority.**—An information charging adulteration of vanilla extract by the addition of a specified coloring matter "whereby its inferiority was concealed and whereby said extract of vanilla was made to appear better and of greater value than it really was," held sufficient averment that the coloration was to make the inferior article appear better and more valuable than it really was.

*People v. Hinshaw*, 135 Mich. 378, 97 N. W. 758.

35. A complaint for selling milk below a certain standard need not allege that an analysis has been made of the milk. *Com. v. Tobias*, 141 Mass. 129, 6 N. E. 217; *Com. v. Bowers*, 140 Mass. 483, 5 N. E. 469.

*Contra.*—On a prosecution for selling milk which falls below a certain standard, the complaint should be more specific than in the case of a prosecution for selling adulterated milk, and should aver the fact that the deficiency is shown by analysis and the name of the officer who analyzed it, the statute designating the officer who must make the analysis. *Shivers v. Newton*, 45 N. J. L. 469. Here the complaint was: "That one Richard H. Shivers did violate the provisions of an act entitled An act to prevent the adulteration and to regulate the sale of milk in this, that said R. H. S. did transport and carry for the purpose of sale, and did offer for sale and sell adulterated milk, contrary to the provisions of section 2 of the aforesaid act of the legislature of the State of New Jersey." The court said: "I am of opinion that this complaint described with sufficient precision a violation of the statute in the selling, or the having in possession with intent to sell, milk which was in fact adulterated by the admixture of any foreign substance. I do not think it describes a violation of the statute in selling or the having in possession, with intent to sell, of milk which shall be shown upon analysis to contain less than twelve per cent. milk solids. The milk declared to be adulterated in the second section is so in fact. The milk mentioned in the fourth section may not be in fact diluted or debased."

36. *Vandegrift v. Meible*, 66 N. J. L. 92, 49 Atl. 16 (pointing out that *Shivers v. Newton*, 45 N. J. L. 469, cited in the last note, was decided under another section of the statute); *State v. Luther*, 20 R. I. 472, 40 Atl. 9.

A compliance with the statute providing for the manner of obtaining and analyzing samples of the alleged adulterated milk need not be averred; such facts are purely evidentiary and are competent and proper in proof of the allegation that the milk was adul-

be alleged unless such an analysis is a part of the statutory description of the offense.<sup>37</sup>

**7. Sale by Dealer.**—The fact that defendant was a dealer in the adulterated article need not be alleged,<sup>38</sup> unless it is an essential element of the offense.<sup>39</sup>

**8. Name of Purchaser.**—Where a sale is alleged the name of the purchaser must be stated or it must be alleged that his name is unknown.<sup>40</sup>

**V. VARIANCE.**—The proof must conform to the offense charged;<sup>41</sup> and where the offense may be committed in several ways set out in the statute, the method alleged must be proved.<sup>42</sup>

Proof of a sale by defendant's agent or servant will sustain an allegation of a sale by defendant,<sup>43</sup> unless the statute expressly provides

terated. *People v. Woodbeck*, 55 App. Div. 277, 67 N. Y. Supp. 38.

The defendant by motion may compel the prosecutor to specify in the nature of a bill of particulars the method of analysis which will be relied upon in proof of the charge. *State v. Luther*, 20 R. I. 472, 40 Atl. 9.

37. See *Vandegrift v. Meihle*, 66 N. J. L. 92, 49 Atl. 16; *Shivers v. Newton*, 45 N. J. L. 469.

38. *State v. Luther*, 20 R. I. 472, 40 Atl. 9.

39. *Com. v. Flannelly*, 15 Gray (Mass.) 195.

**Sale by Recorded Dealer.**—Where the statute makes it an offense for a recorded dealer in milk to sell adulterated milk, the fact that he was recorded as a dealer in the books of the inspector is an essential fact which must be distinctly alleged. It is insufficient to merely describe a named person as inspector, but the fact that he held such office must be distinctly alleged. *Com. v. O'Donnell*, 1 Allen (Mass.) 593.

Where the statute provides for an official inspector of milk, and the keeping by him of an office and books for the purpose of recording the names and places of business of persons engaged in the sale of milk, and makes it an offense for any milk dealer recorded in the books of the inspector to sell adulterated milk, a complaint alleging that the inspector kept "an office and books as required by the statute of the commonwealth in such case made and provided," and further alleging that defendant was recorded as a dealer of milk "in the books of said inspector," is insufficient, although as to the latter allegation it followed the words of the

statute. It should have alleged that defendant was recorded in the books aforesaid or in said books. The averment as to the keeping of books should have been that the inspector kept books for the purpose of recording the names and places of business of all persons engaged in the sale of milk in the city in question. *Com. v. McCarron*, 2 Allen (Mass.) 157.

40. *People v. Burns*, 53 Hun 274, 6 N. Y. Supp. 611. See *Feigen v. McGuire*, 64 N. J. L. 152, 44 Atl. 972.

Variance between allegation and proof. See *infra*, V, "Variance."

41. Where the statute makes different offenses of having possession of milk below a certain standard and possession of milk to which water of foreign substances have been added, the former cannot be proved under a complaint charging the latter. *Com. v. Tobias*, 141 Mass. 129, 6 N. E. 217; *Com. v. Luscomb*, 130 Mass. 42, *approved* in *Com. v. Keenan*, 139 Mass. 193, 29 N. E. 477.

A prosecution for selling adulterated cream of tartar as a drug is not supported by proof of the sale of adulterated cream of tartar as a food in the course of defendant's business as a grocer. *People v. Fulle*, 12 Abb. N. C. (N. Y.) 196.

The charge of having in one's possession, with intent to sell, "milk" to which a foreign substance has been added is sustained by proof of the possession of cream containing boracic acid. *Com. v. Gordon*, 159 Mass. 8, 33 N. E. 709.

42. *Com. v. Tobias*, 141 Mass. 129, 6 N. E. 217.

43. *Com. v. Warren*, 160 Mass. 533, 36 N. E. 308.



for both classes of cases.<sup>44</sup> Evidence that the person alleged to have purchased the article was a mere agent is not a variance where it does not appear that defendant had notice of the agency.<sup>45</sup>

If the defendant, relying upon an exception in the statute, sets up that the article was manufactured before the passage of the act, he has the burden of proving such defense, since the circumstances of manufacture and the movements of the product are peculiarly within his knowledge.<sup>46</sup>

**VI. DEFENSES.**—It is no defense to a prosecution for selling an impure article of food that the substance sold was manufactured under letters patent issued by the United States.<sup>47</sup> A defendant cannot escape responsibility by showing that in selling the impure article he was acting merely as the agent of the owner.<sup>48</sup>

It is no defense to a prosecution for selling adulterated milk that the milk was sold under a contract to deliver to the purchaser daily a specified quantity of milk, for it may be inferred fairly that the contract contemplated the delivery of such milk only as could be sold lawfully.<sup>49</sup> Nor is it a defense to such a prosecution that the milk was sold as "condensed" milk where the circumstances indicated that the milk was for the use of man.<sup>50</sup>

**VII. INSTRUCTIONS.**—Instructions should be given in accordance with the general rules governing that subject.<sup>51</sup>

44. *Heider v. State*, 4 Ohio Dec. 227.

45. "It is settled that when a purchase is made by an agent, of whose agency the seller has not sufficient notice, express or implied, the sale may be regarded in law as made to the agent, and so it may be alleged in an indictment." *Com. v. Farren*, 9 Allen (Mass.) 489.

46. *People v. Briggs*, 114 N. Y. 56, 20 N. E. 820.

47. *Arbuckle v. Blackburn*, 113 Fed. 616, 51 C. C. A. 122, 65 L. R. A. 864; *Palmer v. State*, 39 Ohio St. 236, 48 Am. Rep. 429.

48. *In Bissman v. State*, 54 Ohio St. 242.

49. 43 N. E. 164, the court said: "The statutory provisions governing these cases (Revised Statutes, section 8805, et seq., section 8841, et seq., *Giaque's 7th E.*) do not exempt any one who sells or offers to sell the articles prohibited, because of his relation to the transaction, whether it is that of agent or principal. As they prohibit both the selling and the offering for sale they do not require or permit the application of technical rules to determine at what point the title passes from the vendor to the purchaser. By their titles and provisions they disclose the purpose of the general assembly to prevent the sales of the articles described, and to accom-

plish that purpose by imposing penalties upon all who sell or offer them. The agent is within the terms of the statute because he personally participated in its violation; and the principal is responsible for what he does by another. Any other construction of the statute would afford an easy method for defeating its purpose; and it would extend to those who are likely to know of the adulteration of the article sold immunity from the penalty which is imposed upon others who have not such knowledge."

49. *Com. v. Holt*, 146 Mass. 38, 14 N. E. 930.

50. *Com. v. Darlington*, 9 Pa. Dist. 700.

51. See *infra*, VII, "Instructions."

Instructions as to the effect of a sale by a servant in the ordinary course of his employment, approved. *Com. v. Vieth*, 155 Mass. 442, 29 N. E. 577. See also *Com. v. Warren*, 160 Mass. 533, 36 N. E. 308.

Where it appears that the adulterated article was in possession of the defendant's servant, the court should instruct the jury that proof of possession by the servant was not sufficient to convict the defendant unless there is evidence tending to show that the servant in having the article for sale or exchange was acting for and in

**VIII. POWER OF EQUITY TO ENJOIN PROSECUTION.**—In accordance with the well-settled rule that a court of chancery has no power to restrain criminal proceedings unless they are instituted by a party to a suit already pending before it and to try the same right that is in issue there, a court of equity has no jurisdiction to entertain a bill to inquire into the merits of a controversy involving an alleged adulteration, and if it finds that there has been no adulteration within the statute, to grant an injunction restraining the institution of criminal proceedings.<sup>52</sup>

pursuance of the will of the master. *State v. Smith*, 10 R. I. 258.

**As to preservation of sample in compliance with statute.** *Com. v. Spear*, 143 Mass. 172, 9 N. E. 632.

**Possession With Intent to Sell.**—Where the charge was the possession, with intent to sell, milk to which a foreign substance had been added, an instruction was held proper that if defendant was upon the wagon and in charge of the same, this was evidence from which the jury might find that he

was in possession of the milk with intent to sell it. *Com. v. Rowell*, 146 Mass. 128, 15 N. E. 154.

**Exception in Statute.**—Instructions were held improper for failing to refer to the exception in the statute. *State v. Hutchinson*, 55 Ohio St. 573, 45 N. E. 1043.

**Request for Instructions Necessary.** *People v. Hinshaw*, 135 Mich. 378, 97 N. W. 758.

· 52. *Arbuckle v. Blackburn*, 113 Fed. 616, 51 O. C. A. 122, 65 L. R. A. 864.

# ADULTERY

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### CROSS-REFERENCES:

- |                        |           |
|------------------------|-----------|
| Bigamy;                | Lewdness; |
| Criminal Conversation; | Nuisance. |
| Fornication;           |           |
| <b>Vol. I</b>          |           |

**I. DEFINITION.**—A. UNDER THE CIVIL LAW adultery was sexual intercourse by a married woman with a man other than her husband.<sup>1</sup>

B. UNDER THE ECCLESIASTICAL LAW adultery was the sexual intercourse by a married man or woman with a person other than his or her legal wife or husband, and was punishable by ecclesiastical censure.<sup>2</sup>

C. AT COMMON LAW.—Adultery is not an indictable offense at common law.<sup>3</sup> It was indictable, however, as a public nuisance if it was so flagrant and open as to scandalize the community,<sup>4</sup> and the adulterer could be proceeded against in an action for damages.<sup>5</sup>

D. AS NOW DEFINED.—1. **In General.**—Adultery, as the term is now usually understood, is the voluntary sexual intercourse of two persons of opposite sex, not being husband and wife, one at least of whom is legally married.<sup>6</sup> In some states, however, a married man cannot com-

1. *State v. Weatherby*, 43 Me. 258, 69 Am. Dec. 59; *Com. v. Call*, 21 Pick. (Mass.) 509, 32 Am. Dec. 284.

By the Roman law a married man who had illicit intercourse with an unmarried woman was not guilty of this specific crime. *Kan.*—*Bashford v. Wells*, 78 Kan. 295, 96 Pac. 663, 18 L. R. A. (N. S.) 580. *Me.*—*State v. Weatherby*, 43 Me. 258, 69 Am. Dec. 59. *Mass.*—*Com. v. Call*, 21 Pick. 509, 32 Am. Dec. 284. *Tex.*—*Richardson v. State*, 37 Tex. 346.

2. *Ia.*—*State v. Roth*, 17 Iowa 336. *Kan.*—*Bashford v. Wells*, 78 Kan. 295, 96 Pac. 663, 18 L. R. A. (N. S.) 580. *Mass.*—*Com. v. Call*, 21 Pick. 509, 32 Am. Dec. 284. *Miss.*—*Carotti v. State*, 42 Miss. 334, 97 Am. Dec. 465. *N. H.*—*State v. Marvin*, 35 N. H. 22. *N. J.*—*State v. Gray*, 37 N. J. L. 368.

The definition of the canonical law was, according to Wharton, accepted by every Christian state at the time of the colonization of America, and "is no doubt a part of the common law brought with them by the colonists of all Christian nationalities." *State v. Hasty*, 121 Iowa 507, 96 N. W. 1115, citing 2 Whart. Cr. Law § 1719. See also *Penton v. State*, 42 Fla. 560, 28 So. 774; *Luster v. State*, 23 Fla. 339, 2 So. 690; *Miner v. People*, 58 Ill. 59.

3. *Ark.*—*Crouse v. State*, 16 Ark. 566. *Cal.*—*Ex parte Thomas*, 103 Cal. 497, 37 Pac. 514. *D. C.*—*Pollard v. Lyon*, 1 McArthur 296. *Ia.*—*State v. Hasty*, 121 Iowa 507, 96 N. W. 1115; *State v. Roth*, 17 Iowa 336. *Mass.*—*Com. v. Elwell*, 2 Metc. 190, 35 Am. Dec. 398; *Com. v. Putnam*, 1 Pick. 136. *Miss.*—*Carotti v. State*, 42 Miss. 334, 97 Am. Dec. 465. *N. H.*—*State v. Marvin*, 35 N. H. 22. *N. J.*—*State v.*

*Gray*, 37 N. J. L. 368; *State v. Lash*, 16 N. J. L. 380, 32 Am. Dec. 397. *Pa.*—*Com. v. Lehr*, 2 Pa. Co. Ct. 341. *S. C.*—*State v. Brunson*, 2 Bailey 149. *S. D.*—*State v. Whealey*, 5 S. D. 427, 59 N. W. 211. *Vt.*—*State v. Cooper*, 16 Vt. 551. *Va.*—*Com. v. Isaacs*, 5 Rand. 634; *Anderson v. Com.*, 5 Rand. 627, 16 Am. Dec. 776. *Wash.*—*State v. Keith*, 48 Wash. 77, 92 Pac. 893.

4. *Ark.*—*Crouse v. State*, 16 Ark. 566. *Cal.*—*Ex parte Thomas*, 103 Cal. 497, 37 Pac. 514. *Miss.*—*Carotti v. State*, 42 Miss. 334, 97 Am. Dec. 465. *N. J.*—*Schondel v. State*, 57 N. J. L. 209, 30 Atl. 598. *Tex.*—*Swancoat v. State*, 4 Tex. App. 105.

5. *State v. Lash*, 16 N. J. L. 380, 32 Am. Dec. 397.

6. *U. S.*—*Cartier v. United States*, 148 Fed. 804, 78 C. C. A. 494. *Ala.*—*Owens v. State*, 94 Ala. 97, 10 So. 669; *White v. State*, 74 Ala. 31; *State v. Glaze*, 9 Ala. 283; *State v. Hinton*, 6 Ala. 864. *Cal.*—*People v. Salmon*, 148 Cal. 303, 83 Pac. 42, 113 Am. St. Rep. 268, 2 L. R. A. (N. S.) 1186; *People v. Stratton*, 141 Cal. 604, 75 Pac. 166. *Ga.*—*Tison v. State*, 125 Ga. 7, 53 S. E. 809; *Kendrick v. State*, 100 Ga. 360, 28 S. E. 120 (*explaining Cook v. State*, 11 Ga. 53, 56 Am. Dec. 410, and *overruling Butt v. State*, 33 Ga. 56). *Ill.*—*Lyman v. People*, 198 Ill. 544, 64 N. E. 974; *Miner v. People*, 58 Ill. 59. *Ind.*—*Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21. *Ia.*—*State v. Anderson*, 140 Iowa 445, 118 N. W. 772; *State v. Hasty*, 121 Iowa 507, 96 N. W. 1115; *State v. Mahan*, 81 Iowa 121, 46 N. W. 855; *State v. Wilson*, 22 Iowa 364; *State v. Roth*, 17 Iowa 336. *Kan.*—*State v. Chafin*, 80 Kan. 653, 103 Pac. 143; *Bashford v. Wells*, 78 Kan. 295, 96 Pac.

mit adultery with an unmarried woman, the essence of the crime being in the adulteration of offspring.<sup>7</sup> In others, such intercourse is

663, 18 L. R. A. (N. S.) 580. **Me.**—*State v. Weatherby*, 43 Me. 258, 69 Am. Dec. 59; *State v. Hutchinson*, 36 Me. 261. **Mass.**—*Com. v. Bakeman*, 131 Mass. 577, 41 Am. Rep. 248; *Com. v. Munson*, 127 Mass. 459, 470, 34 Am. Rep. 411; *Com. v. Thompson*, 11 Allen 23, 83 Am. Dec. 653, s. c. 6 Allen 591, 87 Am. Dec. 685; *Com. v. Reardon*, 6 Cush. 78; *Com. v. Elwell*, 2 Metc. 190, 35 Am. Dec. 398; *Com. v. Call*, 21 Pick. 509, 32 Am. Dec. 284. **Mo.**—*State v. Coffee*, 39 Mo. App. 56. **Mont.**—*Territory v. Whitcomb*, 1 Mont. 359, 25 Am. Rep. 740. **Neb.**—*State v. Byrum*, 60 Neb. 384, 83 N. W. 207; *Sweenie v. State*, 59 Neb. 269, 80 N. W. 815. **N. H.**—*State v. Taylor*, 58 N. H. 331; *State v. Wallace*, 9 N. H. 515. **N. M.**—*United States v. Meyers*, 14 N. M. 522, 99 Pac. 336. **N. Y.**—*New York Penal Code*, § 280a. **N. C.**—*State v. Cowell*, 26 N. C. 231. **N. D.**—*State v. Wesie*, 17 N. D. 567, 118 N. W. 20. **Ohio.**—*Holdren v. State*, 29 Ohio St. 651. **Okl.**—*Ex parte Cranford*, 105 Pac. 367. **Pa.**—*Helfrich v. Com.*, 33 Pa. 68, 75 Am. Dec. 579; *Dinke v. Com.*, 17 Pa. 126. **S. C.**—*Hull v. Hull*, 2 Strobb. Eq. 174, 187. **S. D.**—*State v. Whealey*, 5 S. D. 427, 59 N. W. 211. **Tex.**—*Webb v. State*, 24 Tex. App. 164, 5 S. W. 651; *Hildreth v. State*, 19 Tex. App. 195; *Parks v. State*, 4 Tex. App. 134; *Swancoat v. State*, 4 Tex. App. 105; *Parks v. State*, 3 Tex. App. 337. **Utah.**—*State v. Thompson*, 31 Utah 228, 87 Pac. 709. **Vt.**—*State v. Bisbee*, 75 Vt. 293, 54 Atl. 1081; *State v. Searle*, 56 Vt. 516. **Va.**—*Com. v. Lafferty*, 6 Gratt. 672. **Wash.**—*State v. Keith*, 48 Wash. 77, 92 Pac. 893. **Wis.**—*State v. Fellows*, 50 Wis. 65, 6 N. W. 239; *Hunter v. United States*, 1 Pin. 91, 39 Am. Dec. 277.

Apart from statutes adultery cannot be committed by one unmarried person. If one only of two actors is married, the act will be adultery in that one and fornication in the other. *State v. Chafin*, 80 Kan. 653, 103 Pac. 143.

Under the Georgia statute (Penal Code, 1895, § 381) there are three distinct kinds of indictable sexual intercourse, viz.: adultery, fornication, and adultery and fornication; the offense in each case being a joint one. If both parties to the criminal act are married, each is guilty of adultery; if both are

single, each is guilty of fornication; if one is married and the other single, each is guilty of adultery and fornication. *Kendrick v. State*, 100 Ga. 360, 28 S. E. 120, explaining *Cook v. State*, 11 Ga. 53, 56 Am. Dec. 410, and overruling *Butt v. State*, 33 Ga. 56.

Under this statute unless it appears at the trial that both parties to the offense were married persons at the time of its commission, no conviction for adultery can be had. *Tison v. State*, 125 Ga. 7, 53 S. E. 809; *Zackery v. State*, 6 Ga. App. 104, 64 S. E. 281.

**Consent.**—As to the necessity for and sufficiency of consent, see **U. S.**—*Cartier v. United States*, 148 Fed. 804, 78 C. C. A. 494. **Ga.**—*Speer v. State*, 60 Ga. 381; *Nephew v. State*, 5 Ga. App. 841, 63 S. E. 930. **Ind.**—*State v. Markins*, 95 Ind. 464, 48 Am. Rep. 733. **N. D.**—*State v. Wesie*, 17 N. D. 567, 118 N. W. 20. **Tex.**—*Swancoat v. State*, 4 Tex. App. 105. **Wash.**—*State v. Butler*, 8 Wash. 194, 35 Pac. 1093, 40 Am. St. Rep. 900, 25 L. R. A. 434.

It has, however, been held that there is sufficient consent to bring the act done within the definition of adultery, if such act be willingly committed by the person charged with the offense, regardless of whether there was consent to the act of intercourse by the other party to the act. **Iowa.**—*State v. Henderson*, 84 Iowa 161, 50 N. W. 758; *State v. Donovan*, 61 Iowa 278, 16 N. W. 130; *State v. Sanders*, 30 Iowa 582. **Mass.**—*Com. v. Bakeman*, 131 Mass. 577, 41 Am. Rep. 248. **Tex.**—*Alonzo v. State*, 15 Tex. App. 378, 49 Am. Rep. 207; *Swancoat v. State*, 4 Tex. App. 105.

**Consent on her part**, no matter how reluctant, is sufficient to make the offense adultery. A distinction is being made between the use of force to secure her consent to the intercourse and the fact that the intercourse was forcibly had. *Matthews v. State*, 101 Ga. 547, 29 S. E. 424.

As to the method of proving marriage see 1 **ENCYCLOPAEDIA OF EVIDENCE**, 625-6.

**7. Ind.**—*State v. Chandler*, 26 Ind. 591; *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21. **Me.**—*State v. Weatherby*, 43 Me. 258, 69 Am. Dec. 59. **Minn.**—*State v. Armstrong*, 4 Minn. 251.



held to be adultery in both where either one of the persons is married.<sup>8</sup>

2. **Statutory Elements.**—Not being a common law offense the elements of the offense, where it is an offense, can be ascertained only by an examination of the statute in each jurisdiction.<sup>9</sup>

**N. J.**—State *v. Lash*, 16 N. J. L. 380, 32 Am. Dec. 397.

Under the **Edmunds-Tucker Act**, when the act of adultery is committed between a married woman and an unmarried man, both are guilty of adultery; and when committed between a married man and an unmarried woman, the man is guilty of adultery. *United States v. Meyers*, 14 N. M. 522, 92 Pac. 336.

Under the **Philippine statute** adultery can be committed by a married woman and by a man who lies with her knowing that she is a married woman. *Serra v. Mortiga*, 204 U. S. 470, 27 Sup. Ct. 343, 51 L. ed. 571.

8. **Iowa.**—State *v. Hasty*, 121 Iowa 507, 96 N. W. 1115; State *v. Oden*, 100 Iowa 22, 69 N. W. 270; State *v. Mahan*, 81 Iowa 121, 46 N. W. 855; State *v. Wilson*, 22 Iowa 364. **Kan.**—*Bashford v. Wells*, 78 Kan. 295, 96 Pac. 663, 18 L. R. A. (N. S.) 580. **Mass.**—*Com. v. Call*, 21 Pick. 509, 32 Am. Dec. 284. **Mont.**—Territory *v. Whitcomb*, 1 Mont. 359, 25 Am. Rep. 740. **Neb.**—State *v. Byrum*, 60 Neb. 384, 83 N. W. 207. **Okla.**—*In re Smith*, 2 Okla. 153, 37 Pac. 1099. **S. D.**—State *v. Whealey*, 5 S. D. 427, 59 N. W. 211. **Vt.**—State *v. Audette*, 81 Vt. 400, 70 Atl. 833, 130 Am. St. Rep. 1061, 18 L. R. A. (N. S.) 527; State *v. Searle*, 56 Vt. 516. **Wash.**—State *v. Keith*, 48 Wash. 77, 92 Pac. 893.

9. **"Open and Notorious."**—Under the statutes of the following states the acts of adultery must be open and notorious. **Ala.**—*Quartemas v. State*, 48 Ala. 269; *Collins v. State*, 14 Ala. 608. **Cal.**—*Ex parte Thomas*, 103 Cal. 497, 37 Pac. 514; *People v. Gates*, 46 Cal. 53. **Ill.**—*Crane v. People*, 168 Ill. 395, 48 N. E. 54; *Miner v. People*, 58 Ill. 59. **Ind.**—State *v. Johnson*, 69 Ind. 85; State *v. Gartrell*, 14 Ind. 280; *Wright v. State*, 5 Blackf. 358, 35 Am. Dec. 126. **Mo.**—State *v. Crowner*, 56 Mo. 147; State *v. Coffee*, 39 Mo. App. 56.

If the act is done in such a manner, or under such circumstances as necessarily to become public or generally known in the neighborhood, it is open and notorious. *Grisham v. State*, 2 Verg. (Tenn.) 589, 596.

**Lewd and Lascivious Cohabitation.**

In some states the offense consists in lewd and lascivious cohabitation. **Fla.**—*Thomas v. State*, 39 Fla. 437, 22 So. 725. **Mass.**—*Com. v. Munson*, 127 Mass. 459, 34 Am. Rep. 411. **Tenn.**—State *v. Moore*, 1 Swan 136.

Under the **Massachusetts statute** providing that if the parties "shall lewdly and lasciviously associate and cohabit together," proof of a single act might be sufficient to maintain an indictment for adultery. *Com. v. Calef*, 10 Mass. 153.

Under a statute condemning those "who shall lewdly and lasciviously abide and cohabit with each other," it is not necessary that the acts be open and notorious; it is sufficient if the defendants live together as man and wife and indulge in sexual intercourse habitually. State *v. West*, 84 Mo. 440. See the little "Lewdness."

**Openly Living Together.**—Open and unlawful living together as if the marriage relation existed constitutes the offense in some states. **Cal.**—*People v. Salmon*, 148 Cal. 303, 83 Pac. 42, 113 Am. St. Rep. 268, 2 L. R. A. (N. S.) 1186. **Fla.**—*Penton v. State*, 42 Fla. 560, 28 So. 774; *Thomas v. State*, 39 Fla. 437, 22 So. 725; *Pinson v. State*, 28 Fla. 735, 9 So. 706; *Luster v. State*, 23 Fla. 339, 2 So. 690. **Ga.**—*Lawson v. State*, 116 Ga. 571, 42 S. E. 752. **Ind.**—*Jackson v. State*, 116 Ind. 464. 19 N. E. 330; *Clouser v. Clapper*, 59 Ind. 548; State *v. Gartrell*, 14 Ind. 280; *Wright v. State*, 5 Blackf. 358, 35 Am. Dec. 126. **Ia.**—State *v. Marvin*, 12 Iowa, 499. **Mass.**—*Com. v. Calef*, 10 Mass. 153. **Mo.**—State *v. Sekrit*, 130 Mo. 401, 32 S. W. 977; State *v. Crowner*, 56 Mo. 147; State *v. Coffee*, 75 Mo. App. 88; State *v. Coffee*, 39 Mo. App. 56. **Mont.**—Territory *v. Whitcomb*, 1 Mont. 359. **N. J.**—*Bereckman v. Bereckman*, 16 N. J. Eq. 122, 133. **Tex.**—*Richardson v. State*, 37 Tex. 346; *Bradshaw v. State* (Tex. Crim.), 61 S. W. 713. **Va.**—*Pruner v. Com.*, 82 Va. 115; *Jones v. Com.*, 80 Va. 18. **W. Va.**—State *v. Miller*, 42 W. Va. 215, 24 S. E. 822.

As to what constitutes "living together," see: **Ala.**—*Cox v. State*, 117 Ala. 103, 23 So. 806, 67 Am. St. Rep. 166, 41 L. R. A. 760; *Wright v. State*,

**II. PROSECUTION.—A. INSTITUTION OF PROSECUTION.—1. In General.**—The prosecution must be initiated by one who would be a competent witness against the defendant upon the charge of adultery.<sup>10</sup> And unless specially authorized by statute,<sup>11</sup> neither husband nor wife can institute a prosecution for adultery against the other.<sup>12</sup>

108 Ala. 68, 18 So. 941; Walker v. State, 104 Ala. 56, 16 So. 7; Bodifield v. State, 86 Ala. 67, 5 So. 559; 11 Am. St. Rep. 26; Smith v. State, 86 Ala. 57, 6 So. 71, 11 Am. St. Rep. 17; Hall v. State, 53 Ala. 463; Smith v. State, 39 Ala. 554. Ark.—Turney v. State, 60 Ark. 259, 29 S. W. 893; Taylor v. State, 36 Ark. 84; Lyerly v. State, 36 Ark. 39; Sullivan v. State, 32 Ark. 187. Cal.—People v. Salmon, 148 Cal. 303, 83 Pac. 42, 113 Am. St. Rep. 268, 2 L. R. A. (N. S.) 1186. Ill.—Lyman v. People, 198 Ill. 544, 64 N. E. 974, affirming 98 Ill. App. 386. Miss.—Kinard v. State, 57 Miss. 132; Carotti v. State, 42 Miss. 334, 97 Am. Dec. 465. Mo.—State v. Chandler, 132 Mo. 155, 163, 33 S. W. 797, 53 Am. Rep. 483; State v. Sekrit, 130 Mo. 401, 32 S. W. 977; State v. Crowner, 56 Mo. 147. S. C.—State v. Carroll, 30 S. C. 85, 8 S. E. 433, 14 Am. St. Rep. 883. Tex.—Richardson v. State, 37 Tex. 346; Jackson v. State, 51 Tex. Crim. 220, 101 S. W. 807; Shaw v. State, 49 Tex. Crim. 379, 91 S. W. 1087; Boswell v. State, 48 Tex. Crim. 550, 80 S. W. 1076, 122 Am. St. Rep. 731; Collins v. State, 46 Tex. Crim. 550, 80 S. W. 372; Hilton v. State, 41 Tex. Crim. 190, 53 S. W. 113; Massey v. State (Tex. Crim.), 65 S. W. 911; Bird v. State, 27 Tex. App. 635, 11 S. W. 641, 11 Am. St. Rep. 214; Morrill v. State, 5 Tex. App. 447; Parks v. State, 4 Tex. App. 134; Fox v. State, 3 Tex. App. 329, 30 Am. Rep. 144. Va.—Pruner v. Com., 82 Va. 115; Jones v. Com., 80 Va. 18. W. Va.—State v. Miller, 42 W. Va. 215, 24 S. E. 882.

**Habitual Intercourse.**—The Mississippi statute formerly required a "living together." Carotti v. State, 42 Miss. 334, 97 Am. Dec. 465. But at present "habitual sexual intercourse" is punished whether the parties live together or not. Granberry v. State, 61 Miss. 440.

In Vermont, it is sufficient to establish general cohabitation with suspicious circumstances and a mutual adulterous disposition. State v. Kimball, 74 Vt. 223, 52 Atl. 430.

In some states where the statute providing the punishment does not define

the offense the courts have adopted the definition of the ecclesiastical law. D. C.—Chase v. United States, 7 App. Cas. 149, citing Whart. Cr. Law (7th ed.) § 2647. Ill.—Miner v. People, 58 Ill. 59; Lyman v. People, 198 Ill. 544, 64 N. E. 974, affirming 98 Ill. App. 386. Ind.—State v. Pearce, 2 Blackf. 318. Mass.—Com. v. Call, 21 Pick. 509, 32 Am. Dec. 284. Minn.—State v. Armstrong, 4 Minn. 251. Vt.—State v. Searle, 56 Vt. 516.

Solicitation is no part of the act of adultery itself. Smith v. Com., 54 Pa. 209, 93 Am. Dec. 686; State v. Butler, 8 Wash. 194, 35 Pac. 1093, 40 Am. St. Rep. 900, 25 L. R. A. 434. And see the title "Solicitation."

**Conspiracy To Commit Adultery.**—The acting of the parties in concert cannot be the subject of an indictment for conspiracy. Miles v. State, 58 Ala. 390; Shannon v. Com., 14 Pa. 226. See the title "Conspiracy."

For a discussion of the relevancy and sufficiency of evidence to prove adultery, see 1 ENCYCLOPAEDIA OF EVIDENCE, 628-634.

10. State v. Berlin, 42 Mo. 572; Nixon v. Armstrong, 38 Tex. 297; Thomas v. State, 14 Tex. App. 70. See the title "Witnesses."

11. As in: Iowa.—People v. Loftus, 128 Iowa 529, 104 N. W. 906; Bush v. Workman, 64 Iowa 205, 19 N. W. 910; State v. Roth, 17 Iowa 336. Mich.—Wilson v. Daboll, 104 Mich. 155, 62 N. W. 293; People v. Dalrymple, 55 Mich. 519, 22 N. W. 20; People v. Davis, 52 Mich. 569, 18 N. W. 362; Bayliss v. People, 46 Mich. 221, 9 N. W. 257; People v. Knapp, 42 Mich. 267, 3 N. W. 927, 36 Am. Rep. 438; Parsons v. People, 21 Mich. 509. Minn.—State v. Brecht, 41 Minn. 50, 42 N. W. 602; People v. Armstrong, 4 Minn. 251. N. D.—State v. Wesie, 17 N. D. 567, 118 N. W. 20. Okla.—In re Smith, 2 Okla. 153, 37 Pac. 1099. See the title "Husband and Wife."

12. Conn.—State v. Gardner, 1 Root 485. Ga.—Howard v. State, 94 Ga. 587, 20 S. E. 426. Hawaii.—Hawaii v. Kahakaula, 10 Hawaii 28. Ill.—Miner v. People, 58 Ill. 59. Me.—State

One who would not be a competent witness on the trial cannot make the complaint.<sup>13</sup>

**2. Exclusive Right to Prosecute.**—a. *In General.*—By some statutes the exclusive right to institute the prosecution is in the unoffending spouse.<sup>14</sup>

*v. Welch*, 26 Me. 30, 45 Am. Dec. 94; *State v. Burlingham*, 15 Me. 104. **Mass.**—*Com. v. Sparks*, 7 Allen 534. **Mich.**—*People v. Imes*, 110 Mich. 250, 68 N. W. 157; *People v. Isham*, 109 Mich. 72, 67 N. W. 819; *People v. Fowler*, 104 Mich. 449, 62 N. W. 572; *Hanselman v. Dovel*, 102 Mich. 505, 60 N. W. 978, 47 Am. St. Rep. 557. **Minn.**—*State v. Armstrong*, 4 Minn. 251. See *State v. Vollander*, 57 Minn. 225, 58 N. W. 878. **Mo.**—*State v. Berlin*, 42 Mo. 572. **N. J.**—*State v. Wilson*, 31 N. J. L. 77. **N. C.**—*State v. Raby*, 121 N. C. 682, 28 S. E. 490; *State v. Jolly*, 20 N. C. 110, 32 Am. Dec. 673. **Pa.**—*Com. v. Jailer*, 1 Grant 218; *Com. v. Shaffer*, 27 Pa. Co. Ct. 415; *Com. v. Vance*, 29 Pa. Co. Ct. 257; *Com. v. Greary*, 9 Pa. Co. Ct. 60. But see *Com. v. Nick*, 29 Pa. Co. Ct. 8. **Tex.**—*McLean v. State*, 32 Tex. Crim. 521, 24 S. W. 898; *Alonzo v. State*, 15 Tex. App. 378, 49 Am. Rep. 207; *Thomas v. State*, 14 Tex. App. 70. **Vt.**—*State v. Bridgman*, 49 Vt. 202, 24 Am. Rep. 124. **Wis.**—*Crawford v. State*, 98 Wis. 623, 74 N. W. 537, 67 Am. St. Rep. 829; *Mills v. United States*, 1 Pin. 73.

The fact that two parties are indicted and placed on trial together, and it appear that the complaint was signed by one whom it is claimed is the husband of one of the defendants, does not make the proceedings void, where it does not also appear from the records that such complainant is in fact the husband, similarity in name not being sufficient. *Solomon v. State*, 39 Tex. Crim. 140, 45 S. W. 706.

**13. Mo.**—*State v. Berlin*, 42 Mo. 572. **Pa.**—*Com. v. Boyd & Mountz*, 1 Grant 218. **Tex.**—*Thomas v. State*, 14 Tex. App. 70.

**14. U. S.**—*Serra v. Mortiga*, 204 U. S. 470, 27 Sup. Ct. 343, 51 L. ed. 571. **Ia.**—*State v. Loftus*, 128 Iowa 529, 104 N. W. 906; *State v. Stout*, 71 Iowa 343, 32 N. W. 372; *Bush v. Workman*, 64 Iowa 205, 19 N. W. 910; *State v. Hazen*, 39 Iowa 648; *State v. Bennett*, 31 Iowa 25; *State v. Roth*, 17 Iowa 336, 341. **Mich.**—*Willson v. Daboll*, 104 Mich. 155, 62 N. W. 293; *People v. Dalrymple*, 55 Mich. 519, 22 N. W. 20; *Bayliss v. People*, 46 Mich. 221, 9 N. W. 257;

*People v. Knapp*, 42 Mich. 267, 3 N. W. 927, 36 Am. Rep. 438; *Parsons v. People*, 21 Mich. 509. **Minn.**—*State v. Armstrong*, 4 Minn. 251. **N. D.**—*State v. Wesie*, 17 N. D. 567, 118 N. W. 20. **Okla.**—*In re Smith*, 2 Okla. 153, 37 Pac. 1099.

In Oklahoma subsequent to the decision of the Smith case (2 Okla. 153) a statute was passed providing that where the persons are living together in open and notorious adultery any person may make the complaint. *Ex parte Cranford* (Okla.), 105 Pac. 367.

Under the Pennsylvania statute the husband, though not a competent witness on the trial, may institute the prosecution for adultery. *Com. v. Barr*, 25 Pa. Super. 609; *Com. v. Geary*, 9 Pa. Co. Ct. 60.

Under a statute requiring the prosecution to be instituted by the husband or wife of the party to be proceeded against, the appearance of a wife before the grand jury in response to a subpoena, believing such appearance to be obligatory, but not intending to prefer charges of adultery against him, would not be a complaint by her against her husband within the meaning of the law. *State v. Stout*, 71 Iowa 343, 32 N. W. 372; *State v. Donovan*, 61 Iowa 278, 16 N. W. 130.

**Consent Unnecessary.**—If a statute allows to the injured wife or husband the exclusive privilege of instituting the prosecution for adultery, it is contemplated that the wife may proceed without the consent of the husband. *People v. Knapp*, 42 Mich. 267, 3 N. W. 927, 36 Am. Rep. 438.

**Complaint Not an Element of the Offense.**—The complaint is not an element of the crime, but a limitation of the power of the court to punish crime in certain cases. **Iowa.**—*State v. Harmon*, 135 Iowa 167, 112 N. W. 632; *State v. Athey*, 133 Iowa 382, 108 N. W. 224; *State v. Clemenson*, 123 Iowa 524, 99 N. W. 139; *State v. Andrews*, 95 Iowa 451, 64 N. W. 404; *State v. Maas*, 83 Iowa 469, 49 N. W. 1037; *State v. Mahan*, 81 Iowa 121, 46 N. W. 855; *State v. Donovan*, 61 Iowa 278, 16 N. W. 130. **Mich.**—*People v. Isham*, 109 Mich. 72, 67 N. W. 819. **Minn.**—



b. *Prosecution of Married Persons.* — When the prosecution is required to be instituted by the husband or wife of one of the offenders, the general rule is that when both offenders are married persons, the proceedings against one may be instituted by the husband or wife of either.<sup>15</sup>

In Iowa, however, where both offenders are married the complaint must be made by the husband or wife of the offender proceeded against.<sup>16</sup>

c. *Prosecution of Unmarried Persons.* — Where a statute provides that an unmarried person may also be guilty of adultery, the prosecution may be instituted by the husband or wife of the married person with whom the offense was committed.<sup>17</sup>

B. COMMENCEMENT OF PROSECUTION. — The prosecution is commenced when the information is filed with a magistrate,<sup>18</sup> or complaint made to the grand jury,<sup>19</sup> with the intent to prosecute the defendant.<sup>20</sup>

C. RIGHT TO DISCONTINUE PROSECUTION. — Whether the right to determine the commencement of the prosecution does not also carry with it the power to recall or dismiss the charge has resulted in a conflict of decision. Some courts hold that there is this right to discontinue,<sup>21</sup> while others hold the contrary.<sup>22</sup>

D. ADULTERY A PUBLIC OFFENSE. — Adultery is a public offense, even though the statute require that the prosecution is only to

State *v.* Brecht, 41 Minn. 50, 42 N. W. 602.

No prejudice is suffered by a defendant by the failure of the court to specifically charge that the prosecution was instituted at the instance of the defendant's wife, in the absence of a specific request by the defendant for an instruction upon it, the record showing that the wife testified she made the complaint upon which the prosecution was commenced, and such testimony appearing to be uncontradicted. State *v.* Hazen, 39 Iowa 648.

15. Mich. — Willson *v.* Daboll, 104 Mich. 155, 62 N. W. 293; People *v.* Davis, 52 Mich. 569, 18 N. W. 362. Minn. — State *v.* Brecht, 41 Minn. 50, 42 N. W. 602. N. D. — State *v.* Wesie, 17 N. D. 567, 118 N. W. 20. Okla. — *In re* Smith, 2 Okla. 153, 37 Pac. 1099. 16. State *v.* Oden, 100 Iowa 22, 69 N. W. 270; State *v.* Mahan, 81 Iowa 121, 46 N. W. 855; Bush *v.* Workman, 64 Iowa 205, 19 N. W. 910.

Subsequent to the Smith case (2 Okla. 153) a statute was passed amending the law and provided that "any person may make complaint when persons are living together in open and notorious adultery." So that now the prosecution could in such a case be instituted after the divorce of the par-

ties. *Ex parte* Cranford (Okla.), 105 Pac. 367.

17. Ia. — State *v.* Corliss, 85 Iowa 18, 51 N. W. 1154; State *v.* Maas, 83 Iowa 469, 49 N. W. 1037; State *v.* Mahan, 81 Iowa 121, 46 N. W. 855; State *v.* Wilson, 22 Iowa 364. Mich. — People *v.* Davis, 52 Mich. 569, 18 N. W. 362; Bayliss *v.* People, 46 Mich. 221, 9 N. W. 257. Pa. — Com. *v.* Vance, 29 Pa. Co. Ct. 257; Com. *v.* Nick, 29 Pa. Co. Ct. 8.

18. State *v.* Briggs, 68 Iowa 416, 27 N. W. 358; State *v.* Dingee, 17 Iowa 232.

19. State *v.* Henke, 58 Iowa 457, 12 N. W. 477; State *v.* Baldy, 17 Iowa 39.

20. State *v.* Loftus, 128 Iowa 529, 104 N. W. 906; State *v.* Stout, 71 Iowa 343, 32 N. W. 372; State *v.* Donovan, 61 Iowa 278, 16 N. W. 130; State *v.* Roth, 17 Iowa 336.

Intent Question for Jury. — Whether the complaint was made with such an intent is a question for the jury. State *v.* Briggs, 68 Iowa 416, 27 N. W. 358.

21. Hosford *v.* Gratiot Circuit Judge, 129 Mich. 302, 88 N. W. 627; People *v.* Dalrymple, 55 Mich. 519, 22 N. W. 20.

22. State *v.* Athey, 133 Iowa 382, 108 N. W. 224; State *v.* Briggs, 68 Iowa 416, 27 N. W. 358; State *v.* Dingee, 17

be instituted at the instance of the injured husband or wife.<sup>23</sup>

**E. DIVORCE AS AFFECTING PROSECUTION.**—Where the marriage relation exists between the parties when the complaint is made, a subsequent divorce will not discontinue the proceeding.<sup>24</sup> No proceeding, however, can be instituted by a former spouse where a divorce is granted before the complaint is made.<sup>25</sup>

**III. PRELIMINARY PROCEEDINGS.**—**A. JURISDICTION.**—The jurisdiction of the magistrate's court on the preliminary investigation does not depend upon the residence of the defendant.<sup>26</sup>

**B. COMPLAINT.**—The fact that the prosecution was begun by one who would be a competent witness on the trial need never be set forth in the complaint.<sup>27</sup>

**C. GRAND JURY PROCEEDINGS.**—The appearance before the grand jury of the husband or wife is not essential after he or she has commenced the prosecution by filing the information.<sup>28</sup>

**IV. INDICTMENT AND INFORMATION.**—**A. JOINDER OF PARTIES.**—The indictment upon a prosecution for adultery may be joint.<sup>29</sup>

Iowa 232; *State v. Baldy*, 17 Iowa 39.

23. *State v. Corliss*, 85 Iowa 18, 51 N. W. 1154, explaining *State v. Bennett*, 31 Iowa 24, on this point.

Under the Philippine statute adultery is classed as a private offense. *Serra v. Mortiga*, 104 U. S. 470, 27 Sup. Ct. 343, 51 L. ed. 571.

**Double Prosecution.**—Where adultery is made a crime by a statute of the United States and also by the statute of a territory, it may be prosecuted independently under both statutes, and the territorial act remains in force under the state constitution until altered or repealed by the legislature. The fact that congress defined adultery and prescribed the punishment therefore did not prevent the territorial legislature from punishing by statute the same act as an offense against the territory. *State v. Norman*, 16 Utah 457, 52 Pac. 986. See also *United States v. Cruikshank*, 92 U. S. 542, 550, 23 L. ed. 588.

24. *State v. Russell*, 90 Iowa 569, 58 N. W. 915.

25. *State v. Loftus*, 128 Iowa 529, 104 N. W. 906 (criticising *State v. Smith*, 108 Iowa 440, 79 N. W. 115); *In re Smith*, 2 Okla. 153, 37 Pac. 1099.

**Divorce and Remarriage.**—The parties were remarried after a divorce and the act complained of took place previous to such remarriage and subsequent to the divorce. It was held that the husband could institute the proceeding against the paramour of his wife,

though no marriage relation existed between them at the time of the act complained of. *State v. Smith*, 108 Iowa 440, 79 N. W. 115.

26. *State v. Williams* (S. C.), 65 S. E. 982. See the title "Jurisdiction."

27. *People v. Payment*, 109 Mich. 553, 67 N. W. 689; *People v. Isham*, 109 Mich. 72, 67 N. W. 819; *State v. Hayes*, 51 Ore. 466, 94 Pac. 751.

**Complaint no Part of the Offense.** The making of the complaint is no part of the offense, and it is unnecessary to allege that it was made by the proper party. *State v. Brecht*, 41 Minn. 50, 42 N. W. 602.

**Statement by County Attorney Not Sufficient.**—A statement by the county attorney that the complainant wanted the guilty parties punished cannot be construed as the making of the complaint by the proper party, nor would the mere appearance of the party before the grand jury indicate that fact. *State v. Loftus*, 128 Iowa 529, 104 N. W. 906.

28. *State v. Dingee*, 17 Iowa 232. See generally the title "Grand Jury."

29. **Ia.**—*State v. Dingee*, 17 Iowa 232. **Me.**—*State v. Bartlett*, 53 Me. 446. **Mass.**—*Com. v. Bakeman*, 131 Mass. 577, 41 Am. Rep. 248; *Com. v. Elwell*, 2 Mete. 190, 35 Am. Dec. 398. **Va.**—*Scott v. Com.*, 77 Va. 344.

**Joint Act.**—If the parties to the offense be jointly indicted, the indictment must show a joint act or it will be demurrable for duplicity. *Mauil v. State*, 37 Ala. 160.

or several.<sup>30</sup> The fact that the offense is, in a sense, a joint one does not change the rule as to individual responsibility.<sup>31</sup>

**B. CERTAINTY.**—In conformity to the usual rule all the facts necessary to constitute the offense must be set forth in the indictment with certainty and precision.<sup>32</sup>

**Indictment Good When Taken Together.**—An indictment which, when viewed as a whole, charges an offense under the statute, will be sustained even though certain of the specifications contained therein would not be sufficient standing alone.<sup>33</sup>

**C. CHARGING THE OFFENSE.—1. In General.**—In setting out the offense it is advisable to charge the crime in the language of the statute creating it.<sup>34</sup> But it is usually sufficient to use words which in

30. *Ga.*—*Wasden v. State*, 18 *Ga.* 264. *Ill.*—*Lyman v. People*, 198 *Ill.* 544, 64 *N. E.* 974, *affirming* 98 *Ill. App.* 386. *Ia.*—*State v. Dingee*, 17 *Iowa* 232. *R. I.*—*State v. Watson*, 20 *R. I.* 354, 39 *Atl.* 193, 78 *Am. St. Rep.* 871. *Vt.*—*State v. Searle*, 56 *Vt.* 516. *Wash.*—*State v. Nelson*, 39 *Wash.* 221, 81 *Pac.* 721. See the title “**Indictment and Information.**”

31. *Ga.*—*Wasden v. State*, 18 *Ga.* 264. *Ill.*—*Lyman v. People*, 198 *Ill.* 544, 64 *N. E.* 974, *affirming* 98 *Ill. App.* 386. *Ia.*—*State v. Dingee*, 17 *Iowa* 232.

**Trial of One Defendant on Joint Indictment.**—The defendants though jointly indicted need not be tried together, and one of such defendants may be tried and convicted without regard to the other. *Ill.*—*Lyman v. People*, 198 *Ill.* 544, 64 *N. E.* 974. *N. C.*—*State v. Parham*, 50 *N. C.* 416. *S. C.*—*State v. Carroll*, 30 *S. C.* 85, 8 *S. E.* 433, 14 *Am. St. Rep.* 883.

32. *Ia.*—*State v. Briggs*, 68 *Iowa* 420, 27 *N. W.* 358. *Me.*—*State v. Thurstin*, 35 *Me.* 205, 58 *Am. Dec.* 695. *State v. Philbrick*, 31 *Me.* 401. *Mass.*—*Moore v. Conn.*, 6 *Metc.* 243, 39 *Am. Dec.* 724. *Mo.*—*State v. Sekrit*, 130 *Mo.* 401, 32 *S. W.* 977; *State v. Hillman*, 128 *Mo. App.* 172, 106 *S. W.* 603. *Tex.*—*Edwards v. State*, 10 *Tex. App.* 25. *Vt.*—*State v. Miller*, 60 *Vt.* 90, 12 *Atl.* 526; *State v. Higgins*, 53 *Vt.* 191. *W. Va.*—*State v. Ball*, 30 *W. Va.* 382, 4 *S. E.* 645.

A general averment that the accused had committed a particular crime named, without more specific allegations, would be insufficient. *State v. Thurstin*, 35 *Me.* 205, 58 *Am. Dec.* 695.

When the charge is that adultery was committed by one mode, and the state fails to make out its case, defendant cannot be held for committing adultery by another mode also inhibited by stat-

ute, which if it had been charged would have been sufficiently proved. *Bird v. State*, 27 *Tex. App.* 635, 11 *S. W.* 641, 11 *Am. St. Rep.* 214.

33. Where the statute provides that every person who shall live in a state of open and notorious adultery; and every man or woman (one or both of whom are married, and not to each other), who shall lewdly and lasciviously abide and cohabit with each other; and every person married or unmarried, who shall be guilty of open, gross lewdness or lascivious behavior, or of any open and notorious act of public indecency, grossly scandalous, etc., if an indictment charges each one of these offenses it will not be quashed for failing to allege whether the defendants were married or unmarried, for that has no application to the third specification. *State v. Bess*, 20 *Mo.* 419.

**Formal Errors Immaterial.**—In modern criminal practice, merely formal errors and verbal variances, which it is apparent could not have misled or prejudiced the accused, are treated as immaterial. *State v. Burns*, 119 *Iowa* 663, 94 *N. W.* 238.

**Negative Allegations.**—It is not necessary that the indictment should negative every conceivable fact that may change the character of the offense. *State v. Gooch*, 7 *Blackf. (Ind.)* 468.

34. *Ala.*—*Love v. State*, 124 *Ala.* 82, 27 *So.* 217. *Ga.*—*Cook v. State*, 11 *Ga.* 53, 56 *Am. Dec.* 410. *Ill.*—*McCutecheon v. People*, 69 *Ill.* 601. *Ind.*—*State v. Chandler*, 96 *Ind.* 591. *Mo.*—*State v. Roehm*, 61 *Mo.* 82; *State v. Stubblefield*, 32 *Mo.* 563; *State v. Fulton*, 19 *Mo.* 680. *N. C.*—*State v. Stubbs*, 108 *N. C.* 774, 13 *S. E.* 90; *State v. Lyerly*, 52 *N. C.* 158. *Tex.*—*Mitten v. State*, 24 *Tex. App.* 346, 6 *S. W.* 196; *Holland v. State*, 14 *Tex. App.* 182. *Va.*—*Scott v. Com.*, 77 *Va.* 344.



common acceptance are equivalent in meaning.<sup>85</sup> The failure, how-

Where a statute denounces an offense and the different ways by which it might be committed, the pleader may select either or may embody in the indictment all and every means charged in the statute. *Weaver v. State*, 52 Tex. Crim. 11, 105 S. W. 189.

**Living Together in a State of Adultery.**—An indictment was good which charged that defendant "did live in a state of adultery with one J. F. and did then and there cohabit with and have carnal knowledge of the body of the said J. F., at divers times on the days and dates aforesaid—he the said W. A. P. (the defendant) being then and there lawfully married to one O. S. who was still living and not divorced from the said W. A. P.," etc. *Parks v. State*, 4 Tex. App. 134.

35. **Ind.**—*State v. Chandler*, 96 Ind. 591; *State v. Johnson*, 69 Ind. 85. **Mass.**—*Com. v. Squires*, 97 Mass. 59, where it was said that the words "carnal knowledge" mean, both in law and in common speech, sexual bodily connection. **Mo.**—*State v. Clawson*, 30 Mo. App. 139. **N. H.**—*State v. Clark*, 54 N. H. 456. **N. M.**—*United States v. Griego*, 11 N. M. 392, 72 Pac. 20. **N. C.**—*State v. Tally*, 74 N. C. 322 (where the indictment for fornication and adultery charged—"did unlawfully and adulterously bed and cohabit together, and then and there did unlawfully commit fornication and adultery," etc.); *State v. Lyerly*, 52 N. C. 158 (where the indictment charged that "G. M. L. (a male)" and "J. M. (a female)" unlawfully did bed and cohabit together without being "lawfully married," etc., "and then and there and on said other days, etc., did commit fornication and adultery"); *State v. Fore*, 23 N. C. 378. **Pa.**—*Gorman v. Com.*, 124 Pa. 536, 17 Atl. 26, 23 W. N. C. 405. **S. C.**—*State v. Carroll*, 30 S. C. 85, 8 S. E. 433, 14 Am. St. Rep. 883. **Tex.**—*Mitten v. State*, 24 Tex. App. 346, 6 S. W. 196; *Watson v. State* 13 Tex. App. 76; *Edwards v. State*, 10 Tex. App. 25; *Swancoat v. State*, 4 Tex. App. 105.

The indictment charged that the defendant "did commit the crime of adultery with one E. C. by then and there having carnal knowledge of the body of her, the said E. C., the said T. G. (the defendant) being then and there a married man and having then and there a lawful wife alive," etc.

Held that it was not necessary to set forth either the name of the defendant's wife or that E. C. was not his lawful wife, it being necessarily implied if not plainly expressed that E. C. was not the wife of the defendant. *Gorman v. Com.*, 124 Pa. 536, 17 Atl. 26, 23 W. N. C. 405.

Under a statute making the offense of adultery to be when the parties "not living together indulge in habitual carnal intercourse," it is sufficient if the indictment charge them as indulging in habitual carnal intercourse, and the failure to add the words "not living together" does not vitiate the indictment. *State v. Carroll*, 30 S. C. 85, 8 S. E. 433, 14 Am. St. Rep. 883.

Where the indictment was found under a provision, viz.—"a married man deserting his wife and living in a state of adultery with another woman," the charge should be in substance "that the plaintiff being then and there married to (name of wife) did then and there desert his wife, and thence continually, for a space of time, did live and cohabit with another woman (naming her) in a state of adultery, and that during such time the accused was a married man and the person with whom he lived and cohabited was not his wife." And an allegation setting out that "the said Uriah W. Lord, being then and there a married man, to-wit, being then and there married to one Hannah Lord, on the said first day of April, in the year aforesaid, and from said day continually, until the 28th day of November, A. D. 1883, in the county of Brown aforesaid, did unlawfully live and cohabit in a state of adultery with one Celia Amit, a female woman," was held not sufficient. *Lord v. State*, 17 Neb. 526, 23 N. W. 507.

Where the statute defines the offense as "the living together and having carnal intercourse with each other, or habitual intercourse with each other without living together, of a man and woman, when either is lawfully married to another person," an indictment charging "did then and there unlawfully cohabit together and carnally know each other, the said D. E. then and there not being the husband of said M. A. S., and the said M. A. S. not being then and there the wife of the said D. E., being then and there a married man and having a living wife from whom he had not been di-

ever, to use equivalent terms will render the indictment defective.<sup>36</sup>

If the statute does not sufficiently particularize the offense it is necessary to frame the indictment in such terms as to properly designate the offense and give the offender information of the nature and cause of the accusation, so that a proper judgment may be rendered, and that the defendant may be able to plead his conviction or acquittal in bar of another prosecution for the same offense.<sup>37</sup> Nothing can be taken by intendment.<sup>38</sup>

It is also said, as applicable to indictments generally, that the offense is sufficiently charged if it be stated in ordinary and concise language, so that a person of common understanding will understand what is intended,<sup>39</sup> or if it be alleged with such definiteness that the

forced." etc., is insufficient if it fails to charge that the parties did "live together and have carnal intercourse," or that they had "habitual intercourse without living together." The words used were not equivalent to or synonymous with the statute. *Edwards v. State*, 10 Tex. App. 25.

The indictment did not charge as it should under the statute, that the defendants did "lewdly and lasciviously associate," etc., but charged that they "unlawfully did associate, bed and cohabit together, and then and there did commit fornication and adultery, contrary to the statute," and also alleged that the defendants were "not united together in marriage." Held that the offense is substantially charged and the language used implied that they did "lewdly and lasciviously associate." *State v. Stubbs*, 108 N. C. 774, 13 S. E. 90.

36. Ala.—*Maull v. State*, 37 Ala. 160. Ind.—*State v. Johnson*, 69 Ind. 85. Me.—*State v. Thurstin*, 35 Me. 205, 58, Am. Dec. 695. Neb.—*Lord v. State*, 17 Neb. 526, 23 N. W. 507. Tex.—*Edwards v. State*, 10 Tex. App. 25.

37. See the title "Indictment and Information."

An indictment alleged that "O. M. . . . was found in bed feloniously together with one J. Y., under circumstances affording presumption of an illicit and felonious intention, the said J. Y. being then and there a married woman, and having then and there a lawful husband alive other than the said O. M., and the said O. M. being then and there a man other than the husband of the said J. Y., and the said O. M. and said J. Y. not being then and there lawfully married to each other." This was held insufficient, in not stating what the "illicit" inten-

tion was. *State v. Miller*, 60 Vt. 90, 12 Atl. 526.

38. *State v. Sekrit*, 130 Mo. 401, 32 S. W. 977; *State v. Eggleston*, 45 Ore. 346, 77 Pac. 738.

The words in an indictment charging "unlawfully, shamefully and habitually having sexual intercourse" do not charge either a living in a state of open and notorious adultery, or that the parties did lewdly and lasciviously associate together as if husband and wife. *State v. Sekrit*, 130 Mo. 401, 32 S. W. 977.

An indictment alleging that the parties "did live, use and cohabit together as man and wife, in lewd acts of adultery and fornication, not being then and there married to each other," etc., was held insufficient for failure to allege that the acts constituting the offense were openly and publicly committed. *State v. Moore*, 1 Swan (Tenn.) 136.

39. Ga.—*Cook v. State*, 11 Ga. 53, 56 Am. Dec. 40; *Camp v. State*, 3 Ga. 417. Ill.—*Crane v. People*, 168 Ill. 395, 48 N. E. 54; *Lyman v. People*, 98 Ill. App. 386. Ia.—*State v. Anderson*, 140 Iowa 445, 118 N. W. 772. Ore.—*State v. Eggleston*, 45 Ore. 346, 77 Pac. 738.

The information charged the defendant with the crime of adultery, as follows: "He, the said P. H. Nelson, in the county of King, State of Washington, on the 25th day of May, 1903, and thence continuously until about the 15th day of July, 1903, did wilfully, unlawfully and feloniously live and cohabit in an open and notorious state of adultery with one Paulina Smith, and did then and there have carnal knowledge of the body of the said Paulina Smith, the said Paulina Smith being then and there a female person other than the wife of the said P. H. Nelson, and being then and there the lawful

jury, as sensible men, may know the nature of the offense.<sup>40</sup>

2. **Naming Offense.**—In some instances it is sufficient to allege that the defendant "did commit adultery."<sup>41</sup> Where, however, the substantive facts are set out in the indictment it will be sustained, though the crime is not charged by name,<sup>42</sup> or is designated by another name.<sup>43</sup>

3. **Duplicity.**—An indictment may in one count charge two distinct methods by which the offense may have been committed,<sup>44</sup> or it may contain several specifications where but one offense is charged,<sup>45</sup>

wife of Barney Smith, then and there living in Alaska, and the said P. H. Nelson having then and there a lawful wife living in Seattle, King County, Washington, to-wit: one Julia Nelson." Held sufficient, even though the defendant was convicted of living in a state of adultery. A wrong designation or absence of designation will not vitiate an information otherwise sufficient. If a person of common understanding can readily understand what is intended by the information and what crime is charged, the requirements of the law are satisfied. *State v. Nelson*, 39 Wash. 221, 81 Pac. 721.

40. *Cook v. State*, 11 Ga. 53, 56 Am. Dec. 410.

**Held Sufficient.**—"The second count charged that the defendants 'did then and there wrongfully, unlawfully and illegally, each with the other, live together in an open state of adultery, the said Herbert P. Crane, *alias* Bert Crane, being then and there a married man, having been previously married to one Jessie E. Doolittle, and the said Lizzie B. Stiles, *alias* Lillian B. Stiles, being then and there a married woman, having been previously married to one Everell D. Stiles, contrary to the form of the statute in such case made and provided,' etc." *Crane v. People*, 168 Ill. 395, 48 N. E. 54.

41. *Ala.*—*State v. Hinton*, 6 Ala. 864. *N. J.*—*State v. Lash*, 16 N. J. L. 380, 32 Am. Dec. 397. *Pa.*—*Gorman v. Com.*, 124 Pa. 536, 17 Atl. 26; *Helfrich v. Com.*, 33 Pa. 68, 75 Am. Dec. 579.

• In *State v. Baldy*, 17 Iowa 39, it was said to be the better practice to name the offense in the indictment.

An indictment was held sufficient which alleged that "Griego was a married man, having a wife in full life; that he and the defendant Petra Romero were not then married to each other," and further that "they did unlawfully commit the crime of adul-

tery by then and there having unlawful intercourse with each other, contrary," etc. *United States v. Griego*, 11 N. M. 392, 72 Pac. 20, reversed on rehearing on other points.

In Maine the allegation "did commit the crime of adultery" has been held sufficient without more specific allegations. *State v. Thurstin*, 35 Me. 205, 58 Am. Dec. 695.

42. *Lipham v. State*, 125 Ga. 52, 53 S. E. 817, 114 Am. St. Rep. 181; *O'Halloran v. State*, 31 Ga. 206; *State v. Baldy*, 17 Iowa 39.

43. *Disharoon v. State*, 95 Ga. 351, 22 S. E. 698.

In Washington where the crime for which a punishment is prescribed is living in a state of adultery, an information was sustained which charged the defendants with the crime of adultery, which is not a crime under the statute. *State v. Nelson*, 39 Wash. 221, 81 Pac. 721.

44. *Thomas v. State* (Tex. Crim.), 23 S. W. 724.

See the title "Indictment and Information."

45. *State v. Briggs*, 68 Iowa 416, 27 N. W. 358; *State v. Thompson*, 31 Utah 228, 87 Pac. 709.

In *State v. Clawson*, 30 Mo. App. 139, an indictment was held good which charged: "On the first day of June, A. D., 1887, and for the space of nine months next prior thereto, he then and now being a married man, did then and there, and from that day, to-wit, from September the first, A. D. 1886, until June 1, 1887, in said county aforesaid, unlawfully, shamefully, openly, lewdly, lasciviously, and notoriously live, abide, and cohabit with one Bulah R. B. Goodwin, she being then and there a married woman, in a state of open and notorious adultery and they then and there habitually having sexual intercourse together, she then and there having a husband living."



but if a defendant be charged in one count with the commission of many acts of adultery with the same person, on different days and times, it is bad for duplicity.<sup>46</sup>

**4. Joinder of Counts.**—a. *When Permissible.*—The same transaction may be charged in different counts as constituting different offenses, or the act may be charged in one count as being accomplished by different means.<sup>47</sup> So a count charging adultery may be joined with a count charging fornication,<sup>48</sup> or with a count for living in adultery.<sup>49</sup>

In Pennsylvania adultery and bastardy may be charged in the same count.<sup>50</sup>

b. *Conviction for Adultery.*—*Indictment Apparently for Seduction.* A conviction for adultery on an indictment apparently for seduction may be had where the offense as set forth in the indictment is really adultery,<sup>51</sup> or for fornication on an indictment charging adultery and fornication,<sup>52</sup> or for fornication upon an indictment for adultery.<sup>53</sup> That a conviction for fornication cannot be had on an indictment for adultery has also been decided.<sup>54</sup> Objections to the form of the indictment are too late after verdict.<sup>55</sup>

46. *Com. v. Fuller*, 163 Mass. 499, 40 N. E. 764; *State v. Temple*, 38 Vt. 37.

47. *Bailey v. State*, 36 Neb. 808, 55 N. W. 241; *State v. Marvin*, 35 N. H. 22.

48. *Ala.*—*Smitherman v. State*, 27 Ala. 23. *Ga.*—*Sutton v. State*, 124 Ga. 815, 53 S. E. 381. *Tex.*—*Garland v. State*, 51 Tex. Crim. 643, 104 S. W. 888.

49. *Bailey v. State*, 36 Neb. 808, 55 N. W. 241; *State v. Way*, 5 Neb. 283.

Under the Georgia statute an indictment was sustained which contained four counts, one charging fornication, both parties being alleged to be single, one adultery with the same woman, both of them being alleged to be married, one adultery and fornication, the man being alleged to be married and the woman single, and one adultery and fornication, he being alleged to be single and the woman married. *Sutton v. State*, 124 Ga. 815, 53 S. E. 381.

50. *Com. v. Lewis*, 140 Pa. 561, 21 Atl. 501; *Gorman v. Com.*, 124 Pa. 536, 17 Atl. 26.

51. *Disharoon v. State*, 95 Ga. 351, 22 S. E. 698; *O'Halloran v. State*, 31 Ga. 206. See also *Hopper v. State*, 54 Ga. 389; *State v. Baldy*, 17 Iowa 39.

Under the Georgia statute where the offense charged was adultery, which can there only be committed by two married persons, it appearing on the trial that the woman with whom the offense was committed was not married, it was held that a conviction for

adultery could not be had under the indictment. *Kendrick v. State*, 100 Ga. 360, 28 S. E. 120.

52. *State v. Colwell*, 26 N. C. 231.

The Georgia statute making the kinds of sexual intercourse indictable, defines the offense when one of the parties is unmarried, to be adultery and fornication. This offense being charged and it appearing that the person alleged to be unmarried is married, a conviction for adultery will be reversed. *Williams v. State*, 86 Ga. 548 12 S. E. 743.

53. *Kelley v. State*, 32 Tex. Crim. 579, 25 S. W. 425. The court in this case, however, expresses the opinion that upon an indictment for fornication there could not be a conviction for adultery. See also *State v. Pearce*, 2 Blackf. (Ind.) 318; *State v. Taylor*, 58 N. H. 331.

54. *Smitherman v. State*, 27 Ala. 23 (*explaining State v. Hinton*, 6 Ala. 864); *State v. Lash*, 16 N. J. L. 380, 32 Am. Dec. 397.

55. *Ketchingman v. State*, 6 Wis. 426.

An indictment charging that a man and woman "did live in a state of adultery or fornication," but failing to state that they thus lived together or participated in a joint offense with each other, is demurrable for duplicity. *Maul v. State*, 37 Ala. 160.

Where there were two counts in the indictment which charged two distinct offences and a *nolle prosequi* was entered

**D. NECESSARY ALLEGATIONS.—1. Venue.**—The indictment must show that the offense charged was committed within the jurisdiction of the court.<sup>56</sup>

**2. Time of Commission.**—The indictment must allege that the offense was committed on a day certain,<sup>57</sup> and an allegation that the offense was committed at an indefinite time between two specified dates is bad.<sup>58</sup>

It has been held that an allegation that the crime was committed within the period of limitation is sufficient, without charging specific acts.<sup>59</sup> It is likewise sufficient if the time set out in the indictment appears to be within the period of limitation,<sup>60</sup> without alleging that fact in the indictment.<sup>61</sup> If it appears from the date set forth in the indictment that punishment is barred by statute, the indictment is fatally defective.<sup>62</sup>

**a. Then and There.**—When the time when the adultery was committed has been alleged with precision, reference thereto may be had regarding other facts alleged by the term "then and there" without repetition thereof.<sup>63</sup>

as to one and the trial had on the other, the defendant had no ground for complaint. *State v. Marvin*, 35 N. H. 22.

**56. U. S.**—*Serra v. Mortiga*, 204 U. S. 470, 27 Sup. Ct. 343, 51 L. ed. 571. *Me.*—*State v. Jackson*, 39 Me. 291. *Minn.*—*State v. Armstrong*, 4 Minn. 251.

**Amendment Inserting County.**—An indictment cannot be amended by inserting the county where the offense was committed, as this would be matter of substance. *State v. Armstrong*, 4 Minn. 251.

**Application of Federal Statutes.** Act of Congress, c. 397, passed March 3, 1887, amended § 5352 Rev. St., defining and prescribing punishment for adultery, applies to all territories, including the District of Columbia. *Falk v. United States*, 15 App. Cas. (D. C.) 446; *Chase v. United States*, 7 App. Cas. (D. C.) 154. See, however, *United States v. Crawford*, 6 Mackey (D. C.) 149.

The United States Supreme Court while recognizing conflict of decision expresses no opinion on this point. *France v. Connor*, 161 U. S. 65, 67, 16 Sup. Ct. 497, 40 L. ed. 618.

**57.** *State v. Fenlason*, 79 Me. 117, 8 Atl. 459; *State v. Day*, 74 Me. 220; *State v. Thurstin*, 35 Me. 205, 58 Am. Dec. 695; *State v. Thompson*, 31 Utah 228, 87 Pac. 709.

An allegation charging the commission of the offense in eighteen hundred and nine seven, is not sufficient as

charging it in 1897. *Wood v. State* (Tex. Crim.), 51 S. W. 235.

**58.** *Com. v. Fuller*, 163 Mass. 499, 40 N. E. 764; *State v. Thompson*, 31 Utah 228, 87 Pac. 709.

**59.** Under the Oregon statute (§ 1309 Ballinger's Codes and Statutes of Oregon), when time is not a material ingredient in the crime, it may be alleged that the crime was committed at any time before the finding of the indictment and within the time in which an action may be commenced therefor.

**60. Ia.**—*State v. Anderson*, 140 Iowa 445, 118 N. W. 772; *State v. Briggs*, 68 Iowa 416, 27 N. W. 358. *Mass.*—*Com. v. Cobb*, 14 Gray 57; *Com. v. Merriam*, 14 Pick. 518, 25 Am. Dec. 420. *Ore.*—*State v. Eggleston*, 45 Ore. 346, 77 Pac. 738. *Tex.*—*Swancoat v. State*, 4 Tex. App. 105. *Utah.*—*State v. Hilberg*, 22 Utah 27, 61 Pac. 215.

**61.** *State v. Ball*, 30 W. Va. 382, 4 S. E. 645.

**62.** *State v. Ball*, 30 W. Va. 382, 4 S. E. 645.

**Act Not Crime During All the Time Charged.**—The indictment charged cohabitation in a state of adultery from August 10, 1874, until July 15, 1875. The law making such cohabitation criminal was not passed until February 25, 1875: held that the offense being a continuous one, the indictment was good as to the time after the passage of the statute.

**63. Ind.**—*Names v. State*, 20 Ind. App. 168, 50 N. E. 401. *Me.*—*State v.*

b. *Divers Other Days and Times*.—When the indictment charges the offense as committed on a certain day “and on divers other days and times” between certain dates, it is sustainable on the ground that time is not an ingredient of the offense, and the commission thereof might be proved either on the day specified or on any other day within the period of limitation, though the defendant could be convicted of but one offense under the indictment, and the averment of “divers other days and times” might be rejected as surplusage.<sup>64</sup>

c. *Living in Adultery*.—Where the indictment charges a “living in adultery,” it is proper to allege its commission between certain dates, the offense being a continuing one.<sup>65</sup>

E. *INTENT*.—Although the crime of adultery cannot be committed without criminal intent,<sup>66</sup> yet the intent need not be expressly charged.<sup>67</sup>

Hutchinson, 36 Me. 261; State v. Thurstin, 35 Me. 205, 85 Am. Dec. 695. Ore.—State v. Eggleston, 45 Ore. 346, 77 Pac. 738. Utah.—State v. Thompson, 31 Utah 228, 87 Pac. 709.

64. Ga.—Cook v. State, 11 Ga. 53. Ia.—State v. Briggs, 68 Iowa 416, 27 N. W. 358. Neb.—Bailey v. State, 36 Neb. 808, 813, 55 N. W. 241; State v. Way, 5 Neb. 283, 290.

In Massachusetts, however, adultery is held not to be a continuing offense, and where the indictment alleges the offense on a certain day and on divers other days and times, the *continuando* could not be rejected, and that the state should be compelled to limit its proof to the day alleged. Com. v. Fuller, 163 Mass. 499, 40 N. E. 764.

65. Mo.—State v. Clawson, 30 Mo. App. 139. Neb.—Bailey v. State, 36 Neb. 808, 55 N. W. 241; State v. Way, 5 Neb. 283. Utah.—State v. Thompson, 31 Utah 228, 87 Pac. 709. Wash.—State v. Nelson, 39 Wash. 221, 81 Pac. 721.

*Specified Day May Be Alleged*.—The living in adultery may, however, be charged on a single designated day, and is not required to be charged with a *continuando*. Swancoat v. State, 4 Tex. App. 105.

66. U. S.—Serra v. Mortiga, 204 U. S. 470, 27 Sup. Ct. 343, 51 L. ed. 571. Ala.—Banks v. State, 96 Ala. 78, 11 So. 404; Vaughan v. State, 83 Ala. 55, 3 So. 530. Ia.—State v. Clemenson, 123 Iowa 524, 99 N. W. 139. Me.—State v. Goodenow, 65 Me. 30. Vt.—State v. Audette, 81 Vt. 400, 70 Atl. 833, 130 Am. St. Rep. 1061, 18 L. R. A. (N. S.) 527; State v. Chillis, Brayt 131.

67. Ind.—Hood v. State, 56 Ind.

263, 26 Am. Rep. 21. Me.—State v. Goodenow, 65 Me. 30. Mass.—Com. v. Munson, 127 Mass. 459, 34 Am. Rep. 411; Com. v. Goodman, 97 Mass. 117; Com. v. Thompson, 6 Allen 591, 83 Am. Dec. 653; Com. v. Mash, 7 Metc. 472. N. M.—United States v. Griego, 11 N. M. 392, 72 Pac. 20. N. C.—State v. Cody, 111 N. C. 725, 16 S. E. 408; State v. Cutshall, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599. See the title “Indictment and Information.”

*No Criminal Intent Need Be Proved*. While fornication and adultery is a joint act, it is not essential to show that both parties had a guilty intent, it being sufficient that both parties participated in the unlawful sexual intercourse. Nor does it make any difference when it affirmatively appears that the party not on trial had no guilty intent, for if guilty intent of both parties is essential to the conviction of the party on trial, the burden of proof would always be on the state to prove it. When only one is on trial all that is required is that there was illicit and habitual sexual intercourse by the party on trial with the person of the opposite sex charged in the indictment. There may be an unlawful sexual intercourse wherein one party has a guilty intent and the other, through ignorance of the facts, not have such intent. The intercourse may be illicit as to both but criminal as to one only. The state is not called on to prove criminal intent, the case being made out when it is shown that a man and woman, not being married to each other, habitually engaged in sexual intercourse. It is not required to show that it was “lewd and lascivious,” this being an inference of law



**F. GUILTY KNOWLEDGE.**—It is not as a rule necessary to allege guilty knowledge, nor that the defendant knew that the person with whom the offense was committed was at the time married.<sup>68</sup>

**G. INSTITUTION OF PROSECUTION.**—Neither the indictment nor the information need contain an allegation that the prosecution was commenced on the application of the spouse of one of the defendants, although the statute contain a provision that all prosecutions for adultery are required to be so instituted.<sup>69</sup> The allegation that the prosecution was so commenced is not conclusive,<sup>70</sup> nor is it presumptive evidence of its truth.<sup>71</sup>

**H. DESCRIPTION OF PERSONS.**—**1. Marriage.**—The indictment must allege that at the time of the commission of the crime at least one of the persons charged with committing the adultery was married<sup>72</sup> to a

from the facts proved. In this offense, no intent is required to be charged or proved. When habitual sexual intercourse is shown, the law casts the burden of showing marriage on the defendants. If the woman is withdrawn from liability by her lack of knowledge of the facts, he can receive no shelter or benefit from an exculpatory matter in which she does not share. Fornication and adultery is a joint physical act. No intent is charged and none need be proved. *State v. Cutshall*, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599.

68. *State v. Clemenson*, 123 Iowa 524, 99 N. W. 139; *Com. v. Elwell*, 2 Metc. (Mass.) 190, 35 Am. Dec. 398.

It is not necessary to charge that the act was done "knowingly, wilfully, maliciously or feloniously," when the substantive facts are set forth in the indictment. *Ia.*—*State v. Anderson*, 140 Iowa 445, 118 N. W. 772. *Ind. Ter.*—*Reynolds v. United States*, 7 Ind. Ter. 51, 103 S. W. 762. *Vt.*—*State v. Clark*, 75 Atl. 534.

Under the Philippine statute it is necessary to allege that the defendant knew that the woman with whom the adultery was committed was married at the time of the cohabitation. *Serra v. Mortiga*, 204 U. S. 470, 27 Sup. Ct. 343, 51 L. ed. 571.

In case of bigamous marriage, under the Alabama statute, there must be knowledge of previous marriage to constitute the crime of adultery. *Banks v. State*, 96 Ala. 78, 11 So. 404; *Vaughan v. State*, 83 Ala. 55, 3 So. 530.

69. *Ia.*—*State v. Anderson*, 140 Iowa 445, 118 N. W. 772; *State v. Harman*, 135 Iowa 167, 112 N. W. 632; *State v. Andrews*, 95 Iowa 451, 64 N. W. 404; *State v. Maas*, 83 Iowa 469,

49 N. W. 1037; *State v. Mahan*, 81 Iowa 121, 46 N. W. 855; *State v. Briggs*, 68 Iowa 416, 27 N. W. 358. *Mich.*—*People v. Payment*, 109 Mich. 553, 67 N. W. 689; *People v. Isham*, 109 Mich. 72, 67 N. W. 819. *Minn.*—*State v. Brecht*, 41 Minn. 50, 42 N. W. 602.

70. *State v. Briggs*, 68 Iowa 416, 27 N. W. 358; *State v. Roth*, 17 Iowa 336.

71. *State v. Henke*, 58 Iowa 457, 12 N. W. 477, explaining *State v. Roth*, 17 Iowa 336.

72. *U. S.*—*Cartier v. United States*, 148 Fed. 804, 78 C. C. A. 494. *Ala.*—*Banks v. State*, 96 Ala. 78, 11 So. 404; *White v. State*, 74 Ala. 31; *Buchanan v. State*, 55 Ala. 154; *Smitherman v. State*, 27 Ala. 23, explaining *State v. Hinton*, 6 Ala. 864. *Me.*—*State v. Hutchinson*, 36 Me. 261. *Mass.*—*Com. v. Reardon*, 6 Cush. 78. *Mo.*—*State v. Bess*, 20 Mo. 419. *N. M.*—*United States v. Cook*, 103 Pac. 305. *Pa.*—*Com. v. Nick*, 29 Pa. Co. Ct. 8. *Tex.*—*Tucker v. State*, 35 Tex. 113; *Lenert v. State* (Tex. Crim.), 63 S. W. 563; *Parks v. State*, 4 Tex. App. 134; *Clay v. State*, 3 Tex. App. 499.

**Forms Approved.**—An indictment which charged that the crime was committed with "Alice E. Carver, she being at the time a married woman, to-wit, the wife of one George H. Carver," was objected to on the ground that the indictment failed to state that the woman involved in the charge was a married woman, but it was held to comply with the statute, and defendant could not fail to understand the charge. *State v. Anderson*, 140 Iowa 445, 118 N. W. 772.

A count, after laying the venue, charged that Elias Lyman and a woman named Alice, on September 15th, 1899, "not then and there being married to

person other than the alleged *particeps criminis*.<sup>73</sup> It is not, however,

each other, unlawfully, wrongfully and wilfully did live, cohabit and have carnal intercourse together in an open state of adultery, he, the said Elias Lyman, then and there being a married man having a lawful wife, other than the said Alice, living, as he, the said Elias Lyman, and she, the said Alice, then and there well knew, contrary to the form of the statute," etc. This was held to charge the offense sufficiently against Lyman. *Lyman v. People*, 198 Ill. 544, 64 N. E. 974.

An allegation that "on Nov. 1st, 1852, at Gardiner aforesaid, the said defendant being then and there a married man and having a lawful wife alive, did commit the crime of adultery with L. H., the wife of one M. H., by having carnal knowledge of the body of her, the said L. H.," etc., sufficiently alleged that the defendant was a married man. The offense was committed in such case whether the woman was or was not married. *State v. Hutchinson*, 36 Me. 261.

**Insufficient Allegation.**—Indictment charged that defendant "on the 25th day of March, 1851, did commit the crime of adultery with one E. W., the wife of one S. H. W., she, the said E. W., being a married woman and the lawful wife of him the said S. H. W." It was held that the allegation "being a married woman and the lawful wife" of S. H. W. had reference to the time of finding the indictment and not to the offense, in strictness of criminal law. *State v. Thurstin*, 35 Me. 205, 58 Am. Dec. 695.

**When Crime Charged Is Adultery or Fornication.**—In Alabama, where adultery and fornication are charged in one count, it is not necessary to allege that one of the offending parties is married. *Love v. State*, 124 Ala. 82, 27 So. 217; *McLeod v. State*, 35 Ala. 395; *State v. Hinton*, 6 Ala. 864.

73. Ill.—*Lyman v. People*, 98 Ill. App. 386. Ind.—*Names v. State*, 20 Ind. App. 168, 50 N. E. 401. Ia.—*State v. Anderson*, 140 Iowa 445, 118 N. W. 772; *State v. Mahan*, 81 Iowa 121, 46 N. W. 855. Me.—*State v. Hutchinson*, 36 Me. 261. Mass.—*Com. v. Reardon*, 6 Cush. 78; *Moore v. Com.*, 6 Met. 243, 39 Am. Dec. 724. Mo.—*State v. Hillman*, 128 Mo. App. 172, 106 S. W. 603. Ore.—*State v. Eggleston*, 45 Ore. 346, 77 Pac. 738. Pa.—

*Gorman v. Com.*, 124 Pa. 536, 17 Atl. 26; *Helfrich v. Com.*, 33 Pa. 68, 75 Am. Dec. 579. Tex.—*Tucker v. State*, 35 Tex. 113; *Lee v. State*, 47 Tex. Crim. 474, 83 S. W. 1110; *Thomas v. State* (Tex. Crim.), 26 S. W. 724; *Hildreth v. State*, 19 Tex. App. 195; *Collum v. State*, 10 Tex. App. 708; *Clay v. State*, 3 Tex. App. 499.

**Sufficient Allegations.**—An information stated that the defendant "being then and there lawfully married to another person, to wit, A. L., who was then and there living, had carnal intercourse with A. A." This was sufficient, it not being necessary to allege that she was not married to A. A. *Lee v. State*, 47 Tex. Crim. 464, 83 S. W. 1110.

An indictment which charged that "the said C. N. N. being then and there . . . and the said Anna Jones being then and there a married woman and the wife of one William Jones, did then and there live," etc., was held to imply that William Jones was living. *Names v. State*, 20 Ind. App. 168, 50 N. E. 401.

An indictment which alleged that the woman was the "lawful wife of Peter J. Smith," was held to substantially allege that she was not the wife of the defendant. *Com. v. Reardon*, 6 Cush. (Mass.) 78.

If the indictment clearly charges the offense and that the defendants were not united in marriage, the use of the word "spinster" after the name of the woman cannot mislead and affords no ground for arrest of judgment. *State v. Guest*, 100 N. C. 410, 6 S. E. 253.

A charge that the defendant on a day and place named "did then and there unlawfully and feloniously commit the crime of adultery with a certain female person commonly known by the name of F. C., he the said J. E. (the defendant) then and there being a married man and the husband of A. A. E., and she the said F. C., not being his wife, contrary," &c., was held sufficient. *State v. Eggleston*, 45 Ore. 346, 77 Pac. 738.

An indictment alleging with ordinary particularity as to time and place, that the defendant being a married man, having a wife then living, did carnally know C. W. W., she then being a married woman and the wife of L. E. W., who was then living and not the wife of the defendant, and with her did

commit the crime of adultery by carnally knowing her, states the crime with strictness and certainty, and no further specification is necessary. *State v. Bridgman*, 49 Vt. 202, 24 Am. Rep. 124.

Where the indictment alleged that she was "the lawful wife of Peter J. Smith," it is an allegation to all intents and purposes that she was not the wife of the defendant. *Com. v. Reardon*, 6 Cush. (Mass.) 78.

An indictment charging that on a certain day and place anterior to the indictment "J. L., a man, and Mrs. M. D. L., a woman, did then and there unlawfully live together and have carnal intercourse with each other, the said Mrs. M. D. L. being then and there lawfully married to another person then living," etc., sufficiently charged that Mrs. M. D. L. was at the time married to some other person than the co-defendant. *Lenert v. State* (Tex. Crim.), 63 S. W. 563.

**Indictment in Two Counts.**—The first charged that the defendants "did then and there unlawfully and illegally live together in an open state of adultery, contrary," etc. The second count charged: "did then and there wrongfully, unlawfully and illegally, each with the other, live together in an open state of adultery, the said H. P. C. being then and there a married man, having been previously married to one J. E. D., and the said L. B. S., being then and there a married woman, having been previously married to one E. D. S., contrary to the statute," etc. It was held that the indictment was not defective in failing to allege that the plaintiffs in error were married to others than each other at the time of the alleged offense. That the allegation that they "lived together each with the other in an open state of adultery" was sufficient without alleging that each had a living husband or wife at the time and that the defendants were not married to each other. Where the indictment indicates sufficient to give the offender proper notice of the crime it is sufficient. *Crane v. People*, 65 Ill. App. 492.

The use of the word "adultery" in the indictment charging the offense seems to imply necessarily that the participants in the act set forth were not married to each other. *Gorman v. Com.*, 124 Pa. 536, 17 Atl. 26.

**Insufficient Allegations.**—An indictment

charging that the defendant, a man, did live with M. S., a woman, against the peace and dignity, etc., charges no crime. *State v. Johns*, 142 Ala. 61, 38 So. 755.

An indictment alleging that the said Moore "on the 24th of July, etc., did commit the crime of adultery with one Mary Stuart, by then and there having carnal knowledge of the body of said Stuart, she the said Stuart then and there being a married woman and having a husband alive," &c., was insufficient, it not appearing that the woman was not the wife of the accused, the fact that she bore a different name not being sufficient. *Moore v. Com.*, 6 Mete. (Mass.) 243, 39 Am. Dec. 724.

An indictment charging—"did unlawfully, wilfully, knowingly and feloniously cohabit together with and carnally know one W. M., the said N. C. then and there being married and her husband still living, and the said N. C. not then and there being divorced from her husband, but then and there being lawfully married," only inferentially alleges that the woman is the wife of some other man than M. Clay *v. State*, 3 Tex. App. 499.

An indictment charging that the defendant having "a living lawful wife, from whom he had never been divorced, did cohabit and live in adultery with one Lucy Sanders," is defective in that it fails to allege that said Lucy Sanders is not the wife of the defendant. *Tucker v. State*, 35 Tex. 113.

Indictment alleging "said C. W. Searles then and there being a married man and having a lawful wife then living, to wit, ——— did then and there commit the crime of adultery with a woman known and called ———, by then and there having carnal knowledge of the body of the said ———, she, the said ——— then and there not being the wife of the said C. W. S.," was held defective, first, in failing to allege the woman was married; second, in not alleging that she was unmarried, so as to bring it under a provision when the act is committed by a married man and an unmarried woman. *State v. Searle*, 56 Vt. 516.

Under *United States Comp. St.*, 1901, p. 3636, it is not necessary to allege in the indictment that the person with whom the offense is alleged to have been committed was a married woman or that she was unmarried. *United States v. Meyers*, 14 N. M. 522, 99 Pac. 336.



as a rule necessary to allege that both parties to the unlawful act were married persons.<sup>74</sup>

**2. Naming Spouse.**—It has been held unnecessary in addition to charging the marriage of one of the parties, to set forth the name of the spouse of such married party in the indictment.<sup>75</sup>

**3. Naming Paramour.**—It is sufficient to allege that the name of the person with whom the adulterous act was committed is unknown,<sup>76</sup> and where a name is set forth in the indictment, the use of a designation or name which identifies the person implicated is all that is required.<sup>77</sup> But the use of a name which does not properly identify such party is fatal.<sup>78</sup>

**Defect Cured by Verdict.**—The indictment charged the crime as being committed "with one C. M. J., single woman, he, the said T. B. C. during all the time aforesaid being a married man and having a lawful wife alive," etc. It was held that though it is not alleged in so many words that C. M. J., a single woman, was not the lawful wife of T. B. C., a married man, it appeared on the trial that they were different persons and that the verdict settled the fact that C. M. J. was not the wife of T. B. C., and the objection comes too late. *State v. Clark*, 54 N. H. 456.

**74. Ill.**—*Lyman v. People*, 198 Ill. 544, 64 N. E. 974. **1a.**—*State v. Mahan*, 81 Iowa 121, 46 N. W. 855. **Mass.**—*Com. v. Reardon*, 6 Cush. 78. **N. M.**—*United States v. Cook*, 103 Pac. 305.

The Georgia statute requires that both parties to the unlawful intercourse must be married to constitute the crime of adultery. *Tison v. State*, 125 Ga. 7, 53 S. E. 809; *Kendrick v. State*, 100 Ga. 360, 28 S. E. 120; *Williams v. State*, 86 Ga. 548, 12 S. E. 743.

If the indictment charge adultery and fornication with an unmarried woman and it appear on the trial that the woman was married, a conviction thereunder is improper. *Williams v. State*, 86 Ga. 548, 12 S. E. 743.

Should the indictment charge the accused, a married man, with the commission of adultery with a married woman, and the proof shows that she was not married, he could not be properly convicted of that offense. *Kendrick v. State*, 100 Ga. 360, 28 S. E. 120.

In Vermont where the indictment fails to allege that the *particeps criminis* was either a married woman or an unmarried woman, under different sections of a statute, it is insufficient. *State v. Bisbee*, 75 Vt. 293, 54 Atl. 1081.

**75. Gorman v. Com.**, 124 Pa. 536, 17 Atl. 26; *Davis v. Com. (Pa.)*, 7 Atl. 194; *Lenert v. State (Tex. Crim.)*, 63 S. W. 563; *Thomas v. State (Tex. Crim.)*, 26 S. W. 724; *Hildreth v. State*, 19 Tex. App. 195; *Collum v. State*, 10 Tex. App. 708. Compare, however, *Garland v. State*, 51 Tex. Crim. 643, 104 S. W. 898.

An amendment to the indictment at the trial after the jury was empaneled, adding after the words "*Roxcena Whitney*," the alleged *particeps*, the words "otherwise called Rosa Whitney," was not error and was unnecessary. *State v. Arnold*, 50 Vt. 731.

**76. State v. Ean**, 90 Iowa 534, 58 N. W. 898; *Com. v. Thompson*, 2 Cush. (Mass.) 551.

**77. Ala.**—*Henderson v. State*, 105 Ala. 139, 16 So. 927; *State v. Glaze*, 9 Ala. 283. **Cal.**—*People v. Stokes*, 71 Cal. 263, 12 Pac. 71. **1a.**—*State v. Burns*, 119 Iowa 663, 94 N. W. 238; *State v. Cunningham*, 111 Iowa 233, 82 N. W. 775; *State v. Carnagy*, 106 Iowa 483, 76 N. W. 805 (where the indictment named Anna Brown, which was the name by which the woman was known, though her real name was Anna Grubb); *State v. Goode*, 68 Iowa 593, 27 N. W. 772; *State v. Crawford*, 66 Iowa 318, 23 N. W. 684. **Mass.**—*Com. v. Seeley*, 167 Mass. 163, 45 N. E. 91. **Minn.**—*State v. Brecht*, 41 Minn. 50, 42 N. W. 602 (holding that the use of Margaretta when full name is Anna Margaretta and of Frederick when full name is Christian Frederick, is not a material variance).

**78. Ala.**—*Henderson v. State*, 105 Ala. 139, 16 So. 927. **N. H.**—*State v. Vittum*, 9 N. H. 519. **Wis.**—*State v. Dudley*, 7 Wis. 664.

Where an indictment charged the commission of the offense with L. W., and there appeared to be two persons of that name in the town, father and

**4. Allegation of Sex.**—Though it is not necessary to allege the sex of the offenders,<sup>79</sup> it is better pleading to do so.<sup>80</sup>

**5. Race Not Material.**—Where offenders are subject to indictment regardless of race, it is not necessary to set forth in the indictment the race of either of the parties.<sup>81</sup>

**I. SURPLUSAGE.**—The use in the indictment of words that are merely unnecessary will not vitiate it.<sup>82</sup>

son, it was held that the elder was meant, and no testimony would be introduced to show that the son was intended. *State v. Vittum*, 9 N. H. 519.

**79. U. S.**—*Cannon v. United States*, 116 U. S. 55, 6 Sup. Ct. 278, 29 L. ed. 56. **Ala.**—*McLeod v. State*, 35 Ala. 395. **Ind.**—*State v. Smith*, 18 Ind. App. 179, 47 N. E. 685. **N. C.**—*State v. Lashley*, 84 N. C. 754. **Tex.**—*Hildreth v. State*, 19 Tex. App. 195; *Holland v. State*, 14 Tex. App. 182.

The statement in the indictment that the parties had "one or more children" is an averment that they had at least one child, and such statement is sufficient to establish the sex of the parties. *State v. Fore*, 23 N. C. 378.

**80. Hildreth v. State**, 19 Tex. App. 195.

**81. Mulling v. State**, 74 Ga. 10.

**82. Iowa.**—*State v. Briggs*, 68 Iowa 416, 27 N. W. 358; *State v. Ormiston*, 66 Iowa 143, 23 N. W. 370 (meaningless words); *State v. Schilling*, 14 Iowa 455. **Mass.**—*Com. v. Farren*, 9 Allen 489; *Larned v. Com.*, 12 Metc. 240. **Neb.**—*State v. Way*, 5 Neb. 283. **N. Y.**—*Lohman v. People*, 1 N. Y. 379, 49 Am. Dec. 340. **Tex.**—*Collum v. State*, 10 Tex. App. 708. **Utah.**—*United States v. Kershaw*, 5 Utah 618, 19 Pac. 194.

**Illustrations of Surplusage.**—Indictment alleged two offenses, one under the jurisdiction of the court and one not, and on claim being made that both counts were bad for duplicity, it was held that the one over which there was no jurisdiction would be regarded as mere surplusage. *Town of Eldora v. Burlingame*, 62 Iowa 32, 17 N. W. 148.

An allegation that the prosecution was instituted upon complaint of the husband held immaterial, where such authority was not necessary. *State v. Mahan*, 81 Iowa 121, 46 N. W. 855.

An information charging open and notorious adultery, using the words of the statute, is not bad because it contains additional averments showing that the adultery was committed by

the intercourse between the parties. *State v. Yocum*, 9 Mo. App. 589.

Where an indictment charging offense on May 1, 1851, and on *divers other days and times before and after that day*, the words italicized were rejected as surplusage, a certain day having been charged. *Cook v. State*, 11 Ga. 53, 56 Am. Dec. 410. To the same effect are: **Mass.**—*Wells v. Com.*, 12 Gray 326. **N. H.**—*State v. Nichols*, 58 N. H. 41. **N. Y.**—*People v. Adams*, 17 Wend. 475. **Utah.**—*State v. Thompson*, 31 Utah 228, 87 Pac. 709—"on the 13th day of February, 1905, and on *divers other days and thence continually between the said*" specified date and a later date.

Where an indictment contained necessary averments and charged adultery with a woman "who was over 18 years of age," the words were mere surplusage. *State v. Ean*, 90 Iowa 534, 58 N. W. 898.

The words "lewdly and lasciviously" in an indictment which otherwise properly charges the offense, such words not being in the statute, may be stricken therefrom as surplusage. *State v. Clark*, 54 N. H. 456.

If the indictment alleges a date prior to repassage of the law making such offense a crime, but no evidence is admitted of facts prior to the passage of the act, the time prior may be treated as surplusage and the indictment held good as charging the offense from the passage of the law. *State v. Way*, 5 Neb. 283, 290.

An indictment after charging that the defendant was a married woman and the wife of one C. H. M., on a certain date and at a certain place, committed the crime of adultery with one Arthur J. Morrow, "by then and there feloniously permitting the said Arthur J. Morrow to have . . . carnal knowledge of her body." It was contended that this charged Morrow with an offense, but not the defendant, it charging only that she permitted something to be done by another, but it was

**V. PLEAS.**—A. IN GENERAL.—The effect of entering a plea by the defendant is to waive all objections and defects in the indictment, except those that go to the jurisdiction.<sup>83</sup> It has been held in some cases that the defense that the prosecution was not commenced on the complaint of a person having the exclusive right to prosecute, must be established on the trial of the indictment;<sup>84</sup> while others hold that it must be set up similarly to a plea in abatement at common law, by motion to set aside the indictment.<sup>85</sup>

B. FORMER ACQUITTAL.—The defense of former acquittal must be specially pleaded; it cannot be made available under a plea of not guilty.<sup>86</sup>

When Plea Effective.—An acquittal under an indictment for rape may be successfully pleaded upon a subsequent prosecution for adultery growing out of the identical transaction.<sup>87</sup>

When Ineffective.—The acquittal of one of the persons who participated in the unlawful intercourse will not support a plea of former acquittal on the trial of the other.<sup>88</sup>

**VI. TRIAL.**—A. TRIAL MAY BE JOINT OR SEPARATE.—The participants in the adultery may be tried together when so indicted,<sup>89</sup> or if separately indicted they may be tried separately.<sup>90</sup> If indicted separately they may be tried together,<sup>91</sup> or if jointly indicted, there may

held that the indictment was sufficient, and that the words quoted were mere surplusage. *State v. Moore* (Utah), 105 Pac. 293.

83. *Bailey v. State*, 36 Neb. 808, 55 N. W. 241.

Plea of Not Guilty Waives Examination.—Where a statute provides that no information be filed against a defendant until such person has had a preliminary examination, he will be deemed to have waived such examination if none in fact was had if he enter his plea without objection. *State v. Norman*, 16 Utah 457, 472, 52 Pac. 986. See the title "Abatement, Pleas of."

84. *State v. Athey*, 133 Iowa 382, 108 N. W. 224; *State v. Briggs*, 68 Iowa 416, 27 N. W. 358.

85. *State v. Brecht*, 41 Minn. 50, 42 N. W. 602.

86. *Swancoat v. State*, 4 Tex. App. 105.

The question whether or not an indictment charging the accused with bigamy, which was dismissed on a motion to quash, could be successfully pleaded in bar of a prosecution for living in adultery with the same person with whom the bigamous marriage was charged, should be specially pleaded and the matter submitted to the jury in connection with the plea of not guilty. *Swancoat v. State*, 4 Tex. App. 105, 119.

87. *Com. v. McIlvain*, 17 Pa. Co. Ct. 174.

Necessity of Identical Transaction. An acquittal upon a charge of rape would not affect a prosecution against the same defendant for adultery with the same female at another time, it not arising out of the identical transaction. *State v. Shedrick*, 69 Vt. 428, 38 Atl. 311.

88. *State v. Cutshall*, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599 (overruling *State v. Mainor*, 28 N. C. 340); *Solomon v. State*, 39 Tex. Crim. 140, 45 S. W. 706; *Alonzo v. State*, 15 Tex. App. 378, 49 Am. Rep. 207. See the title "Jeopardy."

89. *Mass.*—*Com. v. Thompson*, 99 Mass. 444. N. C.—*State v. Rinehart*, 106 N. C. 787, 11 S. E. 512. Tex.—*McLean v. State*, 32 Tex. Crim. 521, 24 S. W. 898.

90. *State v. Wilson*, 22 Iowa 364.

91. *Com. v. Seeley*, 167 Mass. 163, 45 N. E. 91.

In an indictment for fornication and adultery, the parties may be tried separately, and even if indicted together may be tried and punished regardless of one another. And where both are tried together and convicted, the court may pronounce judgment against one, and set aside the verdict and order a new trial against the other. *State v. Parham*, 50 N. C. 416.



be a severance and each have a separate trial,<sup>92</sup> the acquittal or conviction of one having no effect on the other defendant.<sup>93</sup>

**B. ELECTION.—1. When Election Necessary.**—When it appears upon a prosecution for adultery that the testimony received refers to separate and distinct offenses, it is necessary for the state to elect upon which offense it intends to rely.<sup>94</sup> An election is not necessary, however, where the proof shows a continued adulterous relationship extending over a period of time,<sup>95</sup> or, perhaps, where the

92. Ala.—Wright v. State, 108 Ala. 60, 18 So. 941. Ill.—Lyman v. People, 198 Ill. 544, 64 N. E. 974, *affirming* 98 Ill. App. 386. Ia.—State v. Roth, 17 Iowa 336; State v. Marvin, 12 Iowa 499. N. C.—State v. Guest, 100 N. C. 410, 6 S. E. 253; State v. Parham, 50 N. C. 416; State v. Mainor, 28 N. C. 340. S. C.—State v. Carroll, 30 S. C. 85, 8 S. E. 433, 14 Am. St. Rep. 883. Tex.—Morrill v. State, 5 Tex. App. 447.

Persons indicted for fornication and adultery may be tried separately, though one cannot be convicted after the acquittal of the other, nor when tried together can one be convicted and the other acquitted. When tried alone one may be convicted, and when tried together and convicted and one appeals, judgment may be had against the other. State v. Guest, 100 N. C. 410, 6 S. E. 253.

93. State v. Simpson, 133 N. C. 676, 45 S. E. 567; Solomon v. State, 39 Tex. Crim. 140, 45 S. W. 706; Ledbetter v. State, 21 Tex. App. 344, 17 S. W. 427; Morrill v. State, 5 Tex. App. 447.

One defendant may be put on trial for fornication and adultery and acquitted for lack of proof, and when the other is tried the proof may be ample and there can be no estoppel as to the state in favor of a party not on trial. State v. Cutshall, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599, *overruling* State v. Mainor, 28 N. C. 340. See also State v. Rinehart, 106 N. C. 787, 11 S. E. 512.

94. State v. Loftus, 128 Iowa 529, 104 N. W. 906; State v. Norris, 122 Iowa 154, 97 N. W. 999; Com. v. Fuller, 163 Mass. 499, 40 N. E. 764.

If the indictment charges two offenses as part of the one transaction, it is not necessary for the prosecution to elect, it being confined to cases where it contains charges actually distinct and which grow out of different transactions. The court has, however, the discretion to order an election.

People v. Austin, 1 Park. Cr. (N. Y.) 154.

**Election Not Required Unless Requested.**—Evidence was admitted which showed commission of acts on date alleged in indictment and on days subsequent thereto, and no request for election being made on the trial and before the case was submitted, no relief will be granted on review for the failure to do so. State v. Smith, 108 Iowa 440, 79 N. W. 115.

Where the defendant fails to request an election, after evidence of offenses on different occasions has been introduced, the jury is authorized to find him guilty of any act within the jurisdiction the evidence might show him guilty of. Hamilton v. State, 36 Tex. Crim. 372, 37 S. W. 431.

**Not Applicable to Misdemeanors.** Where adultery is a misdemeanor it is not necessary for the prosecution to elect on which count they will proceed, the doctrine of election not applying to misdemeanors. Furthermore, the request for election is too late when made after conviction. Massey v. State (Tex. Crim.), 65 S. W. 911. And see State v. Parish, 104 N. C. 679, 10 S. E. 457.

**Election by Operation of Law.**—An information contained one count charging the offense on a certain day. Evidence of six other acts of intercourse was admitted. The evidence of such acts was held admissible only to show previous improper acts and the conduct of the parties. Prior to the introduction of any evidence the prosecution could have elected to go on any of the acts, but when evidence regarding one particular was given, the law made that act the one charged. No election having been made by the prosecution, the law made the election. State v. Hillberg, 22 Utah 27, 61 Pac. 215. And see People v. Jenness, 5 Mich. 305, 328.

95. State v. Higgins, 121 Iowa 19, 95 N. W. 244.

court expressly directs the minds of the jury to a specific act.<sup>96</sup>

**2. Time To Direct Election.**—The question as to what stage of the trial the election is required to be made rests entirely in the discretion of the court.<sup>97</sup> The better rule is said to be that the election ought to be made at the latest before the accused is called on for his defense.<sup>98</sup>

**C. VARIANCE.**—If the proof does not correspond with the material allegations of the indictment, there is a fatal variance.<sup>99</sup> The failure, however, to establish averments such as the time of the commission of the crime,<sup>1</sup> or the correct name of a person known equally well by other names,<sup>2</sup> is not such a variance.

96. *People v. Castro*, 133 Cal. 11, 65 Pac. 13.

Where there was no direct evidence except that of a witness who testified to one act of adultery at a time within the period of the statute of limitations, the state was not required to elect the transaction on which it would rely. Query as to whether if several acts had been proved, such election would not be necessary. *State v. Hasty*, 121 Iowa 507, 96 N. W. 1115.

97. *Sutton v. State*, 124 Ga. 815, 53 S. E. 381; *State v. Loftus*, 128 Iowa 529, 104 N. W. 906.

98. *Ga.*—*Sutton v. State*, 124 Ga. 815, 53 S. E. 381. *Iowa.*—*State v. Loftus*, 128 Iowa 529, 104 N. W. 906. *N. C.*—*State v. Parish*, 104 N. C. 679, 10 S. E. 457.

99. *State v. Vittum*, 9 N. H. 519.

**Instances of Fatal Variance.**—The object in stating the name of persons connected with the offense is to enable the jury to identify the crime with the person. The description is sufficient if it be impossible to mistake the one described for another, but where the indictment charges the commission of the offense with one Dolly Croffit, and the testimony only refers to and speaks of one Dolly Crawford, and nothing appears from which it can be ascertained that they are one and the same person, it will not warrant a conviction, as there is a variance between the proof and the allegation. *Henderson v. State*, 105 Ala. 139, 16 So. 927.

Where the indictment charged "living together" and the proof showed

one act of adultery and certain other circumstances, held not to sustain the indictment, and that there was a variance between the proof and the allegation. *Ledbetter v. State*, 21 Tex. App. 344, 17 S. W. 427.

Where there was no proof that the parties "lived together," and the proof was that they did not live together, there was a material variance between the proof and the allegation. *Mitten v. State*, 24 Tex. App. 346, 6 S. W. 196.

The indictment charged that the defendant was married to Mrs. Mollie Garland. The evidence showed a marriage to M. M. Allen and it did not appear that they were the same person. Held a fatal variance. *Garland v. State*, 51 Tex. Crim. 643, 104 S. W. 898.

Where the indictment is for adultery by habitual carnal intercourse "without living together," and the evidence shows carnal intercourse by the parties living together, there is a fatal variance between the allegation and the proof. *Wood v. State* (Tex. Crim.), 51 S. W. 235.

It is a variance where it is shown that the offense was committed with Mary Adaline Winders when the indictment names Adaline Winders. *State v. Dudley*, 7 Wis. 664.

1. *Com. v. Cobb*, 14 Gray (Mass.) 57.

2. *Ala.*—*State v. Glaze*, 9 Ala. 283. *Me.*—*State v. Libby*, 44 Me. 469, 69 Am. Dec. 115. *Mass.*—*Com. v. Seeley*, 167 Mass. 163, 45 N. E. 91. *Minn.*—*State v. Brecht*, 41 Minn. 50, 42 N. W. 602. *Vt.*—*State v. Arnold*, 50 Vt. 731.

# ADVERSE POSSESSION

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#### CROSS-REFERENCES:

Boundaries;	Limitation of Actions;
Deeds;	Prescription.
Easements;	

**I. GENERAL STATEMENT.**—In a variety of actions, suits and proceedings, the title to land is involved. Whether ownership or some lesser quantity of interest is the ultimate fact of the cause of action, the title to that interest must in some manner be alleged and proved. It therefore becomes important to anyone seeking to enforce a supposed right in relation to land based on adverse possession, to understand the modes of alleging and proving the facts constituting the basis of such right, and also to understand the various actions which may be resorted to in the courts when such interests are involved.

Where ownership or seizin is involved, the title, that is to say, the manner of obtaining ownership or seizin, is necessarily made manifest to the court by the pleading and established by the probative force of some admissible evidence. Wherever possession is the ultimate fact, it is to be alleged and proved.

Among the means of establishing title or defeating it, what is known as *adverse possession* is frequently resorted to, and it is essential that a pleader in setting up a claim or defense should understand the meaning in the law of these terms in order that he shall not cast too heavy a burden upon himself, or be met with a successful objection as to variance or failure of proof. Intimately associated with the words *adverse possession* are found the words *seizin*, *ownership*, and *occupancy*, and throughout the statute law there is some confusion in the use of these terms. Hence it is useful to remind the practitioner that *seizin* and *ownership* as to corporeal hereditaments in the modern common law sense mean practically the same thing.<sup>1</sup>

In the law possession is a technical word which is sometimes said to be virtually synonymous with *occupancy*, but which is distinguishable from the latter term.<sup>2</sup> It is sufficient to know that possession as between private individuals is sufficient evidence of title as against any person who does not show an anterior and continued possession, or some higher proof of ownership. Indeed, at one time, possession, however brief, was recognized as sufficient to enable the possessor to invest a *bona fide* innocent purchaser with a title good against the

1. Adverse possession originates in disseisin. See Ala.—Pickett v. Doe, 74 Ala. 122. Cal.—Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100. Conn.—Searles v. DeLadson, 81 Conn. 133, 70 Atl. 589; Bryan v. Atwater, 5 Day 181, 5 Am. Dec. 136. Ill.—Clark v. Jackson, 222 Ill. 13, 78 N. E. 6. Me.—Roberts v. Niles, 95 Me. 244, 49 Atl. 1043. Mass.—Melvin v. Locks & Canals, 5 Met. 15, 38 Am. Dec. 384. Miss.—Alexander v. Polk, 39 Miss. 737. N. Y.—Miner v. New York, 5 Jones & S. 171. Ore.—Sommer v. Compton, 52 Ore. 173, 96 Pac. 124, 1065. Pa.—Olewine v. Messmore, 128 Pa. 470, 18 Atl. 495. Tex.—Beall v. Evans, 1 Tex. Civ. App. 443, 20 S. W. 945.

2. Nathan v. Dierssen, 146 Cal. 63,

79 Pac. 739; Evans v. Foster, 79 Tex. 48, 15 S. W. 170.

Even the term possession "is ambiguous, and much has been said and written, with, perhaps, not entire success, in attempts to define or explain its true signification, as applicable to the law of real property. It will, however, be sufficiently accurate for the purposes of the present discussion, to define possession, in the connection indicated, to be that position or relation which one occupies with respect to a particular piece of land which gives to him its use and control, and excludes all others from a like use or control. If one having exclusive possession in the sense stated, claims to have a freehold interest in the land, he will, in law, be deemed to be seized of the

true owner. "Possession only would support a feoffment."

**Adverse Possession** involves the intent to occupy as owner, and is a possession in opposition to the true title and under a claim of right.

same according to the title or estate claimed, although the paramount title may be in another. Seizin, then, in a legal sense, means possession with the intention of asserting a claim to a freehold estate in the premises added." *Fort Dearborn Lodge v. Klein*, 115 Ill. 177, 3 N. E. 272, 56 Am. Rep. 133. And see *Ill.—Knight v. Knight*, 178 Ill. 553, 53 N. E. 306. *Mass.—Bond v. O'Gara*, 177 Mass. 139, 58 N. E. 275, 83 Am. St. Rep. 265. *Wis.—Illinois Steel Co. v. Bilot*, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905. *Eng.—Taylor v. Horde*, 1 Burr. 60, 97 Eng. Reprint 190, 2 Smith's Lead. Cas. 324.

In the leading case of *Taylor v. Horde*, *supra*, Lord Mansfield commented on the uncertainty and confusion as to the meaning of the words seizin and possession.

3. *Taylor v. Horde*, 1 Burr. 60, 97 Eng. Reprint 190, 2 Smith's Lead. Cas. 324.

4. See *United States.—Stanley v. Schwalby*, 147 U. S. 508, 13 Sup. Ct. 418, 37 L. ed. 259. *Ala.—Goodson v. Brothers*, 111 Ala. 589, 20 So. 443. *Cal.—Mauldin v. Cox*, 67 Cal. 387, 7 Pac. 804. *Colo.—Omaha & G. Smelt. & Ref. Co. v. Tabor*, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236. *Conn.—French v. Pearce*, 8 Conn. 440, 27 Am. Dec. 680. *Ill.—Faloon v. Simshauser*, 130 Ill. 649, 22 N. E. 835. *Ind.—Worthley v. Burbanks*, 146 Ind. 534, 45 N. E. 779; *Willette v. Gifford* (Ind. App.), 92 N. E. 186. *Ia.—Hempsted v. Huffman*, 84 Iowa 398, 51 N. W. 17; *Robinson v. Lake*, 14 Iowa 421. *Md.—Sadtler v. Peabody Heights Co.*, 66 Md. 1, 10 Atl. 599. *Mass.—Bond v. O'Gara*, 177 Mass. 139, 58 N. E. 275, 83 Am. St. Rep. 265. *Mich.—Cook v. Clinton*, 64 Mich. 309, 31 N. W. 317, 8 Am. St. Rep. 816. *Minn.—Sherin v. Brackett*, 36 Minn. 152, 30 N. W. 551. *Miss.—Davis v. Bowmar*, 55 Miss. 671. *Mo.—Hunnewell v. Burchett*, 152 Mo. 611, 54 S. W. 487. *Neb.—Ballard v. Hansen*, 33 Neb. 861, 51 N. W. 295. *N. Y.—Sherry v. Frecking*, 4 Duer 452. *Pa.—Kearney v. Westchester*, 199 Pa. 392, 49 Atl. 227. *Utah.—Dignan v. Nelson*, 26 Utah 186, 72 Pac. 936. *Va.—Hollingsworth v.*

*Sherman*, 81 Va. 668. *W. Va.—Taylor v. Philippi*, 35 W. Va. 554, 14 S. E. 130.

In the late case of *Lathrop v. Levern* (Vt.), 74 Atl. 331, the character of occupancy which will be considered adverse is stated as follows: "Now, in order for possession an occupancy to set the statute of limitations in operation, they must be such in fact that in law they work a disseisin of the owner; and to do that they must have all the elements of adverse possession (*Davenport v. Newton*, 71 Vt. 11, 16, 42 Atl. 1087), and one of those elements, and an essential one, is an intention to claim title. If it is clear, and it is here, that there is no such intention, there can be no pretense of an adverse possession. *Angell, Limit.* (4th ed.), § § 384, 390. It is said in *Ewing v. Burnet*, 11 Pet. 41, 52, 9 L. ed. 624, that an entry by one man on the land of another is an ouster of the legal possession arising from the title or not according to the intention with which it is made. If under claim and color of right, it is an ouster, otherwise it is a mere trespass. In legal language the intention guides the entry, and fixes its character. It is said in *Sharon v. Tucker*, 144 U. S. 533, 541, 12 Sup. Ct. 720, 36 L. ed. 532, that the decisions of the courts have determined that the possession that will bar the right of the former owner to recover real property must be open, visible, continuous, and exclusive, with a claim of ownership, such as will notify all parties seeking information on the subject that the premises are not held in subordination to any title or claim of others, but adversely to all titles and all claimants. So in *Harvey v. Tyler*, 2 Wall. 328, 349, 17 L. ed. 871, it is said that, when there is no claim of right, the possession cannot be adverse to the true title. So in *Bond v. O'Gara*, 177 Mass. 139, 58 N. E. 275, 83 Am. St. Rep. 265, it is said that adverse possession that will ripen into title must be under a claim of right, or, as it has been thought more accurate to say, with an intention to appropriate and hold the land as owner, and to the exclusion, rightfully or wrongfully, of every one else. Our own decisions are to the same effect.



In language settled by the usage of centuries the possession, to be adverse in the technical sense, must be actual, continuous, adverse, notorious, exclusive and hostile. These words are not entirely synonymous.<sup>5</sup> In pleading, the important word is "possession," and the several qualifying words, such as "visible," "hostile," "open," and "notorious," are necessary or not according to the situation including the requirements of pleading in the jurisdiction where the suit is pending.<sup>6</sup>

Though perhaps none of them specifically discuss the necessity of a claim of right, yet they come to the same thing, for they say that the possession must be hostile, and that is equivalent to saying that it must be under a claim of right. *Partch v. Spooner*, 57 Vt. 583. In *Whitney v. French*, 25 Vt. 663, it is said that in this state we have held that entries by strangers under a claim of right are an eviction of the owner. So in *Jangraw v. Mee*, 75 Vt. 211, 54 Atl. 189, 98 Am. St. Rep. 816, it is said to be enough if occupancy and use are exclusive, open, and notorious, and of a character to indicate to the owner that they are under a claim of right."

"Prescription" and "adverse possession" are essentially the same, the principal difference being with respect to enjoyment and occupation. Prescription is the term usually employed when the reference is to incorporeal hereditaments. *Hindley v. Metropolitan El. R. Co.*, 42 Misc. 56, 85 N. Y. Supp. 561.

5. For an explanation of these terms see *U. S.*—*Jasperson v. Scharnikow*, 150 Fed. 571, 80 C. C. A. 373, 15 L. R. A. (N. S.) 1178, and cases cited in note. *Conn.*—*Searles v. DeLadson*, 81 Conn. 133, 70 Atl. 589. *Ill.*—*Bailey v. People*, 190 Ill. 28, 60 N. E. 98, 83 Am. St. Rep. 116; *Knight v. Knight*, 175 Ill. 553, 53 N. E. 306. *Mass.*—*Bond v. O'Gara*, 177 Mass. 139, 58 N. E. 275, 83 Am. St. Rep. 265. *Neb.*—*Hoffine v. Ewings*, 60 Neb. 729, 84 N. W. 93; *Ballard v. Hansen*, 33 Neb. 861, 51 N. W. 295. *N. Y.*—*New York, C. & H. R. Co. v. Moore*, 121 N. Y. Supp. 884. *Vt.*—*Lathrop v. Levarn*, 74 Atl. 331. *Wis.*—*Ovig v. Morrison*, 125 N. W. 449; *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905.

6. *U. S.*—*Holtzman v. Douglass*, 168 U. S. 278, 18 Sup. Ct. 65, 42 L. ed. 466; *Doswell v. De LaLanzo*, 20 How. 29, 15 L. ed. 824; *Tompkins v. Creighton-McShane Oil Co.*, 160 Fed. 303, 87

C. C. A. 427; *Eastern Oregon Land Co. v. Cole*, 92 Fed. 949, 35 C. C. A. 100. *Ala.*—*Matthews v. Tennessee Coal, I. & R. Co.*, 157 Ala. 23, 47 So. 78; *McCreary v. Jackson Lumb. Co.*, 148 Ala. 247, 41 So. 822; *Tennessee, C. & I. R. Co. v. Linn*, 123 Ala. 112, 26 So. 245, 82 Am. St. Rep. 108; *Beasley v. Howell*, 117 Ala. 499, 22 So. 939. *Ark.*—*Ringo v. Woodruff*, 43 Ark. 469. *Cal.*—*Dietz v. Missouri Transfer Co.*, 25 Pac. 423; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100. *Colo.*—*Evans v. Welch*, 29 Colo. 355, 68 Pac. 776; *Lower Latham Ditch Co. v. Loudon etc. Co.*, 27 Colo. 267, 60 Pac. 629, 83 Am. St. Rep. 80. *Del.*—*O'Daniel v. Bakers' Union*, 4 Houst. 488. *D. C.*—*Effinghaus v. Killian*, 1 Mackay 247. *Fla.*—*Hyer v. Griffin*, 55 Fla. 560, 46 So. 635. *Ga.*—*Laramore v. Minish*, 43 Ga. 282; *Gay v. Mitchell*, 35 Ga. 139, 89 Am. Dec. 278. *Idaho.*—*Little v. Crawford*, 13 Idaho 146, 88 Pac. 974. *Ill.*—*Horn v. Metzger*, 234 Ill. 240, 84 N. E. 893; *Downing v. Mayes*, 153 Ill. 330, 38 N. E. 620, 46 Am. St. Rep. 896. *Ind.*—*May v. Dobbins*, 166 Ind. 331, 77 N. E. 353; *Collett v. Vanderburgh County*, 119 Ind. 27, 21 N. E. 329, 4 L. R. A. 321. *Ind. Ter.*—*Choctaw, O. & G. R. Co. v. Rice*, 7 Ind. Ter. 514, 104 S. W. 819. *Iowa.*—*Donahue v. Lannan*, 70 Iowa 73, 30 N. W. 8; *Grube v. Wells*, 34 Iowa 148. *Kan.*—*Pratt v. Ard*, 63 Kan. 182, 65 Pac. 255. *Ky.*—*Courtney v. Ashcraft*, 31 Ky. L. Rep. 1324, 105 S. W. 106; *Taylor v. Buckner*, 2 A. K. Marsh. 18, 12 Am. Dec. 354. *La.*—*Mortimer v. Hodgson*, 155 La. 734, 30 So. 104. *Me.*—*Preble v. Maine Cent. R. Co.*, 85 Me. 260, 27 Atl. 149, 35 Am. St. Rep. 366, 21 L. R. A. 829. *Md.*—*Hackett v. Webster*, 97 Md. 404, 55 Atl. 480; *Armstrong v. Risteau*, 5 Md. 256, 59 Am. Dec. 115. *Mass.*—*Bond v. O'Gara*, 177 Mass. 139, 58 N. E. 275, 83 Am. St. Rep. 265; *Warren v. Bowdran*, 156 Mass. 280, 31 N. E. 300; *Cook v. Babcock*, 11 Cush. 206. *Mich.*—*Lasley v. Knis-*

Adverse possession, pure and simple, that is, where all that is relied upon is possession long-continued and adverse without the presence of any color of title and independent of payment of taxes, when made complete by the period of time recognized for a prescriptive title, namely twenty years, is more than a mere limitation. It constitutes a title which, once perfected, can be divested only in the manner recognized for changing the ownership to real estate under the local law.<sup>7</sup> It is to be remembered, therefore, in pleading, that adverse possession for twenty years is a positive title. This is not a bar to the action or remedy to the plaintiff only, but it takes away his right of possession.<sup>8</sup> The pleader must therefore determine whether the statutes in his own jurisdiction, or the local courts, have changed this rule, for in the one case in using the defense of adverse possession, he may be obliged to plead as though he were setting up a limitation, while in the other he will be allowed to defend under the more general form of denial.

**Color of Title and Payment of Taxes.** — Most of the states have statutes providing that adverse possession accompanied by color of title and payment of taxes, or, in some cases, either of these disjunctively, will be allowed to shorten the period.<sup>9</sup> Whether or not these addi-

- kern, 152 Mich. 244, 115 N. W. 97; Cook v. Clinton, 64 Mich. 309, 31 N. W. 317, 8 Am. St. Rep. 816. **Minn.**—Carpenter v. Coles, 75 Minn. 9, 77 N. W. 424; Washburn v. Cutter, 17 Minn. 335. **Miss.**—McCaughn v. Young, 85 Miss. 277, 37 So. 839. **Mo.**—Swope v. Ward, 185 Mo. 316, 84 S. W. 895; Baber v. Henderson, 156 Mo. 556, 57 S. W. 719, 79 Am. St. Rep. 540. **Neb.**—South Omaha v. Meehan, 71 Neb. 230, 98 N. W. 691; Colvin v. Repub. Val. Land Assn., 23 Neb. 75, 36 N. W. 361, 8 Am. St. Rep. 114. **Nev.**—McDonald v. Fox, 20 Nev. 364, 22 Pac. 234. **N. H.**—Grant v. Fowler, 39 N. H. 101; Riley v. Jameson, 3 N. H. 23, 14 Am. Dec. 325. **N. J.**—Foulke v. Bond, 41 N. J. L. 527. **N. M.**—Johnston v. Albuquerque, 12 N. M. 20, 72 Pac. 9. **N. Y.**—Lewis v. New York & H. R. Co., 162 N. Y. 202, 56 N. E. 540; Brandt v. Ogden, 1 Johns. 156. **N. C.**—Bland v. Beasley, 145 N. C. 168, 58 S. E. 993. **Ohio.**—Dietrick v. Noel, 42 Ohio St. 18, 51 Am. Rep. 788. **Okla.**—Wade v. Crouch, 14 Okla. 593, 78 Pac. 91. **Ore.**—Gardner v. Wright, 49 Ore. 609, 91 Pac. 286. **Pa.**—Collins v. Lynch, 157 Pa. 246, 37 Atl. 723; Hawk v. Senseman, 6 Serg. & R. 21. **S. C.**—Langston v. Cotheran, 78 S. C. 23, 58 S. E. 956. **Tenn.**—Fuller v. Jackson, 62 S. W. 274. **Tex.**—Schleicher v. Gatlin, 85 Tex. 270, 20 S. W. 120. **Utah.**—Salt Lake Inv. Co. v. Fox, 32 Utah 301, 90 Pac. 564, 125 Am. St. Rep. 865, 13 L. R. A. (N. S.) 627. **Vt.**—Lathrop v. Levarn, 74 Atl. 331; Jangraw v. Mee, 75 Vt. 211, 54 Atl. 189, 98 Am. St. Rep. 816. **Va.**—Creekmur v. Creekmur, 75 Va. 430. **Wash.**—Lohse v. Burch, 42 Wash. 156, 84 Pac. 722. **W. Va.**—Ritz v. Ritz, 64 W. Va. 107, 60 S. E. 1095. **Wis.**—Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905; Illinois Steel Co. v. Budzisz, 106 Wis. 499, 81 N. W. 1027, 82 N. W. 534, 80 Am. St. Rep. 54, 48 L. R. A. 830. **Eng.**—Taylor v. Horde, 1 Burr. 60, 97 Eng. Reprint 190.
7. **Cal.**—Collins v. Gray, 154 Cal. 131, 97 Pac. 142. **Neb.**—Martin v. Martin, 76 Neb. 335, 107 N. W. 580, 124 Am. St. Rep. 815. **Eng.**—Taylor v. Horde, 1 Burr. 60, 97 Eng. Reprint 190.
8. Taylor v. Horde, 1 Burr. 60, 97 Eng. Reprint 190, per Lord Mansfield.
9. See Taylor v. Leonard (Ark.), 126 S. W. 387; Knight v. Knight, 178 Ill. 553, 53 N. E. 306.
- Color of title** is that which in appearance is a title but which, by reason of some defect not appearing on its face, is no title. See the following cases: **U. S.**—Cameron v. United States, 148 U. S. 301, 13 Sup. Ct. 595, 37 L. ed. 459; Wright v. Mattison, 18 How. 50, 15 L. ed. 280; Latta v. Clif-

tional independent incidents must be set up as facts depends upon the view prevailing in the local jurisdiction.<sup>10</sup>

**II. PLEADING.—A. GENERALLY.**—In so far as adverse possession is a mere limitation on the right of action it is subject to the rules generally applicable to statutes of limitation.<sup>11</sup>

**B. PLEADING SPECIALLY.—1. Necessity.**—*a. As Basis of Cause of Action.*—A party relying upon title by adverse possession as the basis of his cause of action need not specially plead it, unless required to do so by statute,<sup>12</sup> but may prove adverse possession under a general averment of title.<sup>13</sup>

ford, 47 Fed. 614. Ala.—Nashville, C. & St. L. R. Co. v. Mathis, 109 Ala. 377, 19 So. 384; Farley v. Smith, 39 Ala. 38. Ark.—White v. Stokes, 67 Ark. 184, 53 S. W. 1060. Cal.—Packard v. Moss, 68 Cal. 123, 8 Pac. 818; Bernal v. Gleim, 33 Cal. 668. Colo.—De Foresta v. Gast, 20 Colo. 307, 38 Pac. 244. Ga.—Williamson v. Tison, 99 Ga. 791, 26 S. E. 766; Beverly v. Burke, 9 Ga. 440, 54 Am. Dec. 351. Ill.—Converse v. Calumet River R. Co., 195 Ill. 204, 62 N. E. 887. Ind.—Wilson v. Johnson, 145 Ind. 40, 38 N. E. 38, 43 N. E. 930. Ia.—Lindt v. Uihlein, 116 Iowa 48, 89 N. W. 214. Kan.—Newlin v. Rogers, 6 Kan. App. 410, 51 Pac. 315. Md.—Erdman v. Corse, 87 Md. 506, 40 Atl. 107. Mich.—Miller v. Clark, 56 Mich. 337, 23 N. W. 35. Minn.—McLellan v. Omodt, 37 Minn. 157, 33 N. W. 326. Mo.—Hamilton v. Boggess, 63 Mo. 238. N. J.—Dugan v. Farrier, 47 N. J. L. 383, 1 Atl. 751. N. Y.—Hindly v. Manhattan R. Co., 185 N. Y. 335, 78 N. E. 276. N. C.—Dickens v. Barnes, 79 N. C. 490. Okla.—Woodruff v. Wallace, 3 Okla. 355, 41 Pac. 357. Ore.—Swift v. Mulkey, 17 Ore. 532, 21 Pac. 871. Va.—Sharp v. Shenandoah Furnace Co., 100 Va. 27, 40 S. E. 103. Wis.—Whitcomb v. Provost, 102 Wis. 278, 78 N. W. 432; Edgerton v. Bird, 6 Wis. 527, 70 Am. Dec. 473.

For a collection of cases illustrating what is necessary to constitute color of title, see note to *Tate v. Southard*, 10 N. C. 119, 14 Am. Dec. 578; and note to *Jasperson v. Scharnikow*, 150 Fed. 571, 80 C. C. A. 373, 15 L. R. A. (N. S.) 1178, *et seq.*

10. See Ala.—Tennessee, C. & I. R. Co. v. Linn, 123 Ala. 112, 26 So. 245, 82 Am. St. Rep. 108. Cal.—Cassin v. Nicholson, 154 Cal. 497, 98 Pac. 190. Ill.—Knight v. Knight, 178 Ill. 553, 53 N. E. 306. Wis.—Illinois Steel Co. v. Bilot, 109 Wis. 418, 84

N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905.

11. See the title "Limitation of Actions."

**Disability of Adverse Party.**—Where the bill alleges the disability of the plaintiffs at the time their right of possession accrued, a plea of the statute must negative this fact. *McCloskey v. Barr*, 38 Fed. 165.

**Temporary Absence From State.**—Where a temporary absence from the state of the adverse claimant interrupts the operation of the statute this fact must be set up by plaintiff in his replication to a plea of the statute. *Bateman v. Jackson* (Tex. Civ. App.), 45 S. W. 224, an action of trespass to try title, where the premises were occupied by a tenant during defendant's absence.

12. *Travis v. Hall*, 95 Tex. 116, 65 S. W. 100, 1078; *Gulf, C. & S. F. R. Co. v. Cusenberry*, 86 Tex. 525, 26 S. W. 43. See *Perry v. Ball* (Tex. Civ. App.), 113 S. W. 588.

In actions of trespass to try title, since the statute specially applicable thereto fully prescribes the requisites of the petition and does not require the facts establishing title to be specially pleaded, plaintiff need not specially plead adverse possession notwithstanding a contrary general provision governing limitation of actions. *Benavides v. Molino* (Tex. Civ. App.), 60 S. W. 260, holding that contrary statements in *Curlin v. Hendricks*, 35 Tex. 225, and *Mayers v. Paxton*, 78 Tex. 196, 14 S. W. 568, were mere dicta and not in harmony with the rule established by the supreme court, that where the petition is in the statutory form the plaintiff will be permitted to adduce any competent parol evidence to establish his title without specially pleading the facts proved.

13. Cal.—*Montecito Val. Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac.



**b. As Defense.**—(I.) Generally. — In some jurisdictions a defense of adverse possession must be pleaded specially.<sup>14</sup> In others if relied upon defensively as a bar to the remedy it must be specially pleaded, but if relied upon as an extinguishment of the right it may be proved under a denial of the title of the adverse party.<sup>15</sup> The general rule, however, is that defendant may prove adverse possession as a defense under a general denial or the general issue, where title is thereby put in issue.<sup>16</sup> This applies to any action in which title is in issue,<sup>17</sup>

1113; *Gillespie v. Jones*, 47 Cal. 259. **Mont.**—*Sullivan v. Dunphy*, 4 Mont. 499, 2 Pac. 284. **Tex.**—*Hines v. Lumpkin*, 19 Tex. Civ. App. 556, 47 S. W. 818 (an action for slander of title, holding that in spite of a provision that the statute of limitations must be pleaded specially, where by virtue of the statute adverse possession gives title, it may be availed of under a general allegation of title); *Missouri, K. & T. R. Co. v. Wickham* (Tex. Civ. App.), 44 S. W. 1023. **Wash.**—*Rogers v. Miller*, 13 Wash. 82, 42 Pac. 525, 52 Am. St. Rep. 20, action to quiet title. **Wis.**—*Donahue v. Thompson*, 60 Wis. 500, 19 N. W. 520, an action of trespass.

See also *Asher v. Howard*, 122 Ky. 175, 91 S. W. 270; *Raymond v. Morrison*, 9 Wash. 156, 37 Pac. 318. But see *Montgomery v. Locke*, 72 Cal. 75, 13 Pac. 401; *Frierson v. Irwin*, 5 La. Ann. 531.

The title arising by adverse possession may be proved under any issue which comprehends the fact of ownership. *Grunewald Co. v. Copeland*, 131 Ala. 345, 30 So. 878.

A replication specially pleading adverse possession is not necessary to enable plaintiff to meet a denial of his title by evidence of his adverse possession. *Nelson v. Cooper*, 108 Fed. 919, 48 C. C. A. 140 (trespass to try title); *McInerny v. Irvin*, 90 Ala. 275, 7 So. 841 (trespass *quare clausum*).

**14. Ark.**—*McKewen v. Allen*, 80 Ark. 181, 96 S. W. 392. **Cal.**—*Allen v. McKay & Co.*, 70 Pac. 8; *Woodward v. Faris*, 109 Cal. 12, 41 Pac. 781 (an action to quiet title). **Colo.**—*Webber v. Wannemaker*, 39 Colo. 425, 89 Pac. 780. **N. Y.**—*Raynor v. Timerson*, 46 Barb. 518; *People v. Van Rensselaer*, 8 Barb. 189. But see *Morss v. Salisbury*, 48 N. Y. 636. **Tex.**—*Perry v. Ball*

(Tex. Civ. App.), 113 S. W. 588, holding a plea insufficient.

Where no issue of adverse possession is made by the pleadings, it is too late after the case is before the jury to rely on adverse possession as a source of title. *White River M. & M. Co. v. Langston*, 76 Ark. 420, 88 S. W. 971.

Prescription must be specially pleaded in the answer. *State v. Quantie*, 37 Mont. 32, 94 Pac. 491, 500; *Larsen v. Onesite*, 21 Utah 38, 59 Pac. 234. See *Rhodes v. Cooper*, 113 La. Ann. 600, 37 So. 527. Compare *Montgomery v. Locke*, 72 Cal. 75, 13 Pac. 401, and see the title "Easements."

**Law and Equity.**—The rules as to the necessity of specially pleading adverse user are the same in law and equity. *McKewen v. Allen*, 80 Ark. 181, 96 S. W. 392; *State v. Quantie*, 37 Mont. 32, 94 Pac. 491, 500.

**15. Mo.**—*Hill v. Bailey*, 8 Mo. App. 85. **S. C.**—*Sutton v. Clark*, 59 S. C. 440, 38 S. E. 150, 82 Am. St. Rep. 848. **Tenn.**—*Ferring v. Fleischman* (Tenn. Ch. App.), 39 S. W. 19.

**16. U. S.**—*Hogan v. Kurtz*, 94 U. S. 773, 24 L. ed. 317. **Ill.**—*Keppel v. Dreier*, 187 Ill. 298, 58 N. E. 386; *Coward v. Coward*, 148 Ill. 268, 35 N. E. 759. **Ky.**—See *Kidd v. Bell*, 122 S. W. 232; *Asher v. Howard*, 122 Ky. 175, 91 S. W. 270. **Miss.**—*Tegarden v. Carpenter*, 36 Miss. 404. **Neb.**—*Link v. Campbell*, 72 Neb. 307, 100 N. W. 409, 104 N. W. 939. **N. C.**—*Whitaker v. Jenkins*, 138 N. C. 476, 51 S. E. 104; *Shelton v. Wilson*, 131 N. C. 499, 42 S. E. 937; *Cheatham v. Young*, 113 N. C. 161, 18 S. E. 92, 37 Am. St. Rep. 617; *Falls of Neuse Mfg. Co. v. Brooks*, 106 N. C. 107, 11 S. E. 456; *Farrior v. Houston*, 95 N. C. 578. **Ohio.**—*Kyser v. Cannon*, 29 Ohio St. 359. **Pa.**—See *Way v. Hooton*, 156 Pa. 8, 26 Atl. 784. **Can.**—*Miller v. Wolfe*, 30 Nova Scotia 277.

**17.** "It has long been held that a general denial of the plaintiff's title

whether at law or in equity,<sup>18</sup> such as actions to quiet title,<sup>19</sup> or ejectment.<sup>20</sup>

(II.) Statutes. — The manner or necessity of pleading title by adverse possession may be effected by general statutes.<sup>21</sup> Thus, general provisions requiring limitation of actions to be pleaded have been held applicable to statutes governing adverse possession of land.<sup>22</sup> But it

will suffice for the admission of evidence of adverse possession for the statutory period; because this will not merely bar the remedy but may establish a title in the defendant which will exclusively negative any ownership in the plaintiff." *Hill v. Bailey*, 8 Mo. App. 85; quoted approvingly in *Sutton v. Clark*, 59 S. C. 440, 38 S. E. 150, 82 Am. St. Rep. 848.

Adverse possession for the time prescribed as a bar by the statute of limitations may be given in evidence under the plea of the general issue in detinue. *Lay's Exr. v. Lawson's Admr.*, 23 Ala. 377; *Elam v. Bass*, 4 Munf. (Va.) 301.

18. See *Coward v. Coward*, 148 Ill. 268, 35 N. E. 759.

19. *Milner v. Hyland*, 77 Ind. 458.

20. Conn. — *Trowbridge v. Royce*, 1 Root 50. Fla. — *Weiskoph v. Dibble*, 18 Fla. 24; *Wade v. Doyle*, 17 Fla. 522. Ky. — *Shaw v. Revel*, 21 Ky. L. Rep. 348, 51 S. W. 566. Mich. — *Miller v. Beck*, 68 Mich. 76, 35 N. W. 899. Miss. — *Bell v. Coats*, 56 Miss. 776; *Wilson v. Williams' Heirs*, 52 Miss. 487; *Hutto v. Thornton*, 44 Miss. 166; *Ellis v. Murray*, 28 Miss. 129. Mo. — *Hedges v. Pollard*, 149 Mo. 216, 50 S. W. 889; *Collins v. Pease*, 146 Mo. 135, 47 S. W. 925; *Bird v. Sellers*, 113 Mo. 580, 21 S. W. 91; *Holmes v. Kring*, 93 Mo. 452, 6 S. W. 347; *Nelson v. Brodhack*, 44 Mo. 596, 100 Am. Dec. 328. Neb. — *Link v. Campbell*, 72 Neb. 307, 100 N. W. 409, 104 N. W. 939; *Murray v. Romine*, 60 Neb. 94, 82 N. W. 318; *Fink v. Dawson*, 52 Neb. 647, 72 N. W. 1037; *Williams v. Shepherdson*, 4 Neb. (Unof.) 608, 95 N. W. 827. N. C. — *Shelton v. Wilson*, 131 N. C. 499, 42 S. E. 37. Ohio. — *Rhodes v. Gunn*, 35 Ohio St. 387; *Kyser v. Cannon*, 29 Ohio St. 359. Ore. — See *Neal v. Davis*, 99 Pac. 69. Pa. — *Heath v. Page*, 48 Pa. 130. Tenn. — *Coleson v. Blanton*, 3 Hayw. 152. Tex. — See *Horton v. Crawford*, 10 Tex. 382. Wash. — See *Raymond v.*

*Morrison*, 9 Wash. 156, 37 Pac. 318. Eng. — *Hardman v. Ellames*, 2 Myl. & K. 732, 740.

In *Oldig v. Fisk*, 53 Neb. 156, 73 N. W. 661, the court says: "True, the statute of limitations, as a general rule, must be pleaded, to be made available, but there are two reasons why that rule is not applicable to the defense of adverse possession in an action of ejectment. The first is that sections 626 and 627 of the Code provide specially for the pleadings in actions of ejectment, and as to the answer it is enacted that it shall be sufficient to deny generally the title alleged in the petition. Under such a denial it has always been here held that the defendant may show any facts negating the plaintiff's right of possession. . . . The other reason is that adverse possession is more than a defense of the statute of limitations. Such possession, for the statutory period, not only bars the remedy, but it vests in the occupant an absolute title to the land. . . . Proof of adverse possession goes therefore directly to disprove plaintiff's title, and is admissible under the general issue. . . . What has been said is not opposed to the case of *Alexander v. Meyers*, 33 Neb. 773, 51 N. W. 140, which was a suit to foreclose a lien, and therefore did not present a similar question."

21. Although generally in ejectment adverse possession need not be specially pleaded, a statute requiring defendant to plead title in himself or another in the same manner as is required of a plaintiff renders necessary a general averment of title, under which adverse possession may be proved. *Raymond v. Morrison*, 9 Wash. 156, 37 Pac. 318.

22. Mont. — *State v. Quantie*, 37 Mont. 32, 94 Pac. 491, 500. N. Y. — *Hansee v. Mead*, 2 N. Y. Civ. Proc. 175. Tex. — *Burk v. Turner*, 79 Tex. 276, 15 S. W. 256.

seems such provisions do not apply to actions, the pleadings in which are governed by special statutes.<sup>23</sup>

Proof of adverse possession may be made under a general denial in some states by statute.<sup>24</sup>

**2. Propriety and Effect.**—In some jurisdictions although provable under the general issue, adverse possession may also be specially pleaded.<sup>25</sup> In others a special plea is not proper.<sup>26</sup> But in the latter case an attempted special plea of the statute will be regarded as mere surplusage not affecting the right to prove adverse possession under a general denial,<sup>27</sup> though in some jurisdictions it is demurrable,<sup>28</sup> and must be stricken out.<sup>29</sup>

**3. Nature and Sufficiency.**—a. *Generally.*—Where adverse pos-

But see *Asher v. Howard*, 122 Ky. 175, 91 S. W. 270.

Such a provision is comprehensive and embraces "all actions in all courts in which the defendants put in any answer, and in which, by the rules of procedure, their answer is required to be in writing." Consequently it abrogated the general rule which, in actions to try title to land let in, under the general issue, the defense of the statute. *Horton v. Crawford*, 10 Tex. 382.

Where only one of two defendants pleads adverse possession it is error to submit such issue to the jury as to both defendants. *Bailey v. Baker*, 4 Tex. Civ. App. 395, 23 S. W. 454, citing *Alexander v. Meyers*, 33 Neb. 773, 51 N. W. 140.

23. See *Oldig v. Fisk*, 53 Neb. 156, 73 N. W. 661. Compare *Benavides v. Molino* (Tex. Civ. App.), 60 S. W. 260.

24. *Vail v. Halton*, 14 Ind. 344. See *infra*, III, "Variance."

In Ejectment.—*Shaw v. Revel*, 21 Ky. L. Rep. 348, 51 S. W. 566; *Hutto v. Thornton*, 44 Miss. 166.

25. *Lloyd v. Rawl*, 63 S. C. 219, 241, 41 S. E. 312; *Sutton v. Clark*, 59 S. C. 440, 38 S. E. 150, 82 Am. St. Rep. 848. See *Vanduyn v. Hepner*, 45 Ind. 589. But see *Milner v. Hyland*, 77 Ind. 458.

**Special Plea Not Demurrable.**—Where the law permits the defense to be pleaded specially the defendant cannot be deprived of this right merely because he may also prove the same matter under a plea of the general issue, and it is therefore error to sustain a demurrer to a special plea on this ground. *Tegarden v. Carpenter*, 36 Miss. 404.

26. *Farrior v. Houston*, 95 N. C. 578. The rule of this case applies only to the seven years statute of limitation under color of title, and not to the twenty and thirty years statute, the reason being that possession under color for seven years ripens into title and may be used as a defense under the general issue.

**Objection to This Method of Pleading May Be Waived.**—*Colvin v. Burnet*, 17 Wend. (N. Y.) 564.

27. *Gillespie v. Jones*, 47 Cal. 359; *Farrior v. Houston*, 95 N. C. 578. See also *Mo.*—*Hill v. Atterbury*, 88 Mo. 114, holding that it is not reversible error to refuse to strike out of the answer facts showing adverse possession. *Mont.*—*Sullivan v. Dunphy*, 4 Mont. 499, 2 Pac. 284. *Neb.*—*Oldig v. Fisk*, 53 Neb. 156, 73 N. W. 661. *Ohio.*—*Kyser v. Cannon*, 29 Ohio St. 359.

28. Adverse possession being provable under a general denial in an action to quiet title, a demurrer to a special plea is properly sustained. *Milner v. Hyland*, 77 Ind. 458. But see *Vanduyn v. Hepner*, 45 Ind. 589.

29. *Weiskoph v. Dibble*, 18 Fla. 22, 24.

The court of its own volition should strike out such a plea as tending to embarrass the trial. *Wade v. Doyle*, 17 Fla. 522.

Where, by statute, only the general issue can be pleaded in an action of ejectment, a special plea of adverse possession is not proper and should be stricken out. *Wilson v. Williams' Heirs*, 52 Miss. 487; *Hutto v. Thornton*, 44 Miss. 166.



session<sup>30</sup> or prescription<sup>31</sup> must be specially pleaded, every essential

**30. Colo.**—Webber v. Wannemaker, 39 Colo. 425, 89 Pac. 780; Eberville v. Leadville Tun., M. & D. Co., 28 Colo. 241, 64 Pac. 200. **Ind.**—McCaslin v. State, 38 Ind. App. 184, 75 N. E. 844. **Ky.**—City of Cadiz v. Hillman, 20 Ky. L. Rep. 1776, 50 S. W. 49. **Tex.**—Portis v. Hill, 3 Tex. 273.

Only those facts which are legally essential to title by adverse possession need be averred. *Gaines v. Agnelly*, 1 Woods 238, 9 Fed. Cas. No. 5,173. But the fact that other and evidentiary matters are set out does not affect the sufficiency of the plea. *Horton v. Crawford*, 10 Tex. 382.

The sufficiency of the plea of the statute must be determined by its averments without reference to defensive matters urged in other pleas. *Montague County v. Meadows* (Tex. Civ. App.), 42 S. W. 326.

**Averments Held Sufficient.**—See following cases: **U. S.**—*Gaines v. Agnelly*, 1 Woods 238, 9 Fed. Cas. No. 5,173; *Harpending v. Reformed P. Church*, 16 Pet. 455, 10 L. ed. 1029. **Ill.**—*Walker v. Converse*, 148 Ill. 622, 36 N. E. 202, a suit in equity to establish a title by adverse possession under tax deeds. **Ky.**—*Keaton v. Sublett*, 109 Ky. 106, 58 S. W. 528, where the averment was that possession was actual, peaceable, quiet, open, notorious and adverse.

In *Young v. Cox*, 12 Ky. L. Rep. 347, 14 S. W. 348, an answer was held sufficient which alleged substantially that defendant was the owner of the land in question and that he and his predecessor had had the actual, continuous and adverse possession of it for fifteen years next before the commencement of the action, claiming and using it to a well marked boundary.

An averment that plaintiff "is now and she and her grantors have been, in the actual, open, notorious, and adverse possession under color of title and claim of right for more than ten years last past" is a sufficient allegation of adverse possession. *Hesser v. Siepmann*, 35 Wash. 14, 76 Pac. 295.

A plea of the five year statute of limitations was held sufficient which alleged that, claiming to be the true and lawful owner of the land in controversy, the defendant has had and held actual, peaceable and adverse possession of the said land, claiming it under deeds duly registered, cultivat-

ing, using and enjoying it, and paying all taxes due thereon, for a period of more than five years next before the commencement of this suit, and since the accrual of plaintiff's alleged cause of action. *Montague County v. Meadows* (Tex. Civ. App.), 42 S. W. 326.

A complaint was held to contain a sufficient averment of title by adverse possession which, after alleging that possession of certain described property had been received pursuant to a parol exchange of properties fifteen years before, continued as follows: "Complainant has been in actual, uninterrupted adverse possession of said parcel of land received from defendant for about 15 years, and has openly and notoriously exercised the control of an owner of it from the date of the exchange until now, using it in the same manner that he would have used it had same passed to him by deed. He has cut fire wood from it, raked and hauled straw and leaves from it, split his rails upon it, sold the saw timber from it, and cultivated a small part of it. And all this the defendant well knew, knowing full well, too, that, your complainant was doing so as owner of said land." *Bynum v. Stinson*, 81 Miss. 25, 32 So. 910.

**Co-Tenants.**—Claim of adverse possession by one held sufficiently averred. *Whitaker v. Jenkins*, 138 N. C. 476, 51 S. E. 104. Compare *Jordan v. Jordan* (Ala.), 39 So. 992.

**Insufficient Averment.**—See: **Ala.**—*Normant v. Eureka Co.*, 98 Ala., 181, 12 So. 454, 39 Am. St. Rep. 45. **Tenn.**—*Ferring v. Fleischman* (Tenn. Ch. App.), 39 S. W. 19; *McKee v. Dail*, 1 Tenn. Ch. App. 689 (that defendant "has had possession of the . . . land ever since 1877, exercised ownership over the same and paid taxes on same and is fully entitled to the fee in this land, according to the equity and justice of the case"). **Tex.**—*Montague County v. Meadows* (Tex. Civ. App.), 42 S. W. 326 (ten year statute).

An allegation that the land in question had been conveyed to defendant at a given time and that he had lived in "the peaceful enjoyment and possession of same ever since" is an insufficient averment of adverse possession. *Beatty v. Dozier*, 17 Ky. L. Rep. 1275, 34 S. W. 524.

**31. Ala.**—*Overton v. Moseley*, 135

element thereof must be averred. It is usually sufficient to allege the elements of adverse possession in general terms without stating the specific facts relied upon to prove them;<sup>32</sup> no particular words are required<sup>33</sup> unless by statute,<sup>34</sup> and it has been held sufficient if the pleading clearly shows that the pleader is asserting and relying upon adverse possession.<sup>35</sup> In some jurisdictions, however, the particular facts constituting the alleged adverse possession must be set forth.<sup>36</sup>

Ala. 599, 33 So. 696. Ark.—Johnson v. Lewis, 47 Ark. 66, 2 S. W. 329, 14 S. W. 466. Cal.—But see *Montgomery v. Locke*, 72 Cal. 75, 13 Pac. 401. Ind.—*Mitchell v. Bain*, 142 Ind. 604, 42 N. E. 230. Ky.—*Smoot v. Wainscott*, 28 Ky. L. Rep. 233, 89 S. W. 176. La.—*Rhodes v. Cooper*, 113 La. Ann. 600, 37 So. 527. Nev.—*Chollar-Potosi Min. Co. v. Kennedy*, 3 Nev. 361, 93. Am. Dec. 409. Utah.—*Coleman v. Hines*, 24 Utah 360, 67 Pac. 1122; *Larsen v. One-site*, 21 Utah 38, 59 Pac. 234.

32. *Portis v. Hill*, 3 Tex. 273. See also *Gilreath v. Furman*, 53 S. C. 463, 31 S. E. 291; *Bartlett v. Secor*, 56 Wis. 520. 14 N. W. 714.

An averment by defendant that she had the uninterrupted possession of the lands in question, claiming them as her own, with full knowledge of complainant for more than sixteen years, is a sufficient plea of the statute of limitations. *Love v. Love*, 65 Ala. 554.

As averment that the possession was actual, peaceable, quiet, open, notorious, and adverse, sufficiently shows it was exclusive and visible. *Keaton v. Sublett*, 109 Ky. 106, 58 S. W. 528.

33. *Horton v. Crawford*, 10 Tex. 382. See *Abbott v. Pond*, 142 Cal. 393, 78 Pac. 60.

34. The words of the statute used in defining adverse possession need not be followed. *Bynum v. Stinson*, 81 Miss. 25, 32 So. 910.

Where a statutory form of plea is provided, if it is not followed all the essential facts must be set out. *Ferring v. Fleischman* (Tenn. Ch. App.), 39 S. W. 19.

35. *Keaton v. Sublett*, 109 Ky. 106, 58 S. W. 528; *Duckworth v. Duckworth*, 144 N. C. 620, 57 S. E. 396 (holding sufficient, though not very full and precise nor to be commended as a model, the following plea: "the defendants for a further defense, plead the statute of limitations of twenty years' adverse possession under known and visible lines and boundaries in such cases provided, as a bar to plaintiff's recovery").

"Anything in answer which will apprise the plaintiff that the defendant relies on the statute of limitations is sufficient, if such facts are stated as are necessary to show that the statute is applicable." *Humphrey v. Spencer*, 36 W. Va. 11, 16, 14 S. E. 410, holding sufficient an averment that during a period of more than eleven years the "defendant has had undisputed and undisturbed possession of the property claimed, . . . paid taxes, and her title had never been disputed."

An averment that since the purchase of said tract of land respondent has been paying taxes thereon and the same has been taxed in his name, and all other expenses connected therewith have been paid by him, and he has had the actual adverse possession thereof since the 16th day of October, 1876, was held sufficient compliance with the above rule. *Talbott v. Woodford*, 48 W. Va. 499, 37 S. E. 580.

In *Zeilin v. Rogers*, 21 Fed. 103, which was an action for recovery of real property, it was held that although the statute of limitations was not pleaded directly or in a manner that could be called good pleading, the case having been tried upon that issue, and no objection having been raised by the plaintiff, an answer was sufficient which averred that neither the plaintiff nor his grantor was seized or possessed of the premises for the statutory period of ten years prior to the commencement of the action, and that defendant was in the exclusive possession of the premises during that period.

36. *McCloskey v. Barr*, 38 Fed. 165 (holding insufficient as stating mere conclusions a plea "that at the time of the bringing of this suit, and long prior thereto, this defendant was and still is, in the open, notorious, continuous and exclusive possession of the said premises as the sole owner thereof, and claiming and holding adversely to the complainants and all the world"); *Clarke v. Hughes*, 13 Barb. (N. Y.) 147. See also Cal.—*Mont-*

b. *Reference to Statute.*—In some jurisdictions the statute relied upon must be specifically referred to in the pleading;<sup>37</sup> in others this is unnecessary where the essential facts are averred.<sup>38</sup> But reference to the statute does not dispense with the necessity of setting out the facts.<sup>39</sup>

c. *Particular Allegations.*—(I.) **Generally.**—What particular allegations must be made depends to a great extent upon the requirements of the various statutes as to the essentials of adverse possession.

(II.) **Possession.**—(A.) **GENERALLY.**—Possession must be alleged.<sup>40</sup>

(B.) **CHARACTER OF.**—The character of the possession must be set out.<sup>41</sup>

**Adverse.**—The adverse character of the possession must be averred.<sup>42</sup> This is sufficiently done by simply characterizing it as adverse.<sup>43</sup> The facts showing the nature and character of the pos-

gomery v. Locke, 72 Cal. 75, 13 Pac. 401; Lick v. Diaz, 30 Cal. 65. **Ia.**—Gillis v. Black, 6 Iowa 439. **La.**—Rhodes v. Cooper, 113 La. Ann. 600, 37 So. 527. **Eng.**—Hardman v. Ellames, 2 Myl. & K. 732.

37. The particular statute relied upon must be designated and pleaded; it is not enough to aver the facts constituting the adverse possession. Ferring v. Fleischman (Tenn. Ch. App.), 39 S. W. 19.

It is not sufficient for defendant to allege that he has been in the adverse possession of the land in controversy for more than thirty years. He "must expressly plead and rely on the statute." City of Uniontown v. Berry, 25 Ky. L. Rep. 598, 76 S. W. 145.

38. Harpending v. Reformed P. Church, 16 Pet. (U. S.) 455, 10 L. ed. 1029; Keppel v. Dreier, 187 Ill. 298, 58 N. E. 386 (a proceeding under the Burnt Records Act).

The statute of limitations may be set up either by technical separate plea or in the answer, Dochtermann v. Marshall, 92 Miss. 747, 46 So. 542, holding that where the facts alleged in the answer showed adverse possession, and this was made an issue of the case, that the failure to plead the statute specially was immaterial.

39. Seaverns v. Costello, 8 Ariz. 308, 71 Pac. 930.

40. See *Infra* II, B, 3, c, (II), (D).

The persons holding the alleged adverse possession must be named. Clarke v. Hughes, 13 Barb. (N. Y.) 147.

41. Gillis v. Black, 6 Iowa 439.

"Actual possession" must be averred,

but an allegation that the land was occupied continuously is a sufficient equivalent. Hall v. Roberts, 24 Ky. L. Rep. 2362, 74 S. W. 199, explaining the case of Newcome v. Crews, 98 Ky. 339, 32 S. W. 947, where the omission of the word "actual" was held fatal.

**Peaceable Possession.**—See Elean v. Childress, 40 Tex. Civ. App. 193, 89 S. W. 84. An averment that user was uninterrupted, renders unnecessary any averment that it was peaceable, the former including the latter. Montecito Val. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113.

**Cultivation, Use, or Enjoyment.**—Necessity of alleging in plea of five year statute of limitation. See Elean v. Childress, 40 Tex. Civ. App. 193, 89 S. W. 84.

42. **U. S.**—McGrath v. Valentine, 167 Fed. 473. **Cal.**—Lick v. Diaz, 30 Cal. 65, holding insufficient an attempted plea by the plaintiff. **Ind.**—Sanford v. Tucker, 54 Ind. 219. **N. Y.**—Colvin v. Burnet, 17 Wend. 564. **Tex.**—Portis v. Hill, 3 Tex. 273. But see Bellingham Bay L. C. v. Dibble, 4 Wash. 764, 31 Pac. 30.

43. Portis v. Hill, 3 Tex. 273; Montague County v. Meadows (Tex. Civ. App.), 42 S. W. 326. See *supra*, II, B, 3, a, "Generally." But see *Ia.*—Gillis v. Black, 6 Iowa 439. Wash.—Bellingham Bay L. Co. v. Dibble, 4 Wash. 764, 31 Pac. 30. **Eng.**—Hardman v. Ellames, 2 Myl. & K. 732.

**Not a Conclusion of Law.**—An averment of adverse possession is not a statement of a conclusion of law but of fact, and it is sufficient to allege adverse, continuous, uninterrupted and



session need not be alleged,<sup>44</sup> though where they are set forth<sup>45</sup> or the adverse character of the possession sufficiently appears from other averments,<sup>46</sup> an allegation that possession was adverse is unnecessary.

**Exclusive.**—An averment that possession was exclusive has been held necessary,<sup>47</sup> but the general rule is that this element may sufficiently appear from the use of other words.<sup>48</sup> And where exclusive possession is not essential, as in case of a prescriptive easement, it need not be alleged.<sup>49</sup>

**Hostile.**—The fact that the claim and possession were hostile is involved in the allegation that they were adverse and need not be separately averred.<sup>50</sup>

(C.) **DURATION AND TIME OF.**—Possession for the required time,<sup>51</sup> or for a greater period,<sup>52</sup> prior to the commencement of the action<sup>53</sup> or to the repeal of the statute,<sup>54</sup> must be alleged.

(D.) **CONTINUITY.**—It must be averred that the possession was continuous.<sup>55</sup>

peaceable possession for the statutory period under a claim of ownership. *Gilreath v. Furman*, 53 S. C. 463, 31 S. E. 291.

44. *Portis v. Hill*, 3 Tex. 273. See *supra*, II, B, 3, a.

45. *Morss v. Salisbury*, 48 N. Y. 636, 651, *per* Leonard, C.; *Bellingham Bay L. Co. v. Dibble*, 4 Wash. 764, 31 Pac. 30.

46. *Bartlett v. Secor*, 56 Wis. 520, 14 N. W. 714.

47. *Alexander v. Meyers*, 33 Neb. 773, 51 N. W. 140 (holding an allegation of actual, open, notorious, continuous, and adverse possession insufficient for this reason). See also *Butcher v. Butcher*, 137 Mich. 390, 100 N. W. 604; *Tourtelotte v. Pearce*, 27 Neb. 57, 42 N. W. 915; *Pettit v. Black*, 13 Neb. 142, 12 N. W. 841.

48. *Jackson v. Snodgrass*, 140 Ala. 365, 37 So. 246. See *Hesser v. Siepmann*, 35 Wash. 14, 76 Pac. 295; *Bellingham Bay L. Co. v. Dibble*, 4 Wash. 764, 31 Pac. 30. But see *Jordan v. Jordan* (Ala.), 39 So. 992, where one co-tenant was claiming adverse possession against the other cotenants.

The exclusive and visible character of the possession is sufficiently alleged by an averment that it was "actual, peaceable, quiet, open, notorious, and adverse." *Keaton v. Sublett*, 109 Ky. 106, 58 S. W. 528.

49. *Abbott v. Pond*, 142 Cal. 393, 76 Pac. 60.

50. *Abbott v. Pond*, 142 Cal. 393, 76 Pac. 60; *Montague County v. Meadows* (Tex. Civ. App.), 42 S. W. 326.

51. **U. S.**—*McCloskey v. Barr*, 38 Fed. 165. **Cal.**—*Sharp v. Daughney*, 33 Cal. 505. **Ind.**—*Vanduyne v. Hepner*, 45 Ind. 589.

See *Sullivan v. Dunphy*, 4 Mont. 499, 2 Pac. 284.

An averment of adverse possession for "the time limited by law" is insufficient. *Gillis v. Black*, 6 Iowa 439.

52. *Bynum v. Stinson*, 81 Miss. 25, 32 So. 910.

An averment of possession for a greater number of years than required by statute is good unless it misleads as to the statute intended to be pleaded. Where the statute is referred to by section, such a plea is not misleading. *Roberts v. Decker*, 120 Wis. 102, 97 N. W. 519.

53. *Gates v. Solomon*, 73 Ark. 8, 83 S. W. 348; *Sharp v. Daughney*, 33 Cal. 505.

54. Where the statute providing for adverse possession against the state has been repealed, the plea must show that the alleged adverse possession occurred while the statute was in force. *McCaslin v. State*, 38 Ind. App. 184, 75 N. E. 844.

55. *Winslow v. Winslow*, 52 Ind. 8 (holding insufficient, on this ground, an averment that defendant had been for more than twenty years before the commencement of the action in the exclusive and peaceable possession of the land in question under a claim of title); *Colvin v. Burnet*, 17 Wend. (N. Y.) 564.

"But an averment that complainant and his predecessors, through whom he claims, have successively for more

(III.) **Claim or Color of Title.** — The possession must be alleged to have been under claim or color of title except where the statute does not require color of title.<sup>56</sup> No direct averment of this element is necessary if it sufficiently appears from the facts alleged.<sup>57</sup> The genuineness of an alleged deed constituting color of title need not be alleged.<sup>58</sup>

(IV.) **Knowledge, Notice or Notoriety.** — Where the knowledge of or notice to the owner of the adverse claim is essential it must be alleged.<sup>59</sup>

The notoriety of the possession and claim may sufficiently appear without the use of the word "notorious."<sup>60</sup>

Lack of knowledge by the claimant of the adverse party's title need not be alleged.<sup>61</sup>

(V.) **Description and Inclosure of Land.** — A description of the land

than twenty years been in open, notorious, hostile and adverse use of said . . . right of way and road" is sufficient. "The words 'continuous and exclusive' need not be used, the term 'adverse' being sufficient without the other qualifying adjectives." *Jackson v. Snodgrass*, 140 Ala. 365, 37 So. 246.

56. **U. S.**—*McGrath v. Valentine*, 167 Fed. 473. **Ind.**—*Postlethwaite v. Payne*, 8 Ind. 104. **N. Y.**—*Clarke v. Hughes*, 13 Barb. 147. **Tex.**—*Bailey v. Baker*, 4 Tex. Civ. App. 395, 23 S. W. 454.

An averment of title in a certain person and that defendant has for the necessary period been in adverse possession and occupation of the premises "as purchasers and grantees" from such person is sufficient without alleging a deed, at least as against a demurrer *ore tenus*. *Roberts v. Decker*, 120 Wis. 102, 97 N. W. 519.

Claim of title is sufficiently averred by the words "under claim of right and adversely to plaintiff." *Abbott v. Pond*, 142 Cal. 393, 76 Pac. 60.

**Registered Deed.**—Under some statutes it must be averred that the claim was under a deed duly registered. *Seaverns v. Costello*, 8 Ariz. 308, 71 Pac. 930.

**Necessity of Averring Writing.**—Where adverse possession pursuant to *parol exchange* is claimed, neither record title nor written agreement need be averred. *Bynum v. Stinson*, 81 Miss. 25, 32 So. 910.

57. *Archer v. Beihl*, 136 Fed. 113,

69 C. C. A. 101; *Jones v. Herrick*, 35 Wash. 434, 77 Pac. 798.

*Whitaker v. Jenkins*, 138 N. C. 476, 51 S. E. 104, an action for partition, where one co-tenant pleaded adverse possession. The averments of the answer that plaintiffs had abandoned the land to defendant because it was charged with the support of their mother, that defendant then took sole and exclusive possession and has held the same openly, notoriously and adversely ever since, were held sufficient to show claim of ownership.

58. Where it is alleged that title was claimed under a recorded deed from certain grantors "conveying" the property in question, an allegation that such deed was not a forgery is unnecessary. *Work v. United Globe Mines (Ariz.)*, 100 Pac. 813.

Where a tax deed is relied upon as color of title, it is not necessary to aver the facts making it a valid deed. *Walker v. Converse*, 148 Ill. 622, 36 N. E. 202, *distinguishing* *Koch v. Hubbard*, 85 Ill. 533, on the ground that there the tax deed was relied upon as a valid conveyance of title.

59. Notice to a municipality of a claim of title to a street must be alleged, where necessary to the commencement of the running of the statute. *City of Cadiz v. Hillman*, 20 Ky. L. Rep. 1776, 50 S. W. 49.

60. *Abbott v. Pond*, 142 Cal. 393, 76 Pac. 60.

61. *Cass Farm Co. v. Detroit*, 139 Mich. 318, 102 N. W. 848.

adversely claimed,<sup>62</sup> and the fact that it was inclosed,<sup>63</sup> must be averred under some statutes.

(VI.) Payment of taxes, where necessary to perfect a claim of adverse possession, must be averred in some jurisdictions,<sup>64</sup> though in others it is regarded as a matter of evidence merely which should not be pleaded.<sup>65</sup>

d. *Curing Defective Pleading.*—Although a plea of the statute may be defective in some respects, where its sufficiency is not questioned at the trial and the evidence introduced without objection shows all of the elements of the defense the defects in the plea may be deemed to have been waived.<sup>66</sup> So, too, the averments<sup>67</sup> or de-

62. *Kidd v. Bell* (Ky.) 122 S. W. 232; *Giddings v. Fischer*, 97 Tex. 184, 77 S. W. 209; *Doom v. Taylor*, 35 Tex. Civ. App. 251, 79 S. W. 1086.

It is sufficient to describe the premises so that they may be identified. *Veramendi v. Hutchins*, 56 Tex. 414.

The failure of the plea of the statute to sufficiently describe the boundaries of the land claimed is not material where this sufficiency is supplied by the evidence. *Thompson v. Dutton*, 96 Tex. 205, 71 S. W. 544; *Williams v. Texas & N. O. R. Co.* (Tex. Civ. App.), 114 S. W. 877.

63. See *Giddings v. Fischer*, 97 Tex. 184, 77 S. W. 209; *Doom v. Taylor*, 35 Tex. Civ. App. 251, 79 S. W. 1086.

Although no color of title is averred, it is not necessary to allege that the land was inclosed where the averments show that ownership has been claimed and the property controlled and used under such claim to the knowledge of the other party. *Bynum v. Stinson*, 81 Miss. 25, 32 So. 910.

64. *Eberville v. Leadville Tun., M. & D. Co.*, 28 Colo. 241, 64 Pac. 200.

An averment that defendant has "paid the taxes" on the property in question for the statutory period is not a sufficient allegation that all taxes legally assessed against the property have been paid. *Webber v. Wannemaker*, 39 Colo. 425, 89 Pac. 780; *Eberville v. Leadville Tun., M. & D. Co.*, 28 Colo. 241, 64 Pac. 200.

65. *Ball v. Nichols*, 73 Cal. 193, 14 Pac. 831. See *Partridge v. Shepard*, 71 Cal. 470, 12 Pac. 480.

66. Thus although a plea of the ten year statute of limitation fails to allege a "peaceable" possession, and a plea of the five year statute fails to allege cultivation, use or enjoyment, the pleas are broad enough to support

a judgment if there was no previous exception to their sufficiency, and no objection made to the evidence establishing every material element. *Elean v. Childress*, 40 Tex. Civ. App. 193, 89 S. W. 84.

In *McKewen v. Allen*, 80 Ark. 181, 96 S. W. 392, the following plea was held sufficient: "Defendant states that this cause of action, if cause of action it be, did not accrue within seven years next before the commencement of this suit." There was no objection to its form and no motion that it be made more definite and certain. The evidence was directed specially to the issue of adverse possession of seven years and showed all of the essential elements thereof.

If the earlier proceedings in the case clearly show that plaintiff is relying upon adverse possession in support of his allegation of ownership, defendant cannot complain after judgment of the failure to specially plead prescription. *Frierson v. Irwin*, 5 La. Ann. 525, 531, where the case had been previously tried and appealed on the issue of prescription without objection by defendant to the failure to specially plead it.

Failure to describe boundaries cured by evidence. *Thompson v. Dutton*, 96 Tex. 205, 71 S. W. 544.

Where Defects Could Have Been Cured by Amendment.—See *Jones v. Herrick*, 35 Wash. 434, 77 Pac. 798; *Bellingham Bay L. Co. v. Dibble*, 4 Wash. 764, 31 Pac. 30.

On appeal the failure to plead specially cannot be questioned where not objected to below in any way. *Dunn v. Taylor* (Tex. Civ. App.), 107 S. W. 952.

67. *Butcher v. Butcher*, 137 Mich. 390, 100 N. W. 604, holding that defendant's failure to plead exclusive possession is immaterial where com-



nials<sup>68</sup> of the adverse party may cure a defective pleading of adverse possession.

e. *Inconsistency in Pleading*.—Because a plaintiff relies upon title by adverse possession he is not thereby prevented from setting up other sources of title not consistent therewith.<sup>69</sup> The general rules as to pleading inconsistent defenses are applied to an answer setting up adverse possession.<sup>70</sup>

4. *Demurrer*.—The defense of adverse possession may be raised by demurrer,<sup>71</sup> but only where the pleading demurred to affirmatively shows all the facts essential to the defense.<sup>72</sup>

An insufficient attempt to plead adverse possession is demurrable.<sup>73</sup>

plainant's bill shows that he has been excluded by defendant during the period in question.

68. *By Replication*.—Although a plea of adverse possession is defective in not alleging possession for the required period, a replication expressly denying that fact and putting it in issue cures the defect. *King v. See*, 27 Ky. L. Rep. 1011, 87 S. W. 758.

69. Plaintiff in a suit to quiet title may rely upon a tax title and title by adverse possession, and cannot be required to elect between them. *Liebholt v. Enright*, 77 Kan. 321, 94 Pac. 203.

70. Defendant in ejectment may deny plaintiff's title and also specially plead adverse possession; such defenses are not inconsistent. *Wilson v. Cleaveland*, 30 Cal. 192. See also *Columbia W. P. Co. v. Columbia, etc. Co.*, 42 S. C. 488, 20 S. E. 378, 540. Although his general denial put in issue his alleged possession he is not thereby prevented from specially pleading adverse possession. "The admission of possession contained in the special defense must be confined to that defense." *Dillon v. Center*, 68 Cal. 561, 10 Pac. 176.

Claims under different statutes providing different periods of limitation are not inconsistent and may be set up in the same answer. *Roberts v. Decker*, 120 Wis. 102, 97 N. W. 519.

71. *Williams v. Harrell*, 43 N. C. 123, 55 Am. Dec. 442; *Talbott v. Woodford*, 48 W. Va. 449, 37 S. E. 580. See *Alexander v. Meyers*, 33 Neb. 773, 51 N. W. 140; *Dawkins v. Penrhyn*, 6 Ch. Div. (Eng.) 318.

A bill in equity is demurrable if it shows adverse possession in defendant for the required period, unless it further shows that the complaint comes within some one of the exceptions in

the statute. The defense need not be raised by a plea. *Humbert v. Trinity Church*, 7 Paige (N. Y.) 195.

Form of Demurrer.—A demurrer averring "that it appears by the complaint that the cause of action is barred by the statute of limitations" is sufficient since it is not the office of a demurrer to set forth the facts. *Brennan v. Ford*, 46 Cal. 8.

A general demurrer is insufficient to raise the question that the cause of action stated in the complaint is barred by the statute of limitations. *Brennan v. Ford*, 46 Cal. 8. Compare *Jones v. Herriek*, 35 Wash. 434, 77 Pac. 798. See more fully the title "*Limitation of Actions*."

72. *Ia.*—*City of Pella v. Scholte*, 21 Iowa 463. *Miss.*—*Tush-ho-Yo Tubby v. Barr*, 41 Miss. 52. *W. Va.*—*Talbott v. Woodford*, 48 W. Va. 449, 37 S. E. 580.

Where the complaint seeks to quiet an adverse claim but does not show when the claim was first made, it is not demurrable. *Milner v. Hyland*, 77 Ind. 458.

A complaint is demurrable where it shows sufficient facts to bar the right of action under the statute. *Cameron v. Louisville, etc. R. Co.*, 69 Miss. 78, 10 So. 554.

73. An answer which insufficiently avers adverse possession is demurrable. *Colo.*—*Eberville v. Leadville Tun.*, M. & D. Co., 28 Colo. 241, 64 Pac. 200. *Ind.*—*Sanford v. Tucker*, 54 Ind. 219; *Winslow v. Winslow*, 52 Ind. 8; *Postlethwaite v. Payne*, 8 Ind. 104. *N. Y.*—*Clarke v. Hughes*, 13 Barb. 147. But in determining the sufficiency of the answer on demurrer the averments and deficiencies of the complaint must be considered. *Gilreath v. Furman*, 53 S. C. 463, 31 S. E. 291.

Where plaintiff claims title by ad-

5. **Replication** is necessary in some states where adverse user is specially pleaded in the answer.<sup>74</sup>

6. **Amendments** are allowable in accordance with the general rules governing this subject.<sup>75</sup>

**III. VARIANCE.**—Evidence if objected to should not be admitted to prove adverse possession which is not sufficiently pleaded, where special pleading is unnecessary.<sup>76</sup> Under a special plea of adverse possession the evidence should be confined to matters showing such possession.<sup>77</sup>

Where possession for more than the required number of years previous to the action is alleged the evidence is not limited to the period immediately preceding the action,<sup>78</sup> and such an averment is satisfied by proof of possession for the statutory period.<sup>79</sup>

**IV. QUESTIONS OF LAW AND FACT.**—A. GENERALLY.—Adverse possession is a mixed question of law and fact.<sup>80</sup> What consti-

verse possession his complaint is not demurrable on the ground that adverse possession does not confer title as against the public unless his complaint shows that title was once vested in the public. *Crocker v. Collins*, 37 S. C. 327, 15 S. E. 951, 34 Am. St. Rep. 452.

**When Special Pleading Not Required.**—See *supra*, II, B, 2, "Propriety and Effect."

74. *State v. Quantic*, 37 Mont. 32, 94 Pac. 491, 500. See *King v. See*, 27 Ky. L. Rep. 1011, 87 S. W. 758; *Bateman v. Jackson* (Tex. Civ. App.), 45 S. W. 224 (holding that interruption of the running of the statute by temporary absence from the state must be set up in the replication).

75. *Zeilin v. Rogers*, 21 Fed. 103, holding an amendment allowable after verdict "in furtherance of justice" to conform the pleadings to the proof. See *Jones v. Herrick*, 35 Wash. 434, 77 Pac. 798; *Bellingham Bay L. Co. v. Dibble*, 4 Wash. 764, 31 Pac. 30.

But in a suit in equity to quiet title where the original bill averred facts showing that complainant had not been in adverse possession for the statutory period, an amendment setting out general adverse possession by complainant for the required length of time was held to be at variance with the original allegations and abortive to show any right of adverse possession in complainant. *Magnetic Ore Co. v. Marbury Lumb. Co.*, 113 Ala. 306, 21 So. 36.

76. *City of Cadiz v. Hillman*, 20 Ky. L. Rep. 1776, 50 S. W. 49.

Where the plaintiff has set forth in detail in his complaint the title under

which he claims, "it may be true that he would be restricted to the title alleged and could not recover on adverse possession," but defendant cannot raise this question on appeal where he has himself requested an instruction as to what is necessary to give plaintiff title by adverse possession. *Love v. Turner*, 71 S. C. 322, 51 S. E. 101.

77. A special plea of the statute of limitations does not render admissible evidence of an agreement fixing the boundary line, by virtue of which defendant has been in possession less than the required period of time, although such facts would constitute a good defense to the action of ejectment if pleaded. *Kelley v. Oldham*, 20 Ky. L. Rep. 370, 46 S. W. 214. Compare *Donahue v. Thompson*, 60 Wis. 500, 19 N. W. 520. But see *Mayers v. Paxton*, 78 Tex. 196, 14 S. W. 568; *City of San Antonio v. Rowley* (Tex. Civ. App.), 106 S. W. 753.

78. *Campbell Real Estate Co. v. Wiley* (Tex. Civ. App.), 83 S. W. 251; *Hennessy v. Savings & Loan Co.*, 22 Tex. Civ. 591, 55 S. W. 124.

An allegation of possession for a period of more than ten years next before the filing of this suit and before the ejectment hereinafter alleged, is sustained by proof of ten years' possession completed nine years before the date of the alleged ejectment. *Travis v. Hall*, 95 Tex. 116, 65 S. W. 1077, 1078.

79. *Bogardus v. Trinity Church*, 4 Sandf. Ch. (N. Y.) 633. See also *Harpending v. Reformed P. Church*, 16 Pet. (U. S.) 455, 10 L. ed. 1029.

80. *U. S.—Cook v. Burnley*, 11 Wall.

tutes title by adverse possession is a question of law for the court;<sup>81</sup> whether the essential facts exist in a particular case is in general a question of fact for the jury,<sup>82</sup> or the court sitting as

659, 669, 20 L. ed. 29. **Ga.**—Moore v. Ensign-Oscamp Co., 131 Ga. 421, 62 S. E. 229; Paxson v. Bailey, 17 Ga. 600. **Hawaii.**—Kaaibue v. Crabbe, 3 Hawaii 768. **Minn.**—Washburn v. Cutter, 17 Minn. 361. **Nev.**—McDonald v. Fox, 20 Nev. 364, 22 Pac. 234. **N. C.**—Bryan v. Spivey, 109 N. C. 57, 13 S. E. 766. **Tex.**—Word v. Drouthett, 44 Tex. 365. See also **Ala.**—Doe v. Eslava, 11 Ala. 1028, 1044. **Me.**—Gardner v. Gooch, 48 Me. 487. **N. Y.**—Jackson v. Joy, 9 Johns. 102. **Tex.**—Broxson v. McDougal, 70 Tex. 64, 7 S. W. 591.

The weight of the evidence is for the jury, but where the facts are found their legal sufficiency is for the court. Valentine v. Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715.

81. **Ala.**—Potts v. Coleman, 67 Ala. 221; Collins v. Johnson, 57 Ala. 304; Herbert v. Hanrick, 16 Ala. 581, 594. **Ga.**—Verdery v. Savannah, etc. R. Co., 82 Ga. 675, 9 S. E. 1133; Paxson v. Bailey, 17 Ga. 600; Moody v. Fleming, 4 Ga. 115, 120, 48 Am. Dec. 210. **Hawaii.**—Kaaibue v. Crabbe, 3 Hawaii 768. **Ky.**—Banks v. Collins, 19 Ky. L. Rep. 46, 39 S. W. 519. **Md.**—Baker v. Swan, 32 Md. 355. **Minn.**—Washburn v. Cutter, 17 Minn. 361. **Miss.**—Magee v. Magee, 37 Miss. 138. **Mo.**—Harper v. Morse, 114 Mo. 317, 21 S. W. 517; Boogher v. Neece, 75 Mo. 383; Hamilton v. Boggess, 63 Mo. 233; Macklot v. Dubreuil, 9 Mo. 477; 43 Am. Dec. 550. **N. J.**—Cornelius v. Giberson, 25 N. J. L. 1, 31. **N. Y.**—Jackson v. Walker, 7 Cow. 637. **Pa.**—Armstrong v. Caldwell, 53 Pa. 284; Schwab v. Bickel, 11 Pa. Super. 312. **Tex.**—Greenlee v. Taylor, 79 Tex. 149, 14 S. W. 1056; Word v. Drouthett, 44 Tex. 365. **Wis.**—Kurz v. Miller, 89 Wis. 426, 62 N. W. 182.

“What constitutes title and seniority of title and adverse possession under claim and color of title are all questions of law calling for legal definitions; and while the facts upon which such questions arise must be found by the jury, the legal propositions themselves are for the court to decide. Or, as was said by the Supreme Court, ‘adverse possession is a legal idea, admits of legal distinctions, and is therefore correctly laid down

to be a question of law.’ Bradstreet v. Huntington, 5 Pet. (U. S.) 402, 438.” Reid v. Anderson, 13 App. Cas. (D. C.) 30.

82. **U. S.**—Anderson v. Bock, 15 How. 323, 14 L. ed. 714. **Ala.**—Woods v. Montevallo Coal, etc. Co., 84 Ala. 560, 3 So. 475, 5 Am. St. Rep. 393; Collins v. Johnson, 57 Ala. 304; Kennedy v. Townsley, 16 Ala. 239. **Conn.**—Layton v. Bailey, 77 Conn. 22, 58 Atl. 355; Merwin v. Morris, 71 Conn. 555, 42 Atl. 855; St. Peter’s Church v. Beach, 26 Conn. 355. **Ga.**—Paxson v. Bailey, 17 Ga. 600; Beverly v. Burke, 9 Ga. 440, 54 Am. Dec. 351; Moody v. Fleming, 4 Ga. 115, 48 Am. Dec. 210. **Ill.**—Truesdale v. Ford, 37 Ill. 210. **Kan.**—Douglas v. Muse, 62 Kan. 865 (mem.), 61 Pac. 413. **Ky.**—Gill v. Fauntleroy, 8 B. Mon. 177. **Me.**—Kinsell v. Dagget, 11 Me. 309. **Md.**—Walsh v. McIntire, 68 Md. 402, 13 Atl. 348; Baker v. Swan, 32 Md. 355; Keener v. Kauffman, 16 Md. 296. **Mass.**—Morrison v. Chapin, 97 Mass. 72; Cummings v. Wyman, 10 Mass. 464. **Mich.**—Sauers v. Giddings, 90 Mich. 50, 51 N. W. 265; McCall v. Wells, 55 Mich. 171, 20 N. W. 890; Demill v. Moffat, 45 Mich. 410, 8 N. W. 79. **Minn.**—Kelly v. Palmer, 91 Minn. 133, 97 N. W. 578; Washburn v. Cutter, 17 Minn. 361. **Miss.**—Ford v. Wilson, 35 Miss. 490, 72 Am. Dec. 137; Grafton v. Grafton, 8 Smed. & M. 77. **Mo.**—Morrison v. Bomer, 195 Mo. 535, 94 S. W. 524; Wilson v. Taylor, 119 Mo. 626, 25 S. W. 199; Harper v. Morse, 114 Mo. 317, 21 S. W. 517; Hamilton v. Boggess, 63 Mo. 233; Macklot v. Dubreuil, 9 Mo. 477, 43 Am. Dec. 550. **Neb.**—Webb v. Thiele, 56 Neb. 752, 77 N. W. 56. **N. H.**—Hopkins v. Deering, 71 N. H. 753, 52 Atl. 75. **N. J.**—Johnston v. Fitzgeorge, 50 N. J. L. 470, 14 Atl. 762; Foulke v. Bond, 41 N. J. L. 527. **N. Y.**—Barnes v. Light, 116 N. Y. 34, 22 N. E. 441; Gross v. Welwood, 90 N. Y. 638; Heughes v. Galusha Stove Co. (App. Div.), 118 N. Y. Supp. 109; Lewis v. Upton, 90 App. Div. 453, 86 N. Y. Supp. 397; Jackson v. Stevens, 13 Johns. 495; Jackson v. Joy, 9 Johns. 102. **Pa.**—Sayers v. Pollock, 219 Pa. 274, 68 Atl. 732; Griffin v. Mulley, 167 Pa. 339, 31 Atl. 664; Mason v.



such, to be determined in view of all the circumstances.<sup>83</sup>

Where the evidence is conflicting on the material facts,<sup>84</sup> or where there is any evidence from which the jury might properly find adverse possession for the requisite period, the issue must be submitted to the jury.<sup>85</sup> But where there is no evidence of adverse possession

Ammon, 117 Pa. 127, 11 Atl. 449; Groft v. Weakland, 34 Pa. 304; Nickle v. M'Farlane, 3 Watts 165; Davis v. Robinson, 34 Pa. Super. 371; Schwab v. Bickel, 11 Pa. Super. 312. **Tex.**—Broxson v. McDougal, 70 Tex. 64, 7 S. W. 591; Word v. Drouthett, 44 Tex. 365; Holliday v. Cromwell, 37 Tex. 437; City of San Antonio v. Rowley (Tex. Civ. App.), 106 S. W. 753; Haigler v. Pope, 34 Tex. Civ. App. 124, 77 S. W. 1039. **Va.**—Archer v. Sadler, 2 Hen. & M. 370. **Wash.**—Johnson v. Brown, 33 Wash. 588, 74 Pac. 677. **Wis.**—Illinois Steel Co. v. Budzisz, 119 Wis. 580, 97 N. W. 166; Kurz v. Miller, 89 Wis. 426, 62 N. W. 182; Hacker v. Horlemus, 69 Wis. 280, 34 N. W. 125; Whitney v. Powell, 2 Pin. 115.

Although the plea fails to sufficiently identify and describe the particular land in actual possession of the claimant, if this sufficiency is supplied by the evidence the issue of limitations must be submitted to the jury, Thompson v. Dutton, 96 Tex. 205, 71 S. W. 544; Williams v. Texas & N. O. R. Co. (Tex. Civ. App.), 114 S. W. 877.

Whether there is any evidence of adverse possession is a question for the jury. Walling v. Eggers, 31 Ky. L. Rep. 1009, 104 S. W. 360.

Ouster by Co-Tenant. — **Cal.** — Oglesby v. Hollister, 76 Cal. 136, 18 Pac. 146, 9 Am. St. Rep. 177; Carpenter v. Mendenhall, 28 Cal. 484, 87 Am. Dec. 135. **Mich.** — Highstone v. Burdette, 54 Mich. 329, 20 N. W. 64. **Miss.** — Harmon v. James, 7 Smed. & M. 111, 45 Am. Dec. 296. **Pa.** — Workman v. Guthrie, 29 Pa. 495, 72 Am. Dec. 654. **Tex.** — Honea v. Arledge (Tex. Civ. App.), 120 S. W. 508. **Va.** — Purcell v. Wilson, 4 Gratt. 16.

83. **Cal.** — Thomas v. England, 71 Cal. 456, 12 Pac. 491. **Md.** — Thistle v. Frostburg Coal Co., 10 Md. 129. **Minn.** — Young v. Grieb, 95 Minn. 396, 104 N. W. 131. **Mo.** — Irwin v. Woodmansee, 104 Mo. 403, 16 S. W. 486.

84. **Ala.** — Theodore Land Co. v. Lyons, 148 Ala. 668, 41 So. 682. **Ga.** —

Georgia Iron & Coal Co. v. Allison, 121 Ga. 483, 49 S. E. 618; Cochran v. Warleek, 111 Ga. 396, 36 S. E. 762. **Kan.** — Douglas v. Muse, 62 Kan. 865, 61 Pac. 413. **Ky.** — Ball v. Loughridge, 30 Ky. L. Rep. 1123, 100 S. W. 275. **Mich.** — McKay v. Gardner, 120 Mich. 267, 79 N. W. 185; Beecher v. Ferris, 117 Mich. 108, 75 N. W. 294; Pendill v. Agricultural Soc., 95 Mich. 491, 55 N. W. 384. **Mo.** — Patton v. Fox, 179 Mo. 525, 78 S. W. 804; Sell v. McAnaw, 158 Mo. 466, 59 S. W. 1003. **Neb.** — Kolterman v. Chilvers, 82 Neb. 216, 117 N. W. 405. **N. J.** — Reed v. Hackney, 69 N. J. L. 27, 54 Atl. 229. **Pa.** — Bennett v. Morrison, 120 Pa. 390, 14 Atl. 264, 6 Am. St. Rep. 711; Rung v. Shoneberger, 2 Watts 23, 26 Am. Dec. 95. **S. C.** — Wright v. Willoughby, 79 S. C. 438, 60 S. E. 971. **Tex.** — Thacker v. Wilson (Tex. Civ. App.), 122 S. W. 938.

For a discussion of questions of evidence, see 1 ENCYCLOPAEDIA OF EVIDENCE, 636, *et seq.*

85. **N. Y.** — Barnes v. Light, 116 N. Y. 34, 22 N. E. 441; Stillwell v. Boyer, 36 App. Div. 424, 55 N. Y. Supp. 358; Tindale v. Powell, 88 Hun 193, 34 N. Y. Supp. 659. **Pa.** — Thompson v. Philadelphia & R. Coal & I. Co., 133 Pa. 46, 19 Atl. 346; Bennett v. Morrison, 120 Pa. 390, 14 Atl. 264, 6 Am. St. Rep. 711. **Wis.** — Allen v. Allen, 58 Wis. 202, 16 N. W. 610.

Where evidence tending to establish adverse possession has been introduced, this issue must be submitted to the jury, though the evidence is contradicted and the jury may not consider it sufficient. Link v. Campbell, 72 Neb. 307, 100 N. W. 409, 104 N. W. 939.

Non-suit is properly refused where there is evidence from which the jury might properly find adverse possession. Holder v. Scarborough, 119 Ga. 256, 46 S. E. 93; Lassiter v. Okeetee Club, 70 S. C. 102, 49 S. E. 224; Kolb v. Jones, 62 S. C. 193, 40 S. E. 168. See also Erksen v. Johnston, 8 App. Div. 31, 40 N. Y. Supp. 401.

Where the evidence does not conclusively prove a claim of adverse posses-

or an essential element thereof,<sup>88</sup> or the evidence negatives such possession<sup>87</sup> or is insufficient to sustain a verdict,<sup>89</sup> it is error to submit the question to the jury. And where the facts are undisputed, or where there is no substantial conflict, the question is one of law for the court.<sup>89</sup> Where uncontradicted evidence shows title by adverse possession, it is not error to direct a verdict.<sup>90</sup>

**B. POSSESSION.**—Whether the evidence shows possession of the premises,<sup>91</sup> and if so what the character of the possession is,<sup>92</sup> whether

sion the question is for the jury. *Harrison v. Spencer*, 90 Mich. 586, 51 N. W. 642.

**86 U. S.**—*Chandler v. Von Roeder*, 24 How. 224, 16 L. ed. 633. **Colo.**—*Wood v. Chapman*, 24 Colo. 134, 49 Pac. 136. **D. C.**—*Reid v. Anderson*, 13 App. Cas. 30. **Ga.**—*Greer v. Raney*, 120 Ga. 290, 47 S. E. 939. **Ky.**—*Hightower v. Borden*, 112 S. W. 675; *Chambers v. Sharp*, 29 Ky. L. Rep. 271, 93 S. W. 627. **Md.**—*Walsh v. McIntire*, 68 Md. 402, 13 Atl. 348. **Mich.**—*McKee v. Grand Rapids*, 133 Mich. 272, 95 N. W. 85. See *Demill v. Moffat*, 45 Mich. 410, 8 N. W. 79. **Mo.**—*Chilton v. Comanianni*, 221 Mo. 685, 120 S. W. 1174. **Neb.**—*Baty v. Elrod*, 66 Neb. 735, 92 N. W. 1032, 97 N. W. 343. **Pa.**—*Armstrong v. Caldwell*, 53 Pa. 284; *Nearhoff v. Addleman*, 31 Pa. 279; *Deppen v. Bogar*, 7 Pa. Super. 434. See *DeHaven v. Landell*, 31 Pa. 120. **Tex.**—*Forsod v. Golsen*, 77 Tex. 666, 14 S. W. 232; *Cochran v. Moerer*, 31 Tex. Civ. App. 495, 72 S. W. 1031; *Lackey v. Bennett* (Tex. Civ. App.), 65 S. W. 651; *Wiley v. Lindley* (Tex. Civ. App.), 56 S. W. 1001. **Wis.**—*Allen v. Allen*, 58 Wis. 202, 16 N. W. 610.

Until evidence sufficient to make a *prima facie* case of adverse possession has been introduced it is error for the court to submit the question to the jury. *Judson v. Duffy*, 96 Mich. 255, 55 N. W. 837; *Wilson v. Braden*, 56 W. Va. 372, 49 S. E. 409, 107 Am. St. Rep. 822.

Where the evidence does not show possession for the requisite period (*Lackey v. Bennett* [Tex. Civ. App.], 65 S. W. 651), or color of title (*Bailey v. Baker*, 4 Tex. Civ. App. 395, 23 S. W. 454), it is error to submit the issue of adverse possession to the jury.

The court must instruct the jury that the evidence is insufficient to show title by adverse possession, where there is no evidence of an essential element. *DeHaven v. Landell*, 31 Pa. 120.

**87.** Where the evidence of a party

himself disproves his alleged adverse possession it is error to submit the question to the jury by instructions. *Harrison v. Cachelin*, 27 Mo. 26.

**88.** *Roberson v. Downing Co.*, 126 Ga. 175, 54 S. E. 1020. See *Barnes v. Light*, 116 N. Y. 34, 22 N. E. 441.

**89.** **Ga.**—*Roberson v. Downing Co.*, 126 Ga. 175, 54 S. E. 1020; *Verdery v. Savannah, etc. R. Co.*, 82 Ga. 675, 9 S. E. 1133. **Mo.**—*Hendricks v. Musgrove*, 183 Mo. 300, 81 S. W. 1265; *Sell v. McAnaw*, 158 Mo. 466, 59 S. W. 1003. **N. H.**—*Newmarket Mfg. Co. v. Pendergast*, 24 N. H. 54. **N. Y.**—*Jackson v. Walker*, 7 Cow. 637. **Pa.**—*Union Canal Co. v. Young*, 1 Whart. 410, 30 Am. Dec. 212; *Rung v. Shoneberger*, 2 Watts 23, 26 Am. Dec. 95; *Deppen v. Bogar*, 7 Pa. Super. 434. **Tex.**—*Holland v. Ferris* (Tex. Civ. App.), 107 S. W. 102; *York v. Hutcheson*, 37 Tex. Civ. App. 367, 83 S. W. 895.

**90.** **Ga.**—*Briscoe v. Holder*, 111 Ga. 877, 36 S. E. 960. **Ky.**—*Owens v. Mich.*—*McKee v. Grand Rapids*, 133 Mich. 272, 95 N. W. 85. **Tex.**—*York v. Hutcheson*, 37 Tex. Civ. App. 367, 83 S. W. 895.

Where the evidence clearly shows adverse possession the court is justified in directing a verdict. *McKee v. Grand Rapids*, 133 Mich. 272, 95 N. W. 85.

**91.** **Ala.**—*Chambers v. Morris*, 48 So. 687. **Ill.**—*White v. Harris*, 206 Ill. 584, 69 N. E. 519. **N. Y.**—*Gross v. Welwood*, 90 N. Y. 638.

See: **U. S.**—*Anderson v. Bock*, 15 How. 323; *Ewing v. Burnet*, 11 Pet. 41, 53. **Ala.**—*Zundell v. Baldwin*, 114 Ala. 328, 21 So. 420. **Md.**—*Thistle v. Frostburg Coal Co.*, 10 Md. 129. **N. C.**—*Asbury v. Fair*, 111 N. C. 251, 16 S. E. 467.

**92.** **Ala.**—*Herbert v. Hanrick*, 16 Ala. 581, 594. **Ga.**—*Flannery v. Hightower*, 97 Ga. 592, 25 S. E. 371; *Saterfield v. Randall*, 44 Ga. 576. **La.**—*Succession of Zebriska*, 119 La. 1076, 44 So. 893. **Mich.**—*Sauers v. Giddings*,

adverse,<sup>93</sup> actual,<sup>94</sup> open and notorious,<sup>95</sup> exclusive,<sup>96</sup> and continuous.<sup>97</sup>

90 Mich. 50, 51 N. W. 265. Mo.—Foard v. McAnnelly, 215 Mo. 371, 114 S. W. 990. N. Y.—Gross v. Welwood, 90 N. Y. 638. N. C.—Parker v. Banks, 79 N. C. 480.—S. C.—Roberts v. Roberts, 2 McCord L. 268. Tex.—Word v. Drouthett, 44 Tex. 365; Barrett v. McKinney (Tex. Civ. App.), 93 S. W. 240; Logan v. Robertson (Tex. Civ. App.), 83 S. W. 395. Wis.—Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905.

93. Ala.—Knight v. Hunter, 155 Ala. 238, 46 So. 235; Lawrence v. Alabama State Land Co., 144 Ala. 524, 41 So. 612; Nashville, etc. R. Co. v. Hammond, 104 Ala. 191, 15 So. 935; Trufant v. White, 99 Ala. 526, 13 So. 83. Cal.—Abbott v. Pond, 142 Cal. 393, 76 Pac. 60; Thomas v. England, 71 Cal. 456, 12 Pac. 491. Conn.—St. Peter's Church v. Beach, 26 Conn. 355. Ga.—Baxley v. Baxley, 117 Ga. 60, 43 S. E. 436. Ill.—Carroll v. Rabberman, 240 Ill. 450, 88 N. E. 995. Ind.—Wiggins v. Holley, 11 Ind. 2; Logsdon v. Dingg, 32 Ind. App. 158, 69 N. E. 409. Ky.—Owsley v. Owsley, 117 Ky. 47, 77 S. W. 397; Dubois v. Marshall, 3 Dana 336; Bowles v. Sharp, 4 Bibb 550. La.—Succession of Zebriska, 119 La. 1076, 44 So. 893. Me.—Eaton v. Jacobs, 52 Me. 445; Kinsell v. Daggett, 11 Me. 309. Md.—Armstrong v. Risteau, 5 Md. 256, 59 Am. Dec. 115. Mass.—Fitchburg R. Co. v. Page, 131 Mass. 391; Hill v. Crosby, 2 Pick. 466, 13 Am. Dec. 448. Mich.—Seitz v. People's Sav. Bank, 140 Mich. 106, 103 N. W. 545; Miller v. Shumway, 135 Mich. 654, 98 N. W. 385. Minn.—Kelly v. Palmer, 91 Minn. 133, 97 N. W. 578. Miss.—Bentley v. Callaghan, 79 Miss. 302, 30 So. 709; Magee v. Magee, 37 Miss. 138; Ford v. Wilson, 35 Miss. 490, 72 Am. Dec. 137. Neb.—Webb v. Thiele, 56 Neb. 752, 77 N. W. 56. N. H.—Atherton v. Johnson, 2 N. H. 31. N. J.—Colgan v. Pellens, 48 N. J. L. 27, 2 Atl. 633; Penton v. Sinnickson, 9 N. J. L. 149. N. Y.—Gross v. Welwood, 90 N. Y. 638; Buffalo Creek R. Co. v. Collins, 41 App. Div. 8, 58 N. Y. Supp. 65. Ore.—Alt-schul v. O'Neill, 35 Ore. 202, 58 Pac. 95. Pa.—Mason v. Ammon, 117 Pa. 127, 11 Atl. 449; Thompson v. Kauffel, 110 Pa. 209, 1 Atl. 267; Rung v. Shone-

berger, 2 Watts 23, 26 Am. Dec. 95; McMasters v. Bell, 2 Pen. & W. 180. S. C.—Bryce v. Cayce, 62 S. C. 546, 40 S. E. 948; Rogers v. Madden, 2 Bailey 321; Harrington v. Wilkins, 2 McCord 289. Tex.—Word v. Drouthett, 44 Tex. 365. Vt.—Hall v. Dewey, 10 Vt. 593; Stevens v. Dewing, 2 Atk. 112. Wis.—Ayers v. Reidel, 84 Wis. 276, 54 N. W. 588; Hacker v. Horlemus, 74 Wis. 21, 41 N. W. 965; McPherson v. Featherstone, 37 Wis. 632. Can.—Miller v. Wolfe, 30 Nova Scotia 277; Doe v. Harper, 2 N. Bruns. 289.

But where it is an undisputed fact that the claimant entered and under a deed giving him an absolute title to land, the legal conclusion that possession was adverse is one for the court to draw. Newmarket Mfg. Co. v. Pendergast, 24 N. H. 54.

94. Ala.—McCreary v. Jackson Lumb Co., 148 Ala. 247, 41 So. 822. Ill.—White v. Harris, 206 Ill. 584, 69 N. E. 519. Ind.—Wiggins v. Holley, 11 Ind. 2. Ky.—Cardwell v. Sprigg's Heirs, 7 Dana 36. Md.—Armstrong v. Risteau, 5 Md. 256, 59 Am. Dec. 115. Mich.—Pendill v. Agricultural Soc., 95 Mich. 491, 55 N. W. 384. Mo.—Benne v. Miller, 149 Mo. 228, 50 S. W. 824. N. M.—Johnston v. Albuquerque, 12 N. M. 20, 72 Pac. 9. N. Y.—Martin v. Rector, 30 Hun 138. N. C.—McAllister v. Devane, 76 N. C. 57.

95. Me.—Gardner v. Gooch, 48 Me. 487. Mich.—Pendill v. Agricultural Soc., 95 Mich. 491, 55 N. W. 384. Pa.—Mason v. Ammon, 117 Pa. 127, 11 Atl. 449. S. C.—Bryce v. Cayce, 62 S. C. 546, 40 S. E. 948; Harrelson v. Sarvis, 39 S. C. 14, 17 S. E. 368. Wash.—Johnson v. Brown, 33 Wash. 588, 74 Pac. 677. Wis.—Illinois Steel Co. v. Budzisz, 119 Wis. 580, 97 N. W. 166.

96. Me.—Kinsell v. Daggett, 11 Me. 309. Pa.—O'Hara v. Richardson, 46 Pa. 385. Vt.—Adams v. Fullam, 43 Vt. 592. See *supra*, note 93.

97. Md.—Armstrong v. Risteau, 5 Md. 256, 59 Am. Dec. 115. Mass.—Webster v. Lowell, 142 Mass. 324, 8 N. E. 54; Bowen v. Guild, 130 Mass. 121. Mich.—Pendill v. Agricultural Soc., 95 Mich. 491, 55 N. W. 384. Mo.—Gordon v. Park, 219 Mo. 600, 117 S. W. 1163. Pa.—Mason v. Ammon, 117 Pa. 127, 11 Atl. 449; Thomp-



its extent<sup>98</sup> and duration<sup>99</sup> are all questions for the jury to determine.

C. CLAIM OF OWNERSHIP. — The question whether the possession was held under a claim of ownership is one of fact for the jury,<sup>1</sup> as is the extent<sup>2</sup> and bona fides<sup>3</sup> of the claim.

D. COLOR OF TITLE. — What constitutes color of title is a question for the court.<sup>4</sup>

E. NOTICE OR KNOWLEDGE. — Whether the owner had notice or knowledge of the adverse possession is also for the jury to determine.<sup>5</sup>

F. ABANDONMENT. — Whether the evidence shows an abandonment of an adverse claim is for the jury.<sup>6</sup>

V. INSTRUCTIONS. — A. GENERALLY. — Instructions in actions involving adverse possession are governed by the general rules re-

son v. Kauffel, 110 Pa. 209, 1 Atl. 267; Hollinshead v. Nauman, 45 Pa. 140; Hoopes v. Garver, 15 Pa. 517; Cunningham v. Patton, 6 Pa. 355. **Vt.**—Webb v. Richardson, 42 Vt. 465. See Cook v. Burnley, 11 Wall. (U. S.) 659, 669, 20 L. ed. 29.

As to what is a reasonable time between the occupancy of different tenants is for the jury. Dunn v. Taylor (Tex. Civ. App.), 107 S. W. 952.

98. **Ala.**—Knight v. Hunter, 155 Ala. 238, 46 So. 235. **N. Y.**—O'Donohue v. Cronin, 62 App. Div. 379, 70 N. Y. Supp. 737. **S. C.**—Harrelson v. Sarvis, 39 S. C. 14, 17 S. E. 368. **Wis.**—Krekeberg v. Leslie, 111 Wis. 462, 87 N. W. 450.

99. **Ala.**—Campbell v. Bates, 143 Ala. 338, 39 So. 144. **Ind.**—Wiggins v. Holley, 11 Ind. 2. **Ky.**—Adams v. Tiernan, 5 Dana 394. **N. C.**—Whitaker v. Jenkins, 138 N. C. 476, 51 S. E. 104; Britton v. Ruffin, 122 N. C. 113, 28 S. E. 963; Asbury v. Fair, 111 N. C. 251, 16 S. E. 467. **Pa.**—Cunningham v. Patton, 6 Pa. 355. **Vt.**—Adams v. Fullam, 43 Vt. 592.

When possession commenced is for the jury to determine. **Ind.**—Hearick v. Doe, 4 Ind. 164. **Kan.**—Douglas v. Muse, 62 Kan. 865, 61 Pac. 413. **Mo.**—Bompert v. Stumpff, 40 Mo. 446. **S. C.**—Lyles v. Roach, 30 S. C. 291, 9 S. E. 334. **Vt.**—Adams v. Fullam, 43 Vt. 592.

1. **Ala.**—Lawrence v. Doe, 41 So. 612. **Md.**—Armstrong v. Risteau, 5 Md. 256, 59 Am. Dec. 115. **Mass.**—Fitchburg R. Co. v. Page, 131 Mass. 391. **Nev.**—McDonald v. Fox, 20 Nev. 364, 22 Pac. 234. **Pa.**—Jones v. Porter, 3 Pen. & W. 132. **Vt.**—Jangraw v. Mee, 75 Vt. 211, 54 Atl. 189, 98 Am. St. Rep. 816. **Va.**—Haney v. Breeden, 100

Va. 781, 42 S. E. 916; Nowlin v. Reynolds, 25 Gratt. 137. **Wis.**—Illinois Steel Co. v. Budzisz, 119 Wis. 580, 97 N. W. 166.

2. Patton v. Fox, 179 Mo. 525, 78 S. W. 804.

3. **U. S.**—Wright v. Mattison, 18 How. 50, 15 L. ed. 280; Latta v. Clifford, 47 Fed. 614. **Ala.**—Sledge v. Singley, 139 Ala. 346, 37 So. 98; Holt v. Adams, 121 Ala. 664, 25 So. 716. **Ga.**—Lee v. O'Quin, 103 Ga. 355, 30 S. E. 356; Salter v. Salter, 80 Ga. 178, 4 S. E. 391, 12 Am. St. Rep. 249. **Ill.**—Hardin v. Gouveneur, 69 Ill. 140; Fagan v. Rosier, 68 Ill. 84; Woodward v. Blanchard, 16 Ill. 424. **Mo.**—Gaines v. Saunders, 87 Mo. 557; Turner v. Hall, 60 Mo. 271.

4. **U. S.**—Wright v. Mattison, 18 How. 50, 15 L. ed. 280. **Ala.**—Doe v. Edmondson, 127 Ala. 445, 30 So. 61. **Ga.**—Lee v. O'Quin, 103 Ga. 355, 30 S. E. 356. **Ill.**—Hardin v. Gouveneur, 69 Ill. 140; Fagan v. Rosier, 68 Ill. 84; Shackelford v. Bailey, 35 Ill. 387; Woodward v. Blanchard, 16 Ill. 424. **Mich.**—Miller v. Clark, 56 Mich. 337, 23 N. W. 35. **Mo.**—Boogher v. Neece, 75 Mo. 383. **W. Va.**—Core v. Faupel, 24 W. Va. 238.

Construction of deeds constituting color or claim of title is for the court and it is error to leave it to the jury. Fuelling v. Fuesse (Ind. App.), 87 N. E. 700.

5. Kelly v. Palmer, 91 Minn. 133, 97 N. W. 578; Bryce v. Cayce, 62 S. C. 546, 40 S. E. 948.

6. Buck v. Louisville & N. R. Co. (Ala.), 48 So. 699; Campbell v. Bates, 143 Ala. 338, 39 So. 144; Schwartz v. Kuhn, 10 Me. 274, 25 Am. Dec. 239. See Roberson v. Downing, 126 Ga. 175, 54 S. E. 1020 Patchin v. Stroud, 28 Vt. 394.

lating to that branch of the law.<sup>7</sup> They must correctly announce the law,<sup>8</sup> they should not be misleading,<sup>9</sup> or conflicting,<sup>10</sup> or argumentative.<sup>11</sup>

Instructions must be authorized by the pleadings<sup>12</sup> and the evidence,<sup>13</sup> and must not be inconsistent therewith.<sup>14</sup> They should cover the various phases of the case presented by the evidence,<sup>15</sup> and should

**7. Forms of Instructions.**—See Ala. Hays v. Lemoine, 156 Ala. 465, 47 So. 97. Conn.—Merwin v. Morris, 71 Conn. 555, 42 Atl. 855. Mo.—Harper v. Morse, 114 Mo. 317, 21 S. W. 517. Pa. Griffin v. Mulley, 167 Pa. 339, 31 Atl. 664; Deppen v. Bogar, 7 Pa. Super. 434. Wis.—Bartlett v. Secor, 56 Wis. 520, 14 N. W. 714.

**Form of Instructions as to Ten Year Period of Limitations.**—Campbell Real Est. Co. v. Wiley (Tex. Civ. App.), 83 S. W. 251.

**8. Ala.**—Chastang v. Chastang, 141 Ala. 451, 37 So. 799, 109 Am. St. Rep. 45; Dorlan v. Westervitch, 140 Ala. 283, 37 So. 382, 103 Am. St. Rep. 35. **Ga.**—Williams v. Giddens, 132 Ga. 342, 64 S. E. 64; Burbage v. Fitzgerald, 98 Ga. 582, 25 S. E. 554. **Ky.**—Murphy v. Roney, 26 Ky. L. Rep. 634, 82 S. W. 396. **Mo.**—Benne v. Miller, 149 Mo. 228, 50 S. W. 824. **Neb.**—Knight v. Denman, 64 Neb. 814, 90 N. W. 863, affirmed on rehearing, 68 Neb. 383, 94 N. W. 622. **N. H.**—Manchester v. Dugan, 70 Atl. 1075. **S. C.**—Burnett v. Crawford, 50 S. C. 161, 27 S. E. 645. **Tex.**—Logan v. Meads, 43 Tex. Civ. App. 477, 98 S. W. 210.

**As to Effect of Fencing and Possession.**—Fleming v. Kemp, 170 Mo. 235, 70 S. W. 694; Hedrick v. Kilgore (Tex. Civ. App.), 121 S. W. 892.

**As to Extent of Claim of Ownership.** Lawrence v. Doe (Ala.), 41 So. 612.

**9. Misleading Instructions.**—Ala.—Barry v. Madaris, 156 Ala. 475, 47 So. 152; Hays v. Lemoine, 156 Ala. 465, 47 So. 97 (as to effect of possession); Barron v. Barron, 122 Ala. 194, 25 So. 55. **Ill.**—White v. Harris, 206 Ill. 584, 69 N. E. 519. **Mich.**—Sherrard v. Cudney, 134 Mich. 200, 96 N. W. 15. **Pa.**—Douglas v. Irvine, 126 Pa. 643, 17 Atl. 802.

See Neb.—Hoffine v. Ewings, 60 Neb. 729, 84 N. W. 93. **Pa.**—O'Hara v. Richardson, 46 Pa. 385. **Tex.**—Wood v. Drouthett, 44 Tex. 365.

Requested instruction as to adverse possession by one co-tenant against others held properly refused as mis-

leading. Honea v. Arledge (Tex. Civ. App.), 120 S. W. 508.

Instruction as to the effect of prior outstanding title, held misleading and prejudicial error. Godley v. Barnes, 132 Ga. 513, 64 S. E. 546.

Instruction as to nature of adverse possession held misleading as requiring more than the law requires. Sherrard v. Cudney, 134 Mich. 200, 96 N. W. 15.

Instruction as to notice to owner held properly refused as misleading. Kelly v. Palmer, 91 Minn. 133, 97 N. W. 578.

**10. Campbell Real Est. Co. v. Wiley** (Tex. Civ. App.), 83 S. W. 251; Taffinder v. Merrell, 18 Tex. Civ. App. 661, 45 S. W. 477.

**Instructions Held Not Conflicting.** Campbell Real Est. Co. v. Wiley (Tex. Civ. App.), 83 S. W. 251.

**11. Hays v. Lemoine**, 156 Ala. 465, 47 So. 97. The giving of such instructions, however, is not reversible error. Trufant v. White, 99 Ala. 526, 13 So. 83.

**12. Instructions as to adverse claim not alleged in the answer, is error.** City of Cadiz v. Hillman, 20 Ky. L. Rep. 1776, 50 S. W. 49.

**13. Ill.**—Stalford v. Goldring, 197 Ill. 156, 64 N. E. 395; Shackelford v. Bailey, 35 Ill. 387. **Ky.**—Ewing's Heirs v. Alexander, 1 A. K. Marsh. 407. **Mich.**—Beecher v. Ferris, 117 Mich. 108, 75 N. W. 294. **Tex.**—Collier v. Coutts, 92 Tex. 234, 47 S. W. 525; Whitaker v. Thayer, 38 Tex. Civ. App. 537, 86 S. W. 364; Cochran v. Moerer, 31 Tex. Civ. App. 495, 72 S. W. 1031.

Refusal to charge that a tenant's holding adverse to his landlord cannot be regarded as the latter's possession is not error where there is no evidence to show that the tenant held adversely to his landlord. Bateman v. Jackson (Tex. Civ. App.), 45 S. W. 224.

**14. Chicago & A. R. Co. v. Keegan**, 185 Ill. 70, 56 N. E. 1088.

**15. Dawson v. Falls City Boat Club**, 136 Mich. 259, 99 N. W. 17, 112 Am. St. Rep. 363; Demill v. Moffatt, 45 Mich. 410, 8 N. W. 79.

not omit reference to material facts disclosed thereby.<sup>16</sup> But they should not be upon the weight of the evidence.<sup>17</sup> Nor should they be such as to take from the jury matters of fact proper for their consideration,<sup>18</sup> such as the character of the possession,<sup>19</sup> nor should they assume the existence of disputed facts.<sup>20</sup> But they may properly assume the existence of facts shown by the undisputed evidence.<sup>21</sup>

Instructions submitting questions of law to the jury are erroneous.<sup>22</sup> Where there is no evidence of a fact the court may so instruct the jury.<sup>23</sup>

Defects, omissions and errors in one instruction may be cured by

16. *Western N. C. Land Co. v. Scaife*, 80 Fed. 352, 25 C. C. A. 461; *Travis v. Hall*, 37 Tex. Civ. App. 143, 83 S. W. 425; *Preston v. Hilburn* (Tex. Civ. App.), 44 S. W. 698.

Failure to instruct that a void judgment did not interrupt the running of the statute held error. *Barrett v. McKinney* (Tex. Civ. App.), 93 S. W. 240.

But circumstances though tending to impeach the good faith of the claimant do not require an instruction. *Alabama State Land Co. v. Shuttleworth*, 121 Ala. 565, 25 So. 808.

17. Ark.—*Shirey v. Whitlow*, 80 Ark. 444, 97 S. W. 444. Mass.—*Morrison v. Chapin*, 97 Mass. 72, effect of fencing. Miss.—*Bentley v. Callaghan*, 79 Miss. 302, 30 So. 709.

Instruction held not to be on weight of evidence. *Texas & N. O. R. Co. v. Broom* (Tex. Civ. App.), 114 S. W. 655.

18. Ala.—*Nashville, etc. R. Co. v. Hammond*, 104 Ala. 191, 15 So. 935; *Woods v. Montevallo Coal, etc. Co.*, 84 Ala. 560, 3 So. 475, 5 Am. St. Rep. 393. Conn.—*Merwin v. Morris*, 71 Conn. 555, 42 Atl. 855. Mich.—*Sauers v. Giddings*, 90 Mich. 50, 51 N. W. 265. Mo.—*Benne v. Miller*, 149 Mo. 228, 50 S. W. 824. N. C.—*Britton v. Ruffin*, 122 N. C. 113, 28 S. E. 963, a question as to duration of possession. Pa.—*O'Hara v. Richardson*, 46 Pa. 385; *Hoopes v. Garver*, 15 Pa. 517.

An instruction as to the presumption of possession is improperly given where the facts are all in evidence, the question being for the jury. *Moran v. Higgins*, 19 Ky. L. Rep. 456, 40 S. W. 928.

19. *Keener v. Kauffman*, 16 Md. 296. Where title to a former street was

claimed by adverse possession, an instruction that "it is not necessary, in order to constitute actual and adverse possession, that the fence or inclosure upon said lot of ground should have at all times been up and unbroken, and that the fact that said fence may have been down at places, and at short intervals, would not defeat the rights of defendant, unless you believe that he, or those under whom he claims, intended to and did abandon the possession of said parcel of land during said period of fifteen years," was held error as taking from the jury the consideration of this fact. *City of Cadiz v. Hillman*, 20 Ky. L. Rep. 1776, 50 S. W. 49.

20. *Nashville, etc. R. Co. v. Hammond*, 104 Ala. 191, 15 So. 935; *Adams v. Tiernan*, 5 Dana (Ky.) 394.

21. As for example, facts in regard to possession. *Dunn v. Taylor* (Tex. Civ. App.), 107 S. W. 952.

22. Ala.—*Hays v. Lemoine*, 156 Ala. 465, 47 So. 97. D. C.—*Reid v. Anderson*, 13 App. Cas. 30. Ill.—*Shackleford v. Bailey*, 35 Ill. 387, where the question related to what is color of title. Mo.—*Boogher v. Neece*, 75 Mo. 383.

23. Where there is no evidence of color of title prior to a given time the court may so instruct the jury. *Annis-ton City Land Co. v. Edmondson*, 127 Ala. 445, 30 So. 61.

Where the evidence is legally insufficient to show adverse possession the court upon request must so instruct the jury. *Walsh v. McIntire*, 68 Md. 402, 13 Atl. 348; *DeHaven v. Landell*, 31 Pa. 120.



another instruction,<sup>24</sup> or may be ineffective to mislead the jury.<sup>25</sup>

**B. DEFINING ADVERSE POSSESSION.**—Instructions should sufficiently define adverse possession,<sup>26</sup> though the failure to do so is not reversible error where not objected to nor called to the court's attention by a request for an instruction.<sup>27</sup> They should not ignore any essential element or fact in stating what constitutes adverse possession giving title.<sup>28</sup> But it is not necessary to repeat in each instruction the essential elements of adverse possession where general instructions have been given on this point.<sup>29</sup> The terms used in stating the essential elements of adverse possession should be explained upon request.<sup>30</sup>

**24. Cal.**—*Allen v. McKay*, 70 Pac. 8. **Mich.**—*Beecher v. Ferris*, 112 Mich. 584, 70 N. W. 1106. **Tex.**—*Kobs v. New York & T. Land Co.* (Tex. Civ. App.), 63 S. W. 1087.

Error in a general instruction may be cured by a correct specific instruction. *Yarborough v. Mayes*; 41 Tex. Civ. App. 446, 91 S. W. 624.

An instruction which, standing alone, might be insufficient or misleading may be supplemented by other instructions. *Sutton v. Clark*, 59 S. C. 440, 38 S. E. 150, 82 Am. St. Rep. 848; *Yarborough v. Mayes*, 41 Tex. Civ. App. 446, 91 S. W. 624.

Error in an instruction given at the request of one party may be cured by an instruction given on behalf of the other party. *Lourance v. Goodwin*, 170 Ill. 390, 48 N. E. 903.

**25. Hughes v. Owens**, 29 Ky. L. Rep. 140, 92 S. W. 595; *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201; *Pittman v. Weeks*, 132 N. C. 81; 43 S. E. 582.

**26.** Thus, where the statute defines adverse possession, an instruction that it cannot be defined, but must depend upon the facts in evidence in each particular case, is erroneous. *Preston v. Hilburn* (Tex. Civ. App.), 44 S. W. 698.

**27. Western N. C. Land Co. v. Scaife**, 80 Fed. 352, 25 C. C. A. 461.

Where the court charged the jury that possession must have been open, notorious and adverse, the failure to define adverse as a possession "distinct and hostile" held not error. *Miller v. Beck*, 68 Mich. 76, 35 N. W. 899.

**28. Ala.**—*Chastang v. Chastang*, 141 Ala. 451, 37 So. 799, 109 Am. St. Rep. 45. **Ind.**—*Brown v. Anderson*, 90 Ind. 93. **S. C.**—*Kolb v. Jones*, 62 S. C. 193, 40 S. E. 168, an instruction ignoring the fact as to whether a parting by the statute with its title had been

shown. See *Hutto v. Thornton*, 44 Miss. 166.

The use of the word "hostile" in addition to "adverse" in an instruction is not error since the two words are synonymous. *Weller v. Wagner*, 181 Mo. 151, 79 S. W. 941. See also *Taylor v. Hover*, 77 Neb. 97, 108 N. W. 149; *Hoffine v. Ewings*, 60 Neb. 729, 84 N. W. 93.

**Claim.**—An instruction to find for defendants unless the jury "believe from the evidence that the plaintiff or his vendors under whom he claims, owned and held the land in controversy in actual adverse possession continuously to a well-defined marked boundary line for fifteen years prior to the alleged trespass," is not erroneous for failing to charge that plaintiff must have "claimed" as well as held the adverse possession of the land. *Vincent v. Willis*, 26 Ky. L. Rep. 842, 82 S. W. 583.

The continuity of the possession is covered by an instruction requiring the possession and claim of ownership to have been "open, notorious, visible, adverse and under claim of right" for the statutory period. *Fatie v. Myer*, 163 Ind. 401, 72 N. E. 142.

Failure to use the language of the statute, defining "peaceable" and "adverse" possession, does not vitiate an instruction. *Stoker v. Fugitt* (Tex. Civ. App.), 113 S. W. 310. See *Texas & N. O. R. Co. v. Broom* (Tex. Civ. App.), 114 S. W. 655. But changing the conjunction "or" to "and" in instructing as to the acts which under the statute constitute adverse possession, is error. *Hess v. Webb* (Tex. Civ. App.), 113 S. W. 618.

**29. Williams v. Shepherdson**, 4 Neb. (Unof.) 608, 95 N. W. 827.

**30.** An instruction as to what constitutes "continued" possession should be given if requested, where a general

**C. REQUESTS FOR.**—A requested instruction is properly refused where it is sufficiently embodied in other instructions.<sup>31</sup> But a requested instruction correctly embodying the law and peculiarly applicable to the case should be given.<sup>32</sup>

**D. WHEN NECESSARY.**—Where there is evidence tending to show the essential elements of adverse possession the jury must be instructed with reference thereto.<sup>33</sup> But where the evidence is such that the question is one for the court it is error to charge the jury thereon,<sup>34</sup> except to direct a verdict.<sup>35</sup>

**VI. VERDICT, FINDINGS AND JUDGMENT.**—The verdict, findings and judgment must of course be supported by the evidence,<sup>36</sup> and the verdict or findings must be sufficient to show adverse possession.<sup>37</sup>

A finding<sup>38</sup> or special verdict<sup>39</sup> as to the existence of adverse pos-

session embodied in that term has been given. *Gordon v. Park*, 219 Mo. 600, 117 S. W. 1163.

The adverse character of possession is sufficiently charged by an instruction that possession under a claim of ownership for more than twenty years presumes a grant. *Kolb v. Jones*, 62 S. C. 193, 40 S. E. 168.

**31. Ky.**—*Louisville & N. R. Co. v. Rayl*, 32 Ky. L. Rep. 870, 107 S. W. 298. **N. C.**—*Hill v. Bean*, 150 N. C. 436, 64 S. E. 212. **Tex.**—*Yarborough v. Mayes*, 41 Tex. Civ. App. 446, 91 S. W. 624. See *Cockrell v. Dallas* (Tex. Civ. App.), 111 S. W. 977.

Modification of a requested instruction is not error where the instruction as given is a sufficient statement of the law. *Reeves v. Low*, 8 App. Cas. (D. C.) 105.

**32. Cannon v. Stockmon**, 36 Cal. 535, 95 Am. Dec. 205; *Hearick v. Doe*, 4 Ind. 164.

**33. Hightower v. Borden** (Ky.), 112 S. W. 675; *Brunner Fire Co. v. Payne* (Tex. Civ. App.), 118 S. W. 602; *Rushing v. Lanier* (Tex. Civ. App.), 111 S. W. 1089; *Sellman v. Daniel* (Tex. Civ. App.), 110 S. W. 81.

**34. Colo.**—*Wood v. Chapman*, 24 Colo. 134, 49 Pac. 136. **Ga.**—*Greer v. Raney*, 120 Ga. 290, 47 S. E. 939. **Ky.**—*Chambers v. Tharp*, 29 Ky. L. Rep. 271, 93 S. W. 627.

**35. See Demill v. Moffatt**, 45 Mich. 410, 8 N. W. 79.

**36. Ind.**—*Terre Haute & I. R. Co. v. Zehner*, 28 Ind. App. 229, 62 N. E. 508. **N. Y.**—*Lewis v. Upton*, 90 App. Div. 453, 86 N. Y. Supp. 397. **Utah.**—*Larsen v. Onesite*, 21 Utah 38, 59 Pac. 234.

See the title "Verdict."

Judgment is not sustainable where evidence fails to show the character of the possession for the requisite period. *Wilson v. Jernigan*, 57 Fla. 277, 49 So. 44.

Evidence of abandonment of claim held sufficient to support verdict against adverse possession. *Johnson v. Brown*, 33 Wash. 588, 74 Pac. 677.

**37. Findings held sufficient to show adverse possession.** **Ind.**—*Helton v. Fastnow*, 33 Ind. App. 288, 71 N. E. 230. **Mich.**—*Hart v. Doyle*, 128 Mich. 257, 87 N. W. 219. **Utah.**—*Dignan v. Nelson*, 26 Utah 186, 72 Pac. 936.

**Findings Held Insufficient.**—*Yelverton v. Steele*, 40 Mich. 538 (where it was said that "there should be an express finding in terms certain and explicit, of a state of facts which without going further would satisfy the legal definition"); *Wileox v. Smith*, 38 Wash. 585, 80 Pac. 803.

**38. Cal.**—*Lacoste v. Eastland*, 117 Cal. 673, 49 Pac. 1046. **N. C.**—See *Berry v. Ritter Lumb. Co.*, 141 N. C. 386, 54 S. E. 278. **Tex.**—*Hanrick v. Gurley*, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 328. **Wis.**—*Davis v. City of Appleton*, 109 Wis. 580, 85 N. W. 515. But see *Adams v. Hopkins* (Cal.), 69 Pac. 228, 73 Pac. 971.

Thus a finding of "actual, open, notorious and continuous possession" is insufficient for failure to show that the possession was hostile and exclusive. *Tyee Consol. Min. Co. v. Langstedt*, 121 Fed. 709, 58 C. C. A. 129.

**39. A special verdict that defendant's possession was open, continuous, notorious and adverse is insufficient because failing to show that the pos-**

session should show the elements of such possession, though the contrary has been held.<sup>40</sup> But a general finding as to the absence of adverse possession is sufficient.<sup>41</sup>

**Review.**—The verdict<sup>42</sup> or findings<sup>43</sup> will not be interfered with on appeal unless clearly inconsistent with and unsupported by the evidence.

session was also actual and exclusive. *Ward v. Cochran*, 150 U. S. 597, 14 Sup. Ct. 230, 37 L. ed. 1195.

40. The question of the hostile or adverse character of possession is an ultimate fact and may be found as such. *Webb v. Rhodes*, 28 Ind. App. 393, 61 N. E. 735, a special verdict. See also *Logsdon v. Dingg*, 32 Ind. App. 158, 69 N. E. 409.

41. **Absence of Adverse Possession.** A general finding that the cause of action is not barred by the statute is a sufficient finding as to absence of adverse possession in action to quiet title. *San Francisco & F. Land Co. v. Hartung*, 138 Cal. 223, 71 Pac. 337.

42. *Reed v. Hackney*, 69 N. J. L.

27, 54 Atl. 229. See the title "Appeal."

43. Where the court is sitting as trier of facts its findings of fact are as conclusive as the verdict of a jury on appeal. *Kirton v. Bull*, 168 Mo. 622, 68 S. W. 927.

"Adverse possession is a question of fact, and, when found by the trial court, will not be received by this court as a conclusion from evidential facts, unless it appears that these facts, or some of them, are legally or logically necessarily inconsistent with that conclusion." *Layton v. Bailey*, 77 Conn. 22, 58 Atl. 355, holding that certain evidence was not inconsistent with a finding of adverse possession.



# AFFIDAVITS OF MERITS AND DEFENSE

By EDWARD W. TUTTLE

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### CROSS-REFERENCES:

Appeal;  
Default;  
Judgment;

New Trial;  
Rules of Court;  
Trial.

**I. BASIS OF PRACTICE.** — A. GENERALLY. — The necessity for filing an affidavit of merits or defense rests upon statutes<sup>1</sup> or upon the settled practice of the courts<sup>2</sup> sometimes expressed in rules of court.<sup>3</sup>

B. CONSTITUTIONALITY AND VALIDITY. — **1. Statutes.** — Statutes requiring an affidavit of merits to accompany a plea<sup>4</sup> or an affidavit of defense to be filed to prevent summary judgment<sup>5</sup> or inquest against the defaulting party are constitutional, being a proper exercise of the legislative power to regulate the practice of courts and provide for the speedy enforcement of claims against which there is no legal defense.

**2. Rules of Court.** — By virtue of, and subject to the limitations on, their general power to make rules<sup>6</sup> governing their practice, courts can by rule require affidavits of merits and defense.<sup>7</sup> And

1. See discussion following.

The Purpose of the Statutes. — See *infra*, VIII.

2. The origin of the Pennsylvania practice of taking judgment by default for want of an affidavit of defense was an agreement entered into by members of the Philadelphia bar in 1795. *Helffrich v. Greenberg*, 206 Pa. 516, 56 Atl. 45; *Andrews v. Blue Ridge Pack Co.*, 206 Pa. 370, 55 Atl. 1059; *Vanatta v. Anderson*, 3 Bin. (Pa.) 417, 423; *Union Glass Co. v. First Nat. Bank*, 10 Pa. Co. Ct. 565.

3. For a history of the Pennsylvania practice, see *Union Glass Co. v. First Nat. Bank*, 10 Pa. Co. Ct. 565.

4. *Honore v. Home Nat. Bank*, 80 Ill. 489; *Roberts v. Thomson*, 28 Ill. 79; *Castle v. Judson*, 17 Ill. 381; *McDonell v. Olwell*, 17 Ill. 375 (as to an act applying to one county).

5. *Randall v. Weld*, 86 Pa. 357; *Lawrance v. Borm*, 86 Pa. 225; *Hoffman v. Locke*, 19 Pa. 57 (Act of 1851).

In *Doud v. Citizens' Ins. Co.*, 6 Pa. Co. Ct. 329, such an act was held to violate a constitutional prohibition against the extension of a law by a mere reference to its title.

6. See *Vanatta v. Anderson*, 3 Bin. (Pa.) 417.

7. *Cropley v. Vogeler*, 2 App. Cas. (D. C.) 28; *Hogg v. Charlton*, 25 Pa. 200 (district court); *Vanatta v. Anderson*, 3 Bin. (Pa.) 417 (court of common pleas).

The court has power to enact rules that items of account and averments in statements of claim not denied by an affidavit of defense shall be taken as admitted. *Blair v. Ford China Co.*, 26 Pa. Super. 374.

A rule of court making the pleadings

and procedure on appeal from the judgment of justices of the peace the same as in like cases commenced in the appellate court, but dispensing with the filing of a statement of claim other than the transcript unless the defendant enters a rule for a more specific statement, and in such case providing that in the filing of such statement the defendant is required to reply thereto by affidavit as in other cases, is one which the court has power to make. *Horner v. Horner*, 145 Pa. 258, 23 Atl. 441.

A rule of court which permits judgment for want of an affidavit of defense to be entered in the prothonotary's office, is valid and not unconstitutional as vesting judicial power in the prothonotary. *Western Nat. Bank v. Cotton O. & F. Co.*, 35 Pa. Super. 47.

The court of common pleas has power to make a rule requiring an affidavit of defense from executors, administrators, guardians, committees and others sued in a representative capacity, and providing what shall be deemed a sufficient compliance. *Helffrich v. Greenberg*, 206 Pa. 516, 56 Atl. 45. And such courts have power to establish rules authorizing the entry of judgment for such part of the plaintiff's demand as is not denied by the affidavit of defense and permitting the plaintiff to proceed thereafter to issue and trial for the residue of the claim. *Stedman v. Poterie*, 139 Pa. 100, 21 Atl. 219.

A court of quarter sessions having exclusive jurisdiction by statute of actions on forfeited recognizances has power to make a rule authorizing the entry of judgment in such cases, unless an affidavit of defense is filed

legislative action upon the same subject does not abrogate or prevent the making of rules not inconsistent therewith.<sup>8</sup> Such rules are not unconstitutional<sup>9</sup> and do not violate the right of trial by jury.<sup>10</sup>

C. IN FEDERAL COURTS.—The general rules elsewhere discussed,<sup>11</sup> as to the following by the federal courts of the practice of the state in which they sit, apply to affidavits of merits and defense.<sup>12</sup> Federal statutes may operate to change in some respects the practice followed by the state courts.<sup>13</sup>

II. WHEN REQUIRED.—A. GENERALLY.—By statute or rule of court an affidavit of merits or defense is sometimes required as preliminary evidence of a valid defense or the party's belief in the existence of such a defense and to prevent summary action against him.<sup>14</sup>

within a given time. *Harres v. Com.*, 35 Pa. 416.

A rule of the superior court of Chicago permitting the plaintiff in certain classes of cases to make an affidavit of his belief that the defense is made only for delay to compel the defendant within a specified time to file an affidavit of merits setting forth the facts, is a valid rule. *Wallbaum v. Haskin*, 49 Ill. 313.

8. *Stedman v. Poterie*, 139 Pa. 100, 21 Atl. 219, explaining *Marlin v. Waters*, 127 Pa. 177, 17 Atl. 890. See *Eberhart v. Page*, 89 Ill. 550; *Angel v. Plume & A. Mfg. Co.*, 73 Ill. 412; *Fisher v. National Bank*, 73 Ill. 34.

The act of 1887 did not abrogate existing rules of court in regard to taking judgment for want of a sufficient affidavit of defense, except in so far as such rules were inconsistent with its provisions (*Zimmerman v. Drake*, 17 Pa. Dist. 754); and the plaintiff is at liberty to proceed either under the statute or the rules of court. *Com. v. McCutcheon*, 4 Pa. Co. Ct. 309.

Rules of court not in harmony with the act of 1887 are abrogated thereby. *Marlin v. Waters*, 127 Pa. 177, 17 Atl. 890; *Blake v. Pennsylvania R. Co.*, 12 Pa. Dist. 661.

Although statutes are construed as not requiring affidavits of defense in certain cases, the court may require such affidavits by rule of court. *Helfrich v. Greenberg*, 206 Pa. 516, 56 Atl. 45.

No rule of court is necessary where the statute itself provides for the filing of an affidavit of defense. *McCleary v. Faber*, 6 Pa. 476.

9. *Foertsch v. Germuiler*, 2 App. Cas. (D. C.) 340; *Cropley v. Vogeler*, 2 App. Cas. (D. C.) 28; *Taggart v. Fox*, 1 Grant Cas. (Pa.) 190; *Vanatta v. An-*

*derson*, 3 Bin. (Pa.) 417; *Western Nat. Bank v. Cotton, O. & F. Co.*, 35 Pa. Super. 47.

10. *Fidelity & Dep. Co. v. United States*, 187 U. S. 315, 23 Sup. Ct. 120, 47 L. ed. 194; *Cropley v. Bogeler*, 2 App. Cas. (D. C.) 28.

11. See the title "Courts."

12. See *Consumers' Gas Co. v. American Elec. Const. Co.*, 50 Fed. 778, 1 C. C. A. 663; *Felty v. National Acc. Soc.*, 139 Fed. 57; *Brady v. Osborn Eng. Co.*, 132 Fed. 412; *Mutual L. Ins. Co. v. Patterson*, 45 P. L. J. 413; *Reed v. Raymond*, 37 Fed. 186; *Scott v. The Young America, Newb. Adm.* 101, 21 Fed. Cas. No. 12,549; *The Harriet, Ole.* 222, 11 Fed. Cas. No. 6,096.

Setting Aside Defaults.—The practice as to filing affidavits to set aside defaults, except in equity and admiralty, follows the state practice. *Republic Ins. Co. v. Williams*, 3 Biss. 370, 20 Fed. Cas. No. 11,707.

13. *American A. Co. v. Campbell*, 113 Fed. 398, 11 Pa. Dist. 260. See note from this case, *infra*, II, G, 2, a.

14. See discussion following, and *Brown v. Cowee*, 2 Dougl. (Mich.) 432; *Brien v. Peterman*, 3 Head (Tenn.) 498; *Cave v. Baskett*, 3 Humph. (Tenn.) 340.

As to the constitutionality or validity of statutes and rules of court, see *supra*, I, B.

The statute of Michigan (How's Stat., § 7525) provides that in actions on an open account or account stated, if plaintiff files and serves an affidavit in support of his claim it shall be deemed *prima facie* evidence of indebtedness unless denied by affidavit. This statute makes the same provisions with respect to a set-off as to an original action. *Morrill v. Bissell*, 99 Mich. 409, 58 N. W. 324.



So, also, where the discretionary action of the court is invoked an affidavit of merits is frequently required as a prerequisite to the granting of the remedy or relief asked.<sup>15</sup>

## B. SUPPORTING MOTION OR APPLICATION FOR REMEDY OR RELIEF.

**1. Generally.**—Generally speaking, where the granting or refusing of the remedy or relief asked rests in the sound discretion of the court the motion or application must be supported by an affidavit of merits;<sup>16</sup> but where the moving party is requesting relief to which he is absolutely entitled as a matter of right no such affidavit is necessary.<sup>17</sup>

**2. To Obtain Security for Costs.**—Statutes<sup>18</sup> or rules of practice<sup>19</sup> may require an affidavit of merits or defense from a defendant seeking to compel a plaintiff to furnish security for the payment of costs.

**Virginia Statutes.**—See *Spencer's Admr. v. Field*, 97 Va. 38, 33 S. E. 380.

**Statute of West Virginia.**—See *Miller v. Fewsmith*, 42 W. Va. 323, 26 S. E. 175.

**Rule of the Superior Court of Chicago.**—*Frank v. Morris*, 57 Ill. 138, 11 Am. Rep. 4.

**15. American A. Co. v. Industrial Fed. of A.**, 84 App. Div. 304, 82 N. Y. Supp. 642; *Paddock v. Palmer*, 32 Misc. 426, 66 N. Y. Supp. 743 (where it was pointed out that such an affidavit is not required where the relief asked is a matter of right).

**16. Ill.**—*Wilder v. Arwedson*, 80 Ill. 435; *McKichan v. Follett*, 87 Ill. 103; *Empire F. Ins. Co. v. Real Estate Tr. Co.*, 1 Ill. App. 391. **Mo.**—*Branstetter v. Rives*, 34 Mo. 318. **N. J.**—*Worley v. Scudder*, 10 N. J. L. 231. **N. Y.**—*American A. Co. v. Industrial Fed. of Am.*, 84 App. Div. 304, 82 N. Y. Supp. 642; *Paddock v. Palmer*, 32 Misc. 426, 66 N. Y. Supp. 743; *Sherman v. Gregory*, 42 How. Pr. 481. **Wis.**—*Cottrell v. Giltner*, 5 Wis. 270.

See *infra*, II, B, 10.

**Motion to reinstate an appeal from the justice to the circuit court must be supported by an affidavit of merits.** *Pinger v. Vanelick*, 36 Wis. 141.

**Setting Aside Regular Proceedings on a Bail Bond.**—See *Hilton v. Jackson*, 1 Chit. 677, 18 E. C. L. 201; *Bourne v. Walker*, 2 C. & M. (Eng.) 338.

A motion to compel plaintiff to furnish a copy of the complaint to the defendant, if made before the filing or serving of the complaint, need not be accompanied with an affidavit of mer-

its. *Engs v. Overing*, 2 N. Y. Code Rep. 79.

**Municipal Courts of New York City.**—Rule 23 of the General Rules of Practice applies to the municipal court by virtue of the Greater New York charter, § 1377. *Thornall v. Turner*, 23 Misc. 363, 51 N. Y. Supp. 214.

**Motion for New Trial.**—Some courts require an affidavit of merits in support of a motion for new trial. See *Montgomery v. Carlton*, 56 Tex. 431, and fully the title "New Trial."

**17. Ill.**—*Kelsey v. Lamb*, 21 Ill. 559; *Empire F. Ins. Co. v. Real Estate Tr. Co.*, 1 Ill. App. 391. **Mo.**—*Branstetter v. Rives*, 34 Mo. 318. **N. J.**—*Worley v. Scudder*, 10 N. J. L. 231. **N. Y.**—*American A. Co. v. Industrial Fed. of Am.*, 84 App. Div. 304, 82 N. Y. Supp. 642; *Paddock v. Palmer*, 32 Misc. 426, 66 N. Y. Supp. 743; *Sherman v. Gregory*, 42 How. Pr. 481.

A motion to compel plaintiffs to accept an answer in due form and duly and regularly served need not be accompanied by an affidavit of merits. *Paddock v. Palmer*, 32 Misc. 426, 66 N. Y. Supp. 743.

**18. Del.**—*Rauche v. Blumenthal*, 4 Penne. 521, 57 Atl. 368; *Fidelity Mut. F. Ins. Co. v. Simmons*, 1 Penne. 474, 42 Atl. 367. **Ia.**—*D. M. V. Live Stock Ins. Co. v. Henderson*, 38 Iowa 446. **Pa.**—*Terriberry v. Broude*, 173 Pa. 48, 33 Atl. 699.

**19.** Although a rule of court provides that a non-resident plaintiff may be compelled to furnish security for costs, the court may refuse to require such security unless defendant in his affidavit discloses a just defense to the

But in the absence of such rule or statute it seems that an affidavit is not an essential prerequisite.<sup>20</sup>

3. Change of Venue. — A motion to change the venue or place of trial in civil actions must be supported in some states by an affidavit of merits;<sup>21</sup> and a similar affidavit may be required in opposition to such a motion.<sup>22</sup> The rule, however, is limited to cases where the granting or refusing of the motion is a matter of discretion and does not apply where a party is entitled as a matter of right to a change, as where the action has been commenced in the wrong county.<sup>23</sup>

4. Continuance. — In some jurisdictions a motion for a continuance should be supported by an affidavit of merits.<sup>24</sup>

5. Preventing Advancement of Case on Trial Calendar. — The defendant cannot compel the plaintiff to file an affidavit of merits to prevent the cause from being moved out of its regular order on the trial calendar and the taking of an inquest.<sup>25</sup> A statute, however, in one state requires the defendant, in certain classes of cases, to file an affidavit of defense to prevent the advancement of the cause to a speedy trial.<sup>26</sup> But a rule of court of similar import has been held invalid as conflicting with a statutory method of obtaining a speedy determination of the case.<sup>27</sup>

action. *Trenton Rubber Co. v. Small*, 3 Pa. Super. 8.

In Admiralty. — See *The Harriet*, Ole. 222, 11 Fed. Cas. No. 6,096, and the title "Admiralty."

20. Corn Exch. Nat. Bank *v. Kimball*, 20 Abb. N. C. (N. Y.) 290.

21. Cal. — *Nolan v. McDuffie*, 125 Cal. 334, 58 Pac. 4; *Palmer v. Barclay*, 92 Cal. 199, 28 Pac. 226; *People v. Larue*, 66 Cal. 235, 5 Pac. 157; *Rathgeb v. Tiscornia*, 66 Cal. 96, 4 Pac. 987; *Nicholl v. Nicholl*, 66 Cal. 36, 4 Pac. 882; *Johnson v. Walden*, 12 Pac. 257; *Jensen v. Dorr*, 9 Cal. App. 18, 98 Pac. 45; *Eddy v. Houghton*, 6 Cal. App. 85, 91 Pac. 397. Ind. — *Heshion v. Pressley*, 80 Ind. 490; *Bowen v. Bowen*, 74 Ind. 470. N. Y. — *Fuchs v. Fitzer*, 125 App. Div. 917, 109 N. Y. Supp. 1024; *Hurn v. Olmstead*, 55 Misc. 504, 105 N. Y. Supp. 1091; *Chapin v. Overin*, 72 Hun 514, 25 N. Y. Supp. 627; *Swartwout v. Hoage*, 16 Johns. 3; *Brownell v. Marsh*, 22 Wend. 636; *Lynch v. Mosher*, 4 How. Pr. 86; *Hemingway v. Spaulding*, 1 How. Pr. 70. Wash. — *State v. Superior Court*, 9 Wash. 668, 38 Pac. 206. Eng. — *Johnson v. Nevison*, 2 Dowl. 260.

22. *Olivier v. Cunningham*, 51 Minn. 232, 53 N. W. 462. See *Onandaga County Bank v. Shepherd*, 19 Wend. (N. Y.) 10.

23. *Worley v. Scudder*, 10 N. J. L. 231; *Sherman v. Gregory*, 42 How. Pr. (N. Y.) 481.

But in California the statute (§ 396 C. C. P.) requires an affidavit of merits where defendant seeks a change on the ground that the action was commenced in the wrong county. *Cook v. Pendergast*, 61 Cal. 72.

24. Ill. — *City of Elgin v. Nofs*, 212 Ill. 20, 72 N. E. 43. Ind. — *Pine v. Pro*, 6 Blackf. 426. N. Y. — *Brooklyn Oil Wks. v. Brown*, 38 How. Pr. 451. W. Va. — *Bank of Ravenswood v. Hamilton*, 43 W. Va. 75, 27 S. E. 296. Wis. — *Sutton v. Wegner*, 72 Wis. 294, 39 N. W. 775; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 121; *Cottrell v. Giltner*, 5 Wis. 270.

See *Ex parte Payne*, 130 Ala. 189, 29 So. 622; *Harloe v. Lambie*, 132 Cal. 133, 64 Pac. 88, 84 Am. St. Rep. 17. Compare II, B, 6.

25. *Regan v. Priest*, 3 Denio (N. Y.) 163.

26. Rev. Laws, Mass., c. 173, § 55. See also *Merchants' Nat. Bank v. Glendon Co.*, 120 Mass. 97; *Rogers v. Ladd*, 117 Mass. 334.

27. *Angel v. Plume & A. Mfg. Co.*, 73 Ill. 412; *Fisher v. National Bank*, 73 Ill. 34. But see *Eberhart v. Page*, 89 Ill. 550.

**6. Commission To Examine Witnesses.**—An affidavit of merits in support of a motion for a commission to examine witnesses is necessary only where a stay of proceedings is asked<sup>28</sup> or will be the necessary result of the order.<sup>29</sup>

**7. Leave To Plead.**—An affidavit of merits may be required as a condition to granting leave to plead where the court has the discretionary right to refuse leave.<sup>30</sup> But no affidavit can be required of a party who has an absolute legal right to file a plea.<sup>31</sup>

**8. Condition on Leave To Amend.**—Where the court in its discretion may refuse leave to amend a pleading it may require an affidavit of merits as a condition to the allowance of an amendment.<sup>32</sup> Such an affidavit cannot be required, however, from a party who has an absolute right to amend.<sup>33</sup>

**9. Extension of Time.**—The making of an order extending time rests generally within the discretion of the court which may therefore require a motion or application to be accompanied by an affidavit of merits.<sup>34</sup> And where such an affidavit is required by statute or rule an order made without it may be disregarded by the adverse party,<sup>35</sup>

28. *Warren v. Harvey*, 9 Wend. (N. Y.) 444.

29. *Brisban v. Hoyt*, 1 Wend. (N. Y.) 28.

30. Ill.—*Kelsey v. Lamb*, 21 Ill. 559. Ohio.—*Stout v. Lisinger*, Tapp. 241. R. I.—*Lapham v. Kenyon*, 7 R. I. 251. S. D.—*Searles v. Lawrence*, 8 S. D. 11, 65 N. W. 34.

And see *McCord v. Crooker*, 83 Ill. 556; *Alston v. Brownell*, 4 Ill. App. 17.

Thus where a defendant who has interposed a plea in abatement waits till the trial term before withdrawing it and then asks leave to plead to the merits he may be required to file an affidavit to the merits. *Calhoun v. Grimes*, 25 Miss. 47.

**Frivolous Answer or Demurrer.**—Where judgment is rendered on a frivolous answer, a motion for leave to answer over must be supported by an affidavit of merits as well as an answer showing a good defense. *Louchline v. Strouse*, 49 Wis. 623, 6 N. W. 360.

So where a demurrer is overruled as frivolous, leave to answer will not be given without an affidavit of merits. *Appleby v. Elkins*, 2 Sandf. (N. Y.) 673. See also *Robertson v. Banks*, 1 Smed. & M. (Miss.) 666, under a statute.

The Mississippi statute does not apply, however, where no judgment is rendered on the demurrer (*Ogden v. Glidewell*, 5 How. [Miss.] 179) or

where the demurrer is confessed (*Shaw v. Brown*, 42 Miss. 309).

**After Default.**—See *infra*, II, B, 7.

31. *Kelsey v. Lamb*, 21 Ill. 559.

32. *Ross v. Sims*, 27 Miss. 359. Compare *McKitchan v. Follett*, 87 Ill. 103.

33. *Empire F. Ins. Co. v. Real Estate Tr. Co.*, 1 Ill. App. 391.

34. *Cottrell v. Giltner*, 5 Wis. 270 (note by Chief Justice Dixon). See *Wilder v. Arwedson*, 80 Ill. 435; *Pinger v. Van Click*, 36 Wis. 141.

35. *Graham v. Pinckney*, 7 Robt. (N. Y.) 147. See *Pinger v. VanClick*, 36 Wis. 141.

Under Rule 24 of the General Rules of Practice providing that "no order extending defendant's time to answer or demur shall be granted unless the party applying for such order shall present to the judge to whom the application shall be made an affidavit of merits," etc., it is error to extend the time for such action where no affidavit of merits has been filed. *Donovan v. Cunard S. S. Co.*, 85 N. Y. Supp. 1113; *Romaine v. Cornwell*, 11 Abb. Pr. N. S. (N. Y.) 430 (holding that the case of *Thorpe v. Baulch*, 3 Abb. Pr. [N. Y.] 13*n*, is overruled on this point by the later authority of *White v. Smith*, 16 Abb. Pr. [N. Y.] 109; *McGown v. Leavenworth*, 2 E. D. Smith (N. Y.) 24; *Ellis v. VanNess*, 14 How. Pr. (N. Y.) 313.

Where a copy of the affidavit is not



though the court may allow a subsequent filing of the affidavit, which will validate the order.<sup>36</sup> The general rule is applied to motions for an extension of time to plead<sup>37</sup> and to take testimony.<sup>38</sup>

**10. Opening and Setting Aside Judgments and Defaults.** — a. *Generally.* — As a general rule the necessity for an affidavit of merits on an application to open or set aside a judgment or default<sup>39</sup> depends upon whether the granting or refusing of relief rests in the discretion of the court;<sup>40</sup> if the party applying is entitled as a matter of right to the relief asked he cannot be required to file an affidavit of merits.<sup>41</sup>

b. *Where Regularly Entered.* — A motion or petition to set aside a default judgment regularly taken must be supported by an affidavit of merits.<sup>42</sup> And it is held that a court cannot legally waive this re-

served with the order it may be disregarded. *Corning v. Roosevelt*, 10 N. Y. Supp. 937.

36. *Campbell v. American Z. Co.*, 21 Jones & S. (N. Y.) 131.

37. *Graham v. Pinckney*, 7 Robt. (N. Y.) 147. Compare *supra*, II, B, 7.

38. *Cottrell v. Giltner*, 5 Wis. 270.

39. Practice as to Setting Aside Defaults. — See the title "Judgment;" and *infra*, IV, 7, 2.

40. See *supra*, II, A and B.

41. *American A. Co. v. Industrial Fed. of Am.*, 84 App. Div. 304, 82 N. Y. Supp. 642. See *supra*, II, A.

42. **U. S.** — *Republic Ins. Co. v. Williams*, 3 Biss. 370, 20 Fed. Cas. No. 11,707. **Ala.** — *Ex parte Payne*, 130 Ala. 189, 29 So. 622. **Ariz.** — *Copper King v. Johnson*, 9 Ariz. 67, 76 Pac. 594. **Ark.** — *Chambliss v. Reppy*, 54 Ark. 539, 16 S. W. 571; *Nelson v. Hubbard*, 13 Ark. 253; *Browning v. Roane*, 9 Ark. 354, 50 Am. Dec. 218; *Wilson v. Phillips*, 5 Ark. 183. **Cal.** — *Morgan v. McDonald*, 70 Cal. 32, 11 Pac. 350; *Nevada Bank v. Dresbach*, 63 Cal. 324. **Fla.** — *Russ v. Gilbert*, 19 Fla. 54; *Tidwell v. Witherspoon*, 18 Fla. 282. **Idaho.** — *Holzeman v. Henneberry*, 11 Idaho 428, 83 Pac. 497. **Ill.** — *Little v. Arlington*, 93 Ill. 253; *Moier v. Hopkins*, 21 Ill. 557; *Slack v. Casey*, 22 Ill. App. 412; *Scrafield v. Sheeler*, 18 Ill. App. 507. **Ind.** — *Rupert v. Martz*, 116 Ind. 72, 18 N. E. 381; *Slagle v. Bodmer*, 75 Ind. 331; *Lake v. Jones*, 49 Ind. 297; *Sturgis v. Fay*, 16 Ind. 429, 79 Am. Dec. 440. **Ia.** — *Ellis v. Butler*, 78 Iowa 632, 43 N. W. 459; *Joerns v. Lanicca*, 75 Iowa 705, 38 N. W. 129; *McGrew v. Downs*, 67 Iowa 687, 25 N. W. 880; *Thompson v. Savage*, 43 Iowa 398; *McDonald v. Donaghue*, 30 Iowa

568; *Smith v. Watson*, 28 Iowa 218. **Kan.** — *McPherson v. Kingsbaker*, 22 Kan. 646; *Haight v. Schuck*, 6 Kan. 192. **Ky.** — *Grundy v. Kelly*, 19 Ky. L. Rep. 476, 41 S. W. 20. **Md.** — *Maryland Steel Co. v. Marney*, 91 Md. 360, 46 Atl. 1077. **Mich.** — *Loree v. Reeves*, 2 Mich. 133. **Minn.** — *People's Ice Co. v. Schlenker*, 50 Minn. 1, 52 N. W. 219. But see *McMurrin v. Bourne*, 81 Minn. 515, 84 N. W. 338. **Miss.** — *Shields v. Taylor*, 13 Smed. & M. 127; *Porter v. Johnson*, 2 How. 736. **Mo.** — *Castlio v. Bishop*, 51 Mo. 162; *Adams v. Hickman*, 43 Mo. 168; *Campbell v. Garton*, 29 Mo. 343; *Carr v. Dawes*, 46 Mo. App. 351. **Mont.** — *Bowen v. Webb*, 34 Mont. 61, 85 Pac. 739; *Donnelly v. Clark*, 6 Mont. 135, 9 Pac. 887. **N. H.** — *Ela v. Goss*, 20 N. H. 53. **N. J.** — *Hendrickson v. Herbert*, 38 N. J. L. 296; *Crane v. Condit*, 16 N. J. L. 349; *Miller v. Alexander*, 1 N. J. L. 400. **N. Y.** — *Clews v. Peper*, 112 App. Div. 430, 98 N. Y. Supp. 404; *Cross v. Birch*, 27 Misc. 295, 58 N. Y. Supp. 438; *Davis v. Solomon*, 25 Misc. 695, 56 N. Y. Supp. 80; *Bogardus v. Doty*, 2 How. Pr. 75; *Stewart v. McMartin*, 2 How. Pr. 38. **N. C.** — *Andrews v. Devane*, 3 N. C. 373. **N. D.** — *Brasith v. Bottineau County*, 13 N. D. 344, 100 N. W. 1082; *Wheeler v. Castor*, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746; *Gauthier v. Rusicka*, 3 N. D. 1, 53 N. W. 80. **Ohio.** — *Wayne v. Washington Mut. Ins. Co.*, 1 Ohio Dec. (Reprint) 181; *Stout v. Lisinger*, Tapp. 241. **Ore.** — *Mitchell v. Campbell*, 14 Ore. 454, 13 Pac. 190. **S. C.** — *Williamson v. Cummings*, 2 McCord L. 250. **S. D.** — *Judd v. Patton*, 13 S. D. 648, 84 N. W. 199; *Searles v. Lawrence*, 8 S. D. 11, 65 N. W. 34. **Tex.** — *Foster v. Martin*, 20 Tex. 118; *Cooks v. Phillips*,

quirement,<sup>43</sup> although there is authority to the contrary.<sup>44</sup> Where a statute provides that such an application shall not be entertained by the court unless accompanied by an affidavit the court cannot entertain the motion for any purpose whatever without the affidavit.<sup>45</sup>

**Divorce Decree.**—It has been held that because of the interest which the state has in such proceedings, no affidavit of merits need accompany an application to set aside a divorce decree.<sup>46</sup>

*c. Where Irregularly or Illegally Entered.*—No affidavit of merits can be required where the judgment or default sought to be vacated was irregularly or illegally entered,<sup>47</sup> as where default was prema-

18 Tex. 31. Wash.—Hole v. Page, 20 Wash. 208, 54 Pac. 1123. Wis.—Loucheine v. Strouse, 49 Wis. 623, 6 N. W. 360. Can.—Moore v. Kennedy, 12 Manitoba 173.

See also the following cases: Ga.—Beall v. Marietta Paper Mills Co., 45 Ga. 28. Neb.—Fritz v. Grosnicklaus, 20 Neb. 413, 30 N. W. 411; Hale v. Bender, 13 Neb. 66, 12 N. W. 920. R. I.—Draper v. Bishop, 4 R. I. 489. Can.—Germain v. Watt, 28 N. Bruns. 266.

Especially is this true where the rule of court so provides. Searles v. Lawrence, 8 S. D. 11, 65 N. W. 34.

On a motion to set aside a default judgment against defendant personally on the ground that he was only liable in a representative capacity, an affidavit of merits is necessary. Butler v. Mitchell, 15 Wis. 355.

**Regularity of Default.**—See Havens v. Dibble, 18 Wend. (N. Y.) 655; Brainard v. Hanford, 6 Hill (N. Y.) 368.

**Default After Unauthorized Appearance by Attorney.**—See Kramer v. Gerlach, 28 Misc. 525, 59 N. Y. Supp. 855; Cleveland v. Hopkins, 55 Wis. 387, 13 N. W. 225.

**Leave to plead after expiration of time allowed by law,** see *supra*, II, B, 7 and 9.

**In Federal Courts.**—See *supra*, I, C. **Form and Contents of Affidavit.**—See *infra*, IV.

43. Cal.—Morgan v. McDonald, 70 Cal. 32, 11 Pac. 350; Nevada Bank v. Dresbach, 63 Cal. 324; Parrott v. Den, 34 Cal. 79. N. Y.—Leffler v. Beck, 32 Misc. 776, 66 N. Y. Supp. 479; Cahill v. Lillienthal, 30 Misc. 429, 62 N. Y. Supp. 524; Sandowitz v. Duane, 62 N. Y. Supp. 744; Gold v. Hutchinson, 26 Misc. 1, 55 N. Y. Supp. 575; Goldfeder v. Lincoln, 51 N. Y. Supp. 215. N. D.—Wheeler v. Castor, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746;

Kirschner v. Kirschner, 7 N. D. 291, 75 N. W. 252.

A hearing after a default granted upon an insufficient affidavit of merits will be reversed on appeal. Godson v. Taussig, 32 Misc. 712, 65 N. Y. Supp. 716.

**Where Merits Otherwise Appear.**—See *infra*, II, B, 10, g.

44. State Board of Agr. v. Meyers, 13 Colo. App. 500, 58 Pac. 879, holding such an affidavit not a necessity although the better practice is to require one. See Farden v. Richter, 58 L. J. Q. B. 244, 23 Q. B. D. 124, 60 L. T. 304, questioning a statement of Brett, L. J., in Smith v. Dobbin, 47 L. J. Ex. 65, 3 Ex. D. 338, 37 L. T. 777, that "it is an inflexible rule that judgment once signed cannot be set aside except on affidavit of merits."

"The general rule is that in applications to vacate a judgment on default an affidavit of merits is essential. . . . The rule, however, is one of practice, and the sufficiency of an affidavit of merits, or the necessity for one, where it fairly appears from the records and papers upon which the motion is based that the moving party has a good cause of action or defense on the merits, is a question for the trial court." Crane & O. Co. v. Sauntry, 90 Minn. 301, 96 N. W. 794. See also McMurren v. Bourne, 81 Minn. 515, 84 N. W. 338; Forin v. Duluth, 66 Minn. 54, 68 N. W. 515.

45. The affidavit in such case is jurisdictional. *Ex parte Payne*, 136 Ala. 189, 29 So. 622.

46. Cottrell v. Cottrell, 83 Cal. 457, 23 Pac. 531; McBlain v. McBlain, 77 Cal. 507, 20 Pac. 61.

47. Ark.—Browning v. Roane, 9 Ark. 354, 50 Am. Dec. 218. Cal.—Willson v. Cleaveland, 30 Cal. 192. Ia.—Messinger v. Marsh, 6 Iowa 491. Ky.—See Petty v. Food Co., 32 Ky.

turely taken.<sup>48</sup> So where the court had acquired no jurisdiction over a party,<sup>49</sup> as where there was no valid<sup>50</sup> service of summons or no service whatever,<sup>51</sup> he is not required to file an affidavit of merits in support of a motion to vacate a default judgment, being entitled to relief as a matter of right.

d. *Default Occasioned by Act of Adversary.*—In some jurisdictions if the default was obtained through misapprehension or mistake occasioned by the act of the plaintiff or his attorney, an affidavit of merits is not necessary.<sup>52</sup>

L. Rep. 956, 107 S. W. 699. Mo.—*Branstetter v. Rives*, 34 Mo. 318; *Doan v. Holly*, 27 Mo. 256. N. Y.—*American A. Co. v. Industrial Fed. of Am.*, 84 App. Div. 304, 82 N. Y. Supp. 642; *Howell v. Denniston*, 3 Caines 96; *Depuyster v. Warne*, 2 Caines 45. Tenn.—*Findley v. Johnson*, 1 Overt. 344. Wash.—*Walla Walla Prtg. & Pub. Co. v. Budd*, 2 Wash. Ter. 336, 5 Pac. 602. Wis.—*Knowles v. Fritz*, 58 Wis. 216, 16 N. W. 621.

Where a case has been adjourned or otherwise disposed of for the term, it is irregular for the court to take it up in the absence of and without notice to the attorney; and a judgment rendered under such circumstances should be set aside without any showing of merits. *Maloney v. Hunt*, 29 Mo. App. 379.

Judgment entered upon a stipulation by a party himself made without the knowledge or consent of his attorneys will be set aside upon their application without the filing of an affidavit of merits. *Toy v. Haskell*, 128 Cal. 558, 61 Pac. 89, 79 Am. St. Rep. 70.

But in *Ela v. Goss*, 20 N. H. 53, it was held that the court will not proceed summarily upon petition to vacate a judgment irregularly entered by a justice of the peace if there be no evidence that the petitioner might have prevailed upon the merits.

48. *Ex parte Haynes*, 140 Ala. 196, 37 So. 286; *Foster v. Vehmeyer*, 133 Cal. 459, 65 Pac. 974 (default taken on published summons before the expiration of the legal period for appearance); *Branstetter v. Rives*, 34 Mo. 318; *Hole v. Page*, 20 Wash. 208, 54 Pac. 1123.

49. Cal.—*Norton v. Atchison*, etc. R. Co., 97 Cal. 388, 32 Pac. 452, 30 Pac. 585, 33 Am. St. Rep. 198. Colo.—*Stubbs v. McGillis*, 44 Colo. 138, 96 Pac. 1005, 130 Am. St. Rep. 116, 18 L. R. A. (N. S.) 405. Ind.—*Dobbins v. McNamara*, 113 Ind. 54, 14 N.

E. 887, 3 Am. St. Rep. 626. Ia.—*Rice v. Griffith*, 9 Iowa 539. Md.—*Maryland Steel Co. v. Marney*, 91 Md. 360, 46 Atl. 1077. Minn.—*Magin v. Lamb*, 43 Minn. 80, 44 N. W. 675, 19 Am. St. Rep. 216. Mo.—*Branstetter v. Rives*, 34 Mo. 318. N. C.—*Flowers v. King*, 145 N. C. 234, 58 S. E. 906, 122 Am. St. Rep. 444. N. D.—*Skjelbred v. Shafer*, 15 N. D. 539, 108 N. W. 487, 125 Am. St. Rep. 614.

A code provision authorizing the court to relieve a party from results of his mistake, inadvertence, surprise, or excusable neglect has no application to a motion to set aside a judgment rendered without jurisdiction of the person. *De La Montanya v. De La Montanya*, 112 Cal. 101, 44 Pac. 345, 53 Am. St. Rep. 165, 32 L. R. A. 82; *Norton v. Atchison*, etc. R. Co., 97 Cal. 388, 32 Pac. 452, 30 Pac. 585, 33 Am. St. Rep. 198; *Wheeler v. Moore*, 10 Wash. 309, 38 Pac. 1053. See *infra*, II, B, 11.

50. See *Browns v. Gaston & Simpson G. & S. Min. Co.*, 1 Mont. 57; *Morris v. Kahn*, 31 Misc. 25, 62 N. Y. Supp. 1040 (while no copy of the complaint accompanied the summons); *Hunter v. Lester*, 18 How. Pr. (N. Y.) 347.

Service by leaving a summons at defendant's place of residence is actual; and an application to set aside a default judgment rendered on such service must show a meritorious defense. *Sturgis v. Fay*, 16 Ind. 429, 79 Am. Dec. 440. And see *Lucas v. Waller*, 1 Morris (Iowa) 303.

51. *Savings Bank v. Authier*, 52 Minn. 98, 53 N. W. 812, 18 L. R. A. 498; *Wheeler v. Moore*, 10 Wash. 309, 38 Pac. 1053.

52. *Sears v. Tenagen*, 50 Misc. 275, 100 N. Y. Supp. 469 (holding that where service was made by registered mail and it appeared that the package was not received by the defendant until five days after court convened, no affidavit of merits was necessary on a



e. *Where Complaint States no Cause of Action.*—It has been held that where the complaint does not state a cause of action a default judgment may be set aside without an affidavit of merits.<sup>53</sup>

f. *In equity* the rule as to the necessity<sup>54</sup> of an affidavit of merits is the same as at law, though it may be different as to the contents of such affidavit.<sup>55</sup>

g. *Where Merits Otherwise Appear.*—(I.) Generally.—In some states the necessity of filing an affidavit of merits may be dispensed with where merits otherwise appear.<sup>56</sup>

(II.) *Verified Answer or Plea.*—Where a verified answer or plea accompanies the motion or application for relief and shows a meritorious defense it is a sufficient substitute in some jurisdictions for an affidavit of merits.<sup>57</sup> And the affidavit verifying the plea or answer

motion to set aside the default); *Morris v. Kahn*, 31 Misc. 25, 62 N. Y. Supp. 1040. See also *Browning v. Roane*, 9 Ark. 354, 50 Am. Dec. 218, citing *Stewart v. Atkins*, 3 Cow. (N. Y.) 67; *Olney v. Bacon*, 3 Caines (N. Y.) 132, as so holding, but refusing to approve them or to attempt to lay down any rule embracing all of the exceptions to the general rule requiring an affidavit of merits.

**Fraudulent Stipulation.**—Where the motion to set aside a default which is not based upon § 473, C. C. P., in relation to a default obtained by mistake, inadvertence, surprise or excusable neglect, but is based upon the fact that the judgment was entered upon a fraudulent stipulation, no affidavit of merits is necessary. *Crescent Canal Co. v. Montgomery*, 124 Cal. 134, 56 Pac. 797.

53. *Pease v. County of Kootenai*, 7 Idaho 731, 65 Pac. 432.

54. III.—*Norton v. Hixon*, 25 Ill. 371, 79 Am. Dec. 338; *Grubb v. Crane*, 5 Ill. 153. Ind.—*Dale v. Bugh*, 16 Ind. 233. Mich.—*Stockton v. Williams*, Harr. Ch. 241; *Thayer v. Swift*, Walk. Ch. 384. N. Y.—*Powers v. Trenor*, 3 Hun 37; *Meach v. Chappell*, 8 Paige 135; *Hunt v. Wallis*, 6 Paige 371. Wis.—*Mowry v. Hill*, 11 Wis. 146.

55. See *infra*, IV, F, 1, b, (III.).

56. *Melde v. Reynolds*, 129 Cal. 308, 61 Pac. 932 (holding that the affidavit is not jurisdictional); *Clarke v. Baird*, 98 Cal. 642, 33 Pac. 756. See *Jordan v. Grieg*, 33 Colo. 360, 80 Pac. 1045.

So an affidavit should not be required before setting aside a default where the court is satisfied that defendant has a meritorious defense. *Crescent*

*Canal Co. v. Montgomery*, 124 Cal. 134, 56 Pac. 797.

Where it fairly appears from the records and papers upon which the motion is based that the party has a good defense, the sufficiency or necessity for an affidavit of merits is a question for the trial court. *Crane & O. Co. v. Sauntry*, 90 Minn. 301, 96 N. W. 794.

Where it appeared that the party was in court with his witnesses ready for trial, but that his attorney, believing that the case could not be reached on that day, went to another town and that in his absence the case was reached and judgment by default taken, it was held no error for the trial court to set aside the judgment without requiring an affidavit of merits. In such case the court knew from the circumstances that the party claimed to have a good defense. *Jones v. Jones*, 37 Mont. 155, 94 Pac. 1056.

57. Ark.—*Kupferle v. Merchants' Nat. Bank*, 32 Ark. 717. Ill.—*Kimbark v. Blundin*, 6 Ill. App. 539; *Fergus v. Cleveland Paper Co.*, 3 Ill. App. 629. Ia.—*Huebner v. Farmers' Ins. Co.*, 71 Iowa 30, 32 N. W. 13, where counsel presenting it so request. Mont.—*State v. District Court*, 100 Pac. 207; *Schaeffer v. Gold Cord Min. Co.*, 36 Mont. 410, 93 Pac. 344; *Bowen v. Webb*, 34 Mont. 61, 85 Pac. 739. See *Blizzard v. Epkens*, 105 Ill. App. 117; and *infra*, II, I.

A formal affidavit of merits is not necessary where the proposed answer shows merits and is verified on personal knowledge. *People's Ice Co. v. Schlenker*, 50 Minn. 1, 52 N. W. 219.

Where the affidavit denies a material allegation of the complaint it is suffi-

supplies the lack of a separate affidavit of merits if it states all that is required to appear in the latter.<sup>58</sup> The proposed answer<sup>59</sup> or one already on file<sup>60</sup> may be considered in connection with an affidavit for the purpose of aiding it. But in some states both a copy of the proposed pleading and an affidavit of merits is required, and the verification of the former does not render the latter unnecessary.<sup>61</sup>

(III.) **Verified Petition or Motion.** — Where the form of the showing of merits is not regarded as material, the verified petition or motion setting up the facts of the defense may be sufficient as an affidavit of merits.<sup>62</sup>

**11. Relief From Results of Mistake or Excusable Neglect.** — Under a statute providing that a court may relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, an affidavit of merits is

cient. *Merchants' Ad. Sign Co. v. Los Angeles Bill Post. Co.*, 128 Cal. 619, 61 Pac. 277; *Fulweiler v. Hog's Back Consol. Min. Co.*, 83 Cal. 126, 23 Pac. 65; *Lunnun v. Morris*, 7 Cal. App. 710, 95 Pac. 907; *Montijo v. Sherer & Co.*, 6 Cal. App. 558, 91 Pac. 261.

Although not served with the notice of motion the proposed answer presented at the hearing may be considered as an affidavit of merits. *San Diego Realty Co. v. McGinn*, 7 Cal. App. 264, 94 Pac. 374.

The rule in Wisconsin has been changed by statute and no affidavit of merits is necessary where the answer itself shows merits and is verified. *Levy v. Goldberg*, 40 Wis. 308; *Town of Omro v. Ward*, 19 Wis. 232. See *Republic Ins. Co. v. Williams*, 3 Biss. 370, 20 Fed. Cas. No. 11,707.

58. *Fergus v. Cleveland Paper Co.*, 3 Ill. App. 629.

59. Cal. — *Melde v. Reynolds*, 129 Cal. 308, 61 Pac. 932. Minn. — *Fitzpatrick v. Campbell*, 58 Minn. 20, 59 N. W. 629. Mo. — *Adams v. Hickman*, 43 Mo. 168. Mont. — *Whiteside v. Logan*, 7 Mont. 373, 17 Pac. 34. Neb. — *Haggerty v. Walker*, 21 Neb. 596, 33 N. W. 244.

But see *McPherson v. Kingsbaker*, 22 Kan. 646.

Where a bill of exceptions recites that the motion to set aside a default was heard upon the complaint, motion and affidavits, it will not be presumed that a proffered answer, which was neither identified nor referred to as a paper offered in support of the motion, was considered by the court as an affidavit of merits. *Bowen v. Webb*, 34 Mont. 61, 85 Pac. 739.

60. An answer filed too late may be looked to in aid of the affidavit of merits. The statement that defendant has a good defense will be deemed to refer to such answer. *Reidy v. Scott*, 53 Cal. 69. But see *McPherson v. Kingsbaker*, 22 Kan. 646, where such a statement in the affidavit was regarded as insufficient to show that affiant referred to the proposed answer accompanying the application.

After amendment of the complaint for the foreclosure of a mortgage, merely to correct errors in the description of the property mortgaged, the original answer cannot be looked to as an affidavit of merits. *Parrott v. Den*, 34 Cal. 79.

61. *Wheeler v. Castor*, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746; *Judd v. Patton*, 13 S. D. 648, 84 N. W. 199. See also *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151; *Searles v. Lawrence*, 8 S. D. 11, 65 N. W. 34.

Compare Md. — *Watson v. McHenry*, 107 Md. 245, 68 Atl. 606. N. Y. — *Anderson v. Hough*, 1 Sandf. 721; *Lewis v. Watkins*, 6 Hill 230; *Jones v. Russell*, 3 How. Pr. 324. Pa. — *McCarney v. McCamp*, 1 Ashm. 4.

"From a pleading the court can determine whether a defense is properly pleaded, but as a general rule it cannot determine whether such defense is in fact substantial and meritorious. This is the purpose of the affidavit of merits." *Copper King v. Johnson*, 9 Ariz. 67, 76 Pac. 594.

62. Ind. — *Rooker v. Bruce*, 171 Ind. 86, 85 N. E. 351. Mont. — *State v. District Court*, 100 Pac. 207. Wash. — *Wheeler v. Moore*, 10 Wash. 309, 38 Pac. 1053.

ordinarily required to accompany the application for relief.<sup>63</sup> It is not jurisdictional, however, and the court may grant relief without it where the merits otherwise appear.<sup>64</sup> Nor does this requirement apply to cases where the applicant is entitled to relief as a matter of right regardless of the statute in question,<sup>65</sup> or to motion to set aside a divorce decree.<sup>66</sup>

**12. Waiver by Court.**—Where an affidavit of merits is required by statute<sup>67</sup> or rule of court<sup>68</sup> the court has no authority to waive the requirement.

**C. RESISTING MOTION.**—A motion to strike out a plea or answer as frivolous or a sham,<sup>69</sup> especially where the answer is unverified,<sup>70</sup> must be resisted by an affidavit of merits in some states. And such an affidavit is sometimes required in resistance to a motion for a change of venue.<sup>71</sup>

**D. ACCOMPANYING PLEA OR DEMURRER.**—Statutes or rules in some states require a plea<sup>72</sup> or demurrer<sup>73</sup> to be accompanied by an affidavit.

**E. TO PREVENT TAKING OF INQUEST.**—In New York an affidavit of

63. *Block v. Kearney*, 132 Cal. xviii, 64 Pac. 267; *Nevada Bank v. Dresbach*, 63 Cal. 324; *Bailey v. Taaffe*, 29 Cal. 422.

64. *Melde v. Reynolds*, 129 Cal. 308, 61 Pac. 932; *Crescent C. Co. v. Montgomery*, 124 Cal. 134, 56 Pac. 797; *Clarke v. Baird*, 98 Cal. 642, 33 Pac. 756. See *Gordan v. Greig*, 33 Colo. 360, 80 Pac. 1045.

65. *Toy v. Haskell*, 128 Cal. 558, 61 Pac. 89, 79 Am. St. Rep. 70; *De La Montanya v. De La Montanya*, 112 Cal. 101, 44 Pac. 345, 53 Am. St. Rep. 165, 32 L. R. A. 82; *Norton v. Atchison*, etc. R. Co., 97 Cal. 388, 32 Pac. 452, 30 Pac. 585, 33 Am. St. Rep. 198; *Hole v. Page*, 20 Wash. 208, 54 Pac. 1123; *Wheeler v. Moore*, 10 Wash. 309, 38 Pac. 1053. See *supra* II, B, 10.

66. *Cottrell v. Cottrell*, 83 Cal. 457, 23 Pac. 531; *McBlain v. McBlain*, 77 Cal. 507, 20 Pac. 61 (because the public is an interested party).

67. *Ex parte Payne*, 130 Ala. 189, 29 So. 622; *Morgan v. McDonald*, 70 Cal. 32, 11 Pac. 350. See *supra* II, B, 10, b.

68. *Graham v. Pinkney*, 7 Robt. (N. Y.) 147. See *supra*, II, B, 9. But see *McMurren v. Bourne*, 81 Minn. 515, 84 N. W. 338.

But as to right of court to disregard its own rules, see I, B, 2.

69. *McMurray v. Gifford*, 5 How. Pr. (N. Y.) 14.

But a simple affidavit of merits is all that is required where there is no intricacy in the defense interposed. *Bowen v. Bissell*, 6 Wend. (N. Y.) 511.

70. *Patrick v. McManus*, 14 Colo. 65, 23 Pac. 90, 20 Am. St. Rep. 253.

71. *Olivier v. Cunningham*, 51 Minn. 232, 53 N. W. 462; *Onandaga County Bank v. Shepherd*, 19 Wend. (N. Y.) 10.

72. **Colo.**—*City of Central v. Wilcoxen*, 3 Colo. 566; *Martin v. Skehan*, 2 Colo. 614. **D. C.**—*Loeber v. Moore*, 20 D. C. 1; *Bryan v. Harr*, 21 App. Cas. 190; *Gundersheimer v. Earnshaw*, 13 App. Cas. 178. **Ill.**—*McKichan v. Follett*, 87 Ill. 103; *Beardsley v. Gosling*, 86 Ill. 58; *Mayberry v. Van Horn*, 83 Ill. 289; *Scammon v. McKey*, 21 Ill. 554; *Chicago Stamp v. Mechanical Rubber Co.*, 83 Ill. App. 230; *Hanson v. Hale*, 44 Ill. App. 474. **Md.**—*Codd Co. v. Parker*, 97 Md. 319, 55 Atl. 623; *Adler v. Crook*, 68 Md. 494, 13 Atl. 153. **N. J.**—*Mattix v. Steelman*, 35 N. J. L. 467. **R. I.**—*West v. Darcy*, 20 R. I. 311, 38 Atl. 945. **Va.**—*Lewis v. Hicks*, 96 Va. 91, 30 S. E. 466. **W. Va.**—*Hurlburt v. Straub*, 54 W. Va. 303, 46 S. E. 163.

See *infra*, IV, F, 1, c; IV, F, 2, c; IX, 2. Compare *supra*, II, B, 7.

**On appeal from magistrate**, see *infra*, II, F, 11; V, B, 1.

**A plea in abatement** though verified may be stricken from the files where not accompanied with the required affidavit of merits. *Original Typewriter Circular Co. v. Buehler*, 67 Ill. App. 575, in which it was apparently contended that no affidavit was necessary where a plea in abatement was filed.

73. *Mattix v. Steelman*, 35 N. J. L. 467.



merits is required under certain circumstances to prevent the taking of an inquest,<sup>74</sup> but this practice does not extend to suits in equity.<sup>75</sup>

F. TO PREVENT DEFAULT OR SUMMARY JUDGMENT. — 1. Generally. Statutes and rules of court in several states require a defendant in certain classes of cases and under certain circumstances to file an affidavit of merits or defense to prevent the taking of a default or summary judgment.<sup>76</sup>

2. Actions *Ex Contractu* Generally. — Affidavits of defense are

74. Since 1876, however, if the answer is verified an inquest cannot be taken. *Beglin v. People's Tr. Co.*, 95 N. Y. Supp. 910. See also *Goldberg v. Wood*, 98 N. Y. Supp. 200.

75. *Devlin v. Shannon*, 8 Hun (N. Y.) 531.

76. See sections following and *infra*, IX.

District of Columbia. — The 73d rule of the supreme court of the District of Columbia provides that in actions *ex contractu* where the plaintiff accompanies his declaration with an affidavit he is entitled to judgment unless the defendant file with his plea, if in bar, an affidavit of defense denying the right of the plaintiff as to the whole or some specific part of his claim, and specifically stating also in precise and distinct terms the grounds of his defense, which must be such as would, if true, be sufficient to defeat the plaintiff's claim in whole or in part. *Bryan v. Hart*, 21 App. Cas. (D. C.) 190.

A rule of court in the circuit court of Garrett county, Maryland, requires an affidavit of defense in all cases on the trial docket, *ex contractu*, where the declarations shall have been filed before the rule day. *Watson v. McHenry*, 107 Md. 245, 68 Atl. 606.

The Massachusetts statute provides for an affidavit of no defense by plaintiff in actions to recover a debt or a liquidated demand in money, and requires the defendant, to prevent a default judgment, to make an affidavit showing facts constituting a defense, or such facts as the court may think sufficient to entitle him to defend. *Merchants' Nat. Bank v. Glendon Co.*, 120 Mass. 97; *Rogers v. Ladd*, 117 Mass. 334n.

The Mississippi statute (Code 1871, § 782) is similar to the Massachusetts statute regarding the effect of plaintiff's affidavit in actions on account.

New Jersey Statute. — Vol. 2, Gen. Stat. N. J., p. 2490, § 335.

In Pennsylvania the Act of May 25,

1887, P. L., 272, made a material change in the affidavit of defense law. By the terms of that statute the statement of claim takes the place of a common law action, and in an action of assumpsit requires an affidavit to be filed to prevent summary judgment. *Ryon v. Starr* (No. 1), 214 Pa. 310, 63 Atl. 701; *Ashman v. Weigley*, 148 Pa. 61, 23 Atl. 897. Former statutes were repealed thereby only so far as inconsistent therewith. See *Newbold v. Pennock*, 154 Pa. 591, 26 Atl. 606; *Marlin v. Waters*, 127 Pa. 177, 17 Atl. 890; *Com. v. Perrego*, 31 Pa. Super. 126; *Trenton Rubber Co. v. Small*, 3 Pa. Super. 8; *Ruhland v. Alexander*, 19 Pa. Co. Ct. 577; *Lessing Bldg. Assn. v. Lentz*, 10 Pa. Dist. 257. For the actions in which affidavits of defense are required in Pennsylvania, see the succeeding sections.

For a review of the development of the Pennsylvania practice see *Abeles v. Powell*, 6 Pa. Super. 123; *Union Glass Co. v. First Nat. Bank*, 10 Pa. Co. Ct. 565.

The Rhode Island statute (Gen. Laws, R. I., c. 239, § 14) provides amongst other things, that if the plaintiff shall file with his declaration a copy of the bill, note, bond, instrument in writing, book entries, judgment or recognizance, the defendant shall within ten days after filing the declaration, if the case be in the common pleas division, or within the time fixed for filing such pleas if in a district court, make affidavit setting out that in his opinion there is a good and valid defense, and in what said defense consists; otherwise judgment shall be entered as by default. *Pawtucket S. & G. P. Co. v. Briggs*, 21 R. I. 457, 44 Atl. 595.

West Virginia Statute. — See *Ceranto v. Trimboli*, 63 W. Va. 340, 60 S. E. 138; *Hurlburt & Sons v. Straub*, 54 W. Va. 303, 46 S. E. 173.

Virginia Statute. — See *Spencer v. Field*, 97 Va. 38, 33 S. E. 380.

usually required only in actions upon contracts,<sup>77</sup> or upon contracts for the payment of money.<sup>78</sup>

**3. Actions on Written Instruments.**—Defendant is sometimes required to file an affidavit in actions on written instruments<sup>79</sup> or instruments for the payment of money.<sup>80</sup> The instrument need not exhibit on its face every fact essential to the plaintiff's recovery,<sup>81</sup>

<sup>77.</sup> See preceding section, and *infra*, II, F, 5.

A rule providing for affidavits of defense in actions *ex contractu* is not confined to money demands pure and simple. *Fidelity & Dep. Co. v. United States*, 187 U. S. 315, 23 Sup. Ct. 126, 47 L. ed. 194.

The West Virginia statute applying to actions "for the recovery of money arising out of contract" applies to all actions *ex contractu* as distinguished from actions *ex delicto*, and therefore includes an action or *scire facias* upon a judgment. *Marsteller v. Ward*, 52 W. Va. 74, 43 S. E. 178.

**Recovery of Money By Action On Contract.**—The Virginia statute (§ 3211, Va. Code 1904) covers all cases in which any person is "entitled to recover money by action on any contract" express or implied (*Long v. Pence*, 93 Va. 584, 25 S. E. 593); including actions on judgments and decrees (*Cardwell v. Talbott*, 5 Va. L. Reg. 182); and on insurance policies (*Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487); but does not apply to actions for damages for the breach of a contract (*Wilson v. Dawson*, 96 Va. 687, 32 S. E. 461); nor to actions for penalties. *Western Union Tel. Co. v. Bright*, 90 Va. 778, 20 S. E. 146.

<sup>78.</sup> An appeal bond given on appeal to the supreme court from a money judgment is a contract for the payment of money. *Myers v. Shoneman*, 90 Ill. 80; *Mestling v. Hughes*, 89 Ill. 389; *Coursen v. Browning*, 86 Ill. 57. Compare *infra*, II, F, 5, e, (II).

A replevin bond is not such a contract. *Peck v. Wilson*, 22 Ill. 205.

In a suit upon an injunction bond where the plaintiff files an affidavit of his claim, the defendant under the statute is required to file with his plea an affidavit of merits. *New York Exch. Bank v. Reed*, 332 Ill. 123, 83 N. E. 548.

A proceeding by distress for rent is within the meaning of this provision. *Bartlett v. Sullivan*, 87 Ill. 219.

**Express or Implied Contract.**—See *Lloyd v. Hough*, 1 How. (U. S.) 153,

11 L. ed. 83; *Long v. Pence*, 93 Va. 584, 25 S. E. 593.

<sup>79.</sup> **Arbitration and Award.**—This does not apply to an action upon a parol submission to arbitration, and a written award in pursuance thereof. *Calder v. Lansing*, 1 Hill (N. Y.) 212.

<sup>80.</sup> A lease reserving a pecuniary rent is an instrument in writing for the payment of money (*Frank v. Maguire*, 42 Pa. 77), and so is a recognizance for the support of the family of the recognizer (*Com. v. Fellman*, 17 Pa. Dist. 1060; *Com. v. Good*, 17 Pa. Dist. 1061); or a verified recognizance conditioned on the appearance of a defendant to answer a criminal charge (*Harres v. Com.*, 35 Pa. 416), and an entry in plaintiff's bank book made by defendant bank showing it debtor (*Schoonover v. Jones*, 11 Pa. Co. Ct. 61).

**Optional Agreement.**—An action of an agreement under seal settling the amount of indebtedness due from one party to the other is within the affidavit of defense law, although it provides that the debtor may at his option pay the amount in a mortgage or mortgages aggregating the sum in question which might be given by a certain named party. *Singerly v. Caldwell*, 88 Pa. 312, distinguishing this sort of a contract from one by which payment is to be made in goods or chattels, and the agreement in the case at bar being primarily one to pay money with a superadded privilege to the debtor of paying in mortgages if he preferred.

An agreement under seal for the payment of the stipulated price for land in certain instalments, the last of which is not yet due and payable, is not an instrument of writing for the payment of money on which judgment can be entered under the statute for failure to file an affidavit of defense at the first term. *Schabinger v. Warren*, 4 Houst. (Del.) 544.

<sup>81.</sup> *Vulcanite Pav. Co. v. Philadelphia*, 115 Pa. 280, 8 Atl. 777.

but it must constitute in itself the basis of the obligation to pay.<sup>82</sup>

4. **Liquidated Damages.**—The actions in which affidavits of defense are required are generally those in which the claim is a liquidated one<sup>83</sup> or capable of liquidation from the averments of plaintiff's statement.<sup>84</sup>

5. **Actions of Assumpsit.**—a. *Generally.*—The Pennsylvania Act requiring an affidavit of defense in actions of assumpsit has been construed as not applying to all actions of assumpsit, but only to those which are *ex contractu*<sup>85</sup> in their nature. It has no application to actions *ex delicto* or of a mixed nature,<sup>86</sup> even though they are in form assumpsit,<sup>87</sup> or which combine tort and contract.<sup>88</sup> But the act applies to all actions *ex contractu* in their nature,<sup>89</sup> whether the contract be executory,<sup>90</sup> or oral or written<sup>91</sup> if the damages are liquidated or can

But an executory contract in writing for the payment of money which of itself does not constitute a *prima facie* right in the plaintiff to recover is not within the Act of 1835 unless supplemented with averments of fact so full, specific and precise as to warrant a verdict of the jury in favor of the plaintiff. *McKeon Soap Mfg. Co. v. Religious Press Co.*, 115 Pa. 310, 8 Atl. 781, which was an action on a written agreement to pay a certain amount for advertising to be inserted in plaintiff's papers.

82. A mortgage containing a recital of indebtedness but no express covenant to pay is not within the law. *Fidelity Ins. & Tr. Co. v. Miller*, 89 Pa. 26, following *Scott v. Fields*, 7 Watts (Pa.) 360, which was a similar action on a mortgage containing an unequivocal acknowledgment of a bond for the debt.

83. See *Rogers v. Ladd*, 117 Mass. 334n; *Wilson v. Dawson*, 96 Va. 687, 32 S. E. 461.

An unitemized charge for attorney's services in a lump sum for a period extending over many years, is not within the scope of the statute allowing judgment at the first term for failure to file an affidavit of defense. *Taylor v. Addicks*, 4 Penne. (Del.) 411, 55 Atl. 1010.

84. See *infra*, II, F, 5, a.

85. *Corry v. Pennsylvania R. Co.*, 194 Pa. 516, 45 Atl. 341 (an action for damage to plaintiff's trunk sent to defendant's depot in anticipation of plaintiff's becoming a passenger); *Union Glass Co. v. First Nat. Bank*, 10 Pa. Co. Ct. 565; *Bradley v. Potts*, 2 Pa.

Dist. 797; *Brady v. Osborn Eng. Co.*, 14 Pa. Dist. 324, 132 Fed. 412.

An action for breach of a written contract to convey land is an action *ex contractu* and one in which an affidavit of defense is required. *Bradley v. Potts*, 2 Pa. Dist. 797.

Where the effect of an amendment is to make the action one of assumpsit the statute applies. *Wright v. Hopkins*, 3 Pa. Dist., 240.

86. *Kinney v. Mitchell*, 136 Fed. 773, 69 C. C. A. 493; *Giles v. Cavanaugh (Pa.)*, 4 Atl. 205; *Hirst v. Whitesides*, 1 Pa. Dist. 621.

87. *Corry v. Pennsylvania R. Co.*, 194 Pa. 516, 45 Atl. 341; *Kinney v. Mitchell*, 14 Pa. Dist. 301; *United Collieries Co. v. Pennsylvania R. Co.*, 11 Pa. Dist. 300.

88. *Kinney v. Harrison Mfg. & B. Co.*, 22 Pa. Super. 601.

89. *Byrne v. Hayden*, 124 Pa. 170, 16 Atl. 750; *Com. v. Yeisley*, 6 Pa. Super. 273. Compare *Wilson v. Dawson*, 96 Va. 690, 32 S. E. 461.

Where a cause of action is such that under the rules of pleading at common law it will support a declaration in debt with a count in detinue it comes within the affidavit of defense law of 1887. *Jones v. Gordon*, 124 Pa. 263, 16 Atl. 862, which was an action to recover a legacy received by defendant as trustee which he had refused to account for.

A sheriff's interpleader, unless it proceeds as an action in assumpsit, is not within the scope of the act. *Strouse v. Bard*, 8 Pa. Super. 48.

90. *Mantua Hall & M. Co. v. Brooks*, 163 Pa. 40, 29 Atl. 744.

91. *Blanchard v. Hunter*, 7 Pa. Co. Ct. 552.



be liquidated from the facts set forth in the statement of claim.<sup>92</sup>

But a feigned issue, contemplating a trial upon the merits, is not within the scope of the act.<sup>93</sup>

b. *Importance of Form of Action.*—The nature of the cause of action rather than the form of the action appears to determine whether it comes within the scope of the statute.<sup>94</sup> But where the facts are such that they give rise to a cause of action both upon contract and in tort, if the action is expressly made one on contract an affidavit of defense is necessary.<sup>95</sup>

c. *Breach of Implied Obligation.*—An implied contract for the payment of money may be covered by the act.<sup>96</sup> But an action for the breach of the implied obligation or duty arising from a relation created by contract is in its nature *ex delicto* although in form *assumpsit*, and does not therefore require an affidavit of defense.<sup>97</sup> Thus in an action against a carrier based upon its failure to properly perform the duties incumbent on it no such affidavit is necessary.<sup>98</sup> But where the action is based directly upon the contract and not upon any implied obligation, the affidavit is required.<sup>99</sup>

d. *Action for Penalty.*—An action for a penalty, although in form

92. *Brady v. Osborn Eng. Co.*, 132 Fed. 412, 14 Pa. Dist. 324; *Holland v. Sunbury Iron Wks.*, 9 Pa. Super. 261; *Creighton v. National Safe Co.*, 10 Pa. Dist. 600. But see *Bradley v. Potts*, 2 Pa. Dist. 797.

In an action of *assumpsit* for breach of a building contract, if the plaintiff though claiming a certain sum as damages, sets forth no facts from which his damages can be liquidated at the named sum or any other sum without a writ of inquiry no affidavit of defense is necessary. *Krug v. Snyder*, 32 Pa. Co. Ct. 33.

*Breach of Promise.*—An action of *assumpsit* for breach of promise of marriage is not within the statute requiring an affidavit of defense. *Zimmerman v. Drake*, 17 Pa. Dist. 754.

93. *Brink v. Spencer*, 14 Pa. Dist. 570.

94. *Barr v. Duncan*, 76 Pa. 395, and *infra*, II, F, 5, c. See *Duffield v. Rosenzweig*, 144 Pa. 520, 23 Atl. 4.

Under a rule of court covering actions founded upon contract whether in form *ex contractu* or *ex delicto*, where the debt or damages can be liquidated without the aid of a jury, an action of *trover* for a certain amount of money received by defendant with plaintiff's consent which defendant undertook to deliver to plaintiff but refused and neglected to pay over on demand, requires

an affidavit of defense. *Allen v. St. Clair*, 3 Pa. Co. Ct. 463.

95. *Ridgeway Grain Co. v. Pennsylvania R. Co.*, 34 Pa. Co. Ct. 664; and see *infra*, II, F, 5, c.

96. As an implied agreement to pay for goods sold and delivered. *Borlin v. Com.*, 99 Pa. 42 (*arguendo*). But see *Woodwell v. Bluff Min. Co.*, 25 Pa. 365.

97. *Brady v. Osborn Eng. Co.*, 132 Fed. 412, 14 Pa. Dist. 324 (holding that an action for damages for the breach of the implied obligation to exercise proper professional skill in performing a contract, was not within the statute); *Barr v. Duncan*, 76 Pa. 395 (duty of innkeeper to guest); *United Collieries Co. v. Pennsylvania R. Co.*, 27 Pa. Co. Ct. 124 (an action against a carrier to recover for overcharges alleged to be due to undue discrimination and false pretenses).

98. *Johnson v. Wells, Fargo & Co.*, 35 Pa. Co. Ct. 15; *s. c.*, on appeal, 17 Pa. Dist. 725 (an action against an express company for failure to deliver a package); *Cosgrove v. Pittsburgh, C. C. & St. L. R. Co.*, 32 Pa. Co. Ct. 240; *Dulaney v. Hoosac Tunnel Fast Line*, 30 Pa. Co. Ct. 606; *Moyer v. Pennsylvania R. Co.*, 19 Pa. Co. Ct. 383.

99. *Action on Bill of Lading.*—*Ridgway Grain Co. v. Pennsylvania R. Co.*, 34 Pa. Co. Ct. 664, *distinguishing* *Corry v. Pennsylvania R. Co.*, 194 Pa. 516, 45 Atl. 341.

debt or assumpsit, is not such as to require an affidavit of defense.<sup>1</sup>

e. *Contingent or Conditional Obligations.*—(I.) Generally.—The fact that the obligation is contingent or conditional does not take it without the scope of a law applying to actions *ex contractu*.<sup>2</sup>

(II.) Bonds.—Where an action on a bond or forfeited recognizance is essentially an action for breach of a contract, an affidavit of defense is required,<sup>3</sup> but where the act or acts which are the real basis of the cause of action are tortious in their nature, such an affidavit is not required.<sup>4</sup>

f. *Foreign Attachment.*—An action of assumpsit by foreign attachment is within the affidavit of defense law, where a general appearance has been entered,<sup>5</sup> but not otherwise.<sup>6</sup>

g. *Insurance Policy.*—Actions on insurance policies are within the scope of the act.<sup>7</sup>

1. *Commercial Nat. Bank v. Kirk*, 222 Pa. 567, 71 Atl. 319, 128 Am. St. Rep. 823; *Bartoe v. Guekert*, 158 Pa. 124, 27 Atl. 845; *Osborn v. First Nat. Bank*, 154 Pa. 134, 26 Atl. 289; *Union Glass Co. v. First Nat. Bank*, 10 Pa. Co. Ct. 565 (holding that an action under the "National Banking Act" to recover twice the amount of usurious interest paid is a suit for a penalty and is *ex delicto*); *Cordes v. Swartz*, 11 Pa. Dist. 425. *Compare* *Western Union Tel. Co. v. Bright*, 90 Va. 778, 20 S. E. 146. "Debt for penalties is in its nature *ex delicto*, whereas all other debt is in its nature *ex contractu*." *Osborn v. First Nat. Bank*, 154 Pa. 134, 26 Atl. 289.

But a suit on a note and for a higher rate of interest allowed by law, and in the nature of a penalty, for refusal to pay, is within the affidavit of defense law applying in general terms to actions on notes and bills. *Bank of U. S. v. Thayer*, 2 Watts & S. (Pa.) 443.

An action for treble damages for discrimination in freight rates is not within the statute. *Moyer v. Pennsylvania R. Co.*, 19 Pa. Co. Ct. 383.

2. See *Fidelity & Dep. Co. v. United States*, 187 U. S. 315, 23 Sup. Ct. 120, 47 L. ed. 194, and section following. But see *Borlin v. Com.*, 99 Pa. 43; *Com. v. Hoffman*, 74 Pa. 105; *Com. v. Miles*, 33 Pa. Co. Ct. 613.

3. *Twp. of Hazle v. Markle*, 175 Pa. 405, 34 Atl. 734; *Byrne v. Hayden*, 124 Pa. 170, 16 Atl. 750; *Com. v. Meeser*, 19 Pa. Super. 1; *Com. v. Yeisley*, 6 Pa. Super. 273 (an action on a constable's bond); *Com. v. McCutcheon*, 4 Pa. Co.

Ct. 309 (forfeited recognizance). See also *Kase v. Greenough*, 88 Pa. 403; *Sands v. Fritz*, 84 Pa. 15; *Com. v. Bault*, 1 Browne (Pa.) 237; *Davis v. Dolan*, 1 Browne (Pa.) 317. But see *Boas v. Nagle*, 3 Serg. & R. (Pa.) 250.

*Compare supra*, II, F, 2, notes.

*Replevin Bond.*—*Barr v. McGary*, 131 Pa. 401, 19 Atl. 45; *Clements v. Dempsey*, 7 Pa. Super. 52. But see *Sands v. Fritz*, 84 Pa. 15.

*Surety Bonds.*—*Union Tr. Co. v. City Tr., etc. Co.*, 4 Pa. Dist. 381.

4. *Barnhart v. Seanor*, 8 Pa. Dist. 18. See also *Borlin v. Com.*, 99 Pa. 42; *Sands v. Fritz*, 84 Pa. 15; *Com. v. Milnor*, 23 Pa. Super. 1 (assumpsit on the official bond of a sheriff for negligence in permitting an escape); *Com. v. Miles*, 33 Pa. Co. Ct. 613.

5. *Philadelphia & R. R. Co. v. Snowdon*, 166 Pa. 236, 30 Atl. 1129; *Wing v. Bradner*, 162 Pa. 72, 29 Atl. 291; *Callaghan v. Oldmixon*, 26 Pa. Co. Ct. 436; *Hubbard v. Dorman*, 7 Pa. Co. Ct. 384; *Praun v. Miller*, 3 Pa. Dist. 536.

6. *Paff v. North Bangor Co.*, 5 Pa. Co. Ct. 543; *Locke Reg. Co. v. Dragon Auto Co.*, 17 Pa. Dist. 159.

7. *Mutual L. Ins. Co. v. Keen*, 135 Fed. 677, 68 C. C. A. 315; *Hebb v. Kittingham Ins. Co.*, 138 Pa. 174, 20 Atl. 837; *Gauler v. Solicitors L. & T. Co.*, 9 Pa. Co. Ct. 634; *Doud v. Citizens' Ins. Co.*, 6 Pa. Co. Ct. 421. See *McCaffrey v. Knights & Ladies of Columbia*, 213 Pa. 609, 63 Atl. 189; *Moore v. Susquehanna Mut. F. Ins. Co.*, 196 Pa. 30, 46 Atl. 366. *Compare* *Mortock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487.

6. **Actions on Judgments.**—In some states an affidavit of defense may be required in actions on judgments.<sup>8</sup>

7. **Scire Facias.**—In certain actions by *scire facias* an affidavit of defense may be necessary.<sup>9</sup> The Pennsylvania practice in this class of cases was not affected by the act of 1887.<sup>10</sup>

8. **Replevin.**—Statutes sometimes require an affidavit of defense in actions of replevin.<sup>11</sup>

9. **Actions by Commonwealth.**—In Pennsylvania an affidavit of defense is necessary in an action by the commonwealth for the recovery of money.<sup>12</sup>

10. **Justice Court.**—Affidavits of defense are sometimes required in justice courts, but the justice has no authority to enter judgment for the insufficiency of the affidavit.<sup>13</sup>

11. **Appeals From Magistrate.**—General acts may<sup>14</sup> or may not<sup>15</sup> apply to cases appealed from a justice or other similar inferior court. But the matter may be regulated by local statutes<sup>16</sup> or rules of court.<sup>17</sup>

12. **Effect of Amendment by Plaintiff.**—After the amendment of the plaintiff's statement in a material respect the court may order the defendant to file a new affidavit of defense if the one already filed is not sufficient to meet the amended statement.<sup>18</sup> But unless so or-

8. See *supra*, II, F, 5, a; *infra*, II, F, 7.

An Action of Debt Upon a Foreign Judgment.—Mink v. Shaffer, 124 Pa. 280, 16 Atl. 805; McCleary v. Faber, 6 Pa. 476. See also Wing v. Bradner, 162 Pa. 72, 29 Atl. 291; Palmer v. March, 64 Pa. 239; Luckenbach v. Anderson, 47 Pa. 123; Hogg v. Charlton, 25 Pa. 200.

A rule requiring an affidavit of defense to accompany a plea in cases of *scire facias* on judgment and in actions on judgments from a state court, or from a court of the United States, applies to a plea of *nul tiel* record. Loeber v. Moore, 20 D. C. 1.

9. Hart v. Anderson, 198 Pa. 558, 48 Atl. 636; Perkins v. Coray, 196 Pa. 608, 46 Atl. 1103; Pennsylvania Co. v. Beaumont, 190 Pa. 101, 42 Atl. 522; Hummel v. Lilly, 188 Pa. 463, 41 Atl. 613, 68 Am. St. Rep. 879; Marsteller v. Ward, 52 W. Va. 74, 43 S. E. 178.

10. Ruhland v. Alexander, 19 Pa. Co. Ct. 577; Johnson v. Seofield, 8 Pa. Dist. 410.

A *scire facias* sur judgment, being neither assumpsit, debt nor covenant, is not within the meaning of the act of 1887. Cowden v. Kennedy, 7 Pa. Co. Ct. 312.

11. Miller v. Jackson, 34 Pa. Super. 31; Heisley v. Economy T. Mfg. Co., 33 Pa. Super. 218.

12. Com. v. Bailey, 129 Pa. 480, 10

Atl. 764; Com. v. Perrego, 31 Pa. Super. 126.

13. Moore v. Bundy, 22 Pa. Co. Ct. 583; Spangler v. Rush, 6 Pa. Dist. 28. Compare II, 6, K.

14. Reid v. Cisler, 35 Ill. App. 572; Jenson v. Frick, 35 Ill. App. 23; World's Soap Mfg. Co. v. Woltz, 27 Ill. App. 202; Martin v. Hochstader, 27 Ill. App. 166. See *infra*, V, B, 1.

15. American Trade Exch. Co. v. Schroeder, 23 Pa. Co. Ct. 660; Meredith v. Ferguson, 19 Pa. Co. Ct. 190; Lentz v. Sylvester, 6 Pa. Co. Ct. 580. *Contra*, Potts v. Benzenhafer, 6 Pa. Dist. 433.

16. See Marshall v. Neiman, 6 Pa. Co. Ct. 176.

The local Act of April 14, 1846, requiring defendants in appeals from justices of the peace to file affidavits of defense whenever the cause of action was within the affidavit of defense law was not repealed by the Act of 1887. Trenton Rubber Co. v. Small, 3 Pa. Super. 8; Heroy Co. v. Smith, 18 Pa. Co. Ct. 27, s. c., 5 Pa. Dist. 293. But see Potts v. Benzenhafer, 6 Pa. Dist. 433.

17. Horner v. Horner, 145 Pa. 258, 23 Atl. 441; Chain v. Hart, 140 Pa. 374, 21 Atl. 442.

On an appeal from the judgment of an alderman no statute requires the filing of an affidavit of defense. Cordes v. Swartz, 11 Pa. Dist. 425.

18. See Burns v. Armstrong, 223 Pa.



dered the filing of a new or supplemental affidavit is unnecessary.<sup>19</sup> A plea filed to an amended declaration and affidavit of claim must be supported by an affidavit of merits.<sup>20</sup>

**G. PREREQUISITES TO NECESSITY OF FILING AFFIDAVIT. — 1. Generally.** — Conceding the action or proceeding to be of such a nature that an affidavit of merits or defense can be required, the plaintiff must have strictly complied with those provisions of the statute or rule of court upon which depends his right to demand an affidavit from the defendant.<sup>21</sup>

**2. Where Statement or Affidavit of Claim a Prerequisite. — a. Generally.** — Statutes frequently provide for an affidavit of merits or defense where plaintiff has filed a verified statement or affidavit of his claim.<sup>22</sup> Under such circumstances the failure of the plaintiff to file a legally sufficient affidavit<sup>23</sup> or statement<sup>24</sup> of claim relieves the defendant from the burden of the statute, and the filing of an insufficient

66, 72 Atl. 255; *Cook v. Forker*, 193 Pa. 461, 44 Atl. 560, 74 Am. St. Rep. 699; *Jones v. Gordon*, 124 Pa. 263, 16 Atl. 862; *Ludwig v. Dearborn*, 23 Pa. Co. Ct. 362.

Plaintiff cannot demand another affidavit of defense where the affidavit to the original statement has been held sufficient, by merely changing the form of the pleading or setting forth the evidence by which it is claimed that the cause of action is sustained, although where additional matter of substance has been added which is not covered or put at issue by the original affidavit the court will direct a further affidavit to be filed. *Kinney v. Harrisburg Mfg. & B. Co.*, 31 Pa. Co. Ct. 286.

19. *Krug v. Snyder*, 32 Pa. Co. Ct. 33; *Niagara Fire Ins. Co. v. Thron*, 4 Pa. Co. Ct. 308.

Where the court has refused to require defendant to file a new affidavit in reply to an amended statement of claim, such failure to file an affidavit denying the new facts set up in the amended statement cannot be taken as an admission. *Moore v. Everitt*, 20 Pa. Super. 13.

20. *Gundersheimer v. Earnshaw*, 13 App. Cas. (D. C.) 178.

21. See sections following; also *infra*, IX, C, 7, and *Merriam Co. v. Thomas & Co.*, 103 Va. 24, 48 S. E. 490.

**Filing Copy of Instrument Sued On.** The plaintiff must comply with the statute as to the filing of a copy of the instrument sued on. *Clark v. Dotter*, 54 Pa. 315; *Frank v. Maguire*, 42 Pa. 77; *Dewey v. Dupuy*, 2 Watts & S. (Pa.) 553; *West v. Darcy*, 20 R. I. 311, 38 Atl. 945.

**22. Plaintiff's Statement or Affidavit of Claim.** — See II, B, 10, g, and the following: *Del.* — *Miller v. Hart*, 3 Penne. 279, 51 Atl. 683. *D. C.* — *Dobbins v. Thomas*, 26 App. Cas. 157; *Meyers v. Davis*, 13 App. Cas. 361. *Ill.* — *Haggard v. Smith*, 71 Ill. 226. *Pa.* — *Mink v. Shaffer*, 124 Pa. 280, 16 Atl. 805; *De Con Bros. Co. v. Englander*, 39 Pa. Super. 243.

An affidavit of no defense is required to be made by the plaintiff in Massachusetts. *Merchants' Nat. Bank v. Glendon Co.*, 120 Mass. 97.

23. *Hibbert v. Guardian S. & L. Assn.*, 3 Penne. (Del.) 591, 53 Atl. 54; *Fisher v. National Bank of Commerce*, 73 Ill. 34; *Reed v. Fleming*, 102 Ill. App. 668. See also *Del.* — *Work, McCouch & Co. v. Tatman*, 2 Houst. 304. *Mich.* — *Morrill v. Bissell*, 99 Mich. 409, 58 N. W. 324. *Va.* — *Merriman Co. v. Thomas*, 103 Va. 24, 48 S. E. 490. *W. Va.* — *Marsteller v. Ward*, 52 W. Va. 74, 43 S. E. 178; *Connalley v. Wallace Co.*, 51 W. Va. 181, 41 S. E. 167; *Vinson v. Norfolk & W. R. Co.*, 37 W. Va. 598, 16 S. E. 802.

Where the affidavit of claim is a nullity because not sworn to before an authorized officer, no affidavit of merits can be required. *Smith v. Lyons*, 80 Ill. 600.

24. *Peale v. Addicks*, 174 Pa. 543, 34 Atl. 201; *Murphy v. Taylor*, 173 Pa. 317, 33 Atl. 1041; *Fell v. Leach*, 31 Pa. Co. Ct. 137.

If a statement of claim is not sufficient to sustain a judgment, an affidavit of defense is not required. *Rosenblum v. Stolzenberg*, 36 Pa. Super. 644; *Zeller v. Wunder*, 36 Pa. Super. 1;

affidavit of defense is not a waiver of defects in the statement." Where the insufficiency of the statement of claim is not apparent on its face but is shown by an affidavit of defense, default judgment cannot be entered though the affidavit be insufficient.<sup>26</sup> If, however, such an affidavit of defense, besides disclosing the deficiency, supplies it, summary judgment may be taken.<sup>27</sup>

*b. Service of Notice or Statement.*—The service of a copy of plaintiff's statement<sup>28</sup> or notice of the filing of the same<sup>29</sup> where required by statute<sup>30</sup> is a prerequisite to the right to insist upon an affidavit of merits or defense.

**H. PERSONS FROM WHOM REQUIRED.—1. Generally.**—By virtue of the terms or spirit of the statutes certain classes of defendants are not required to file affidavits of merits or defense in an otherwise proper case.<sup>31</sup> Thus the Illinois act does not apply to non-residents of the county in which the action is brought.<sup>32</sup>

*Creighton v. National Safe Co.*, 10 Pa. Dist. 600.

Where the statement is defective as to any item of the claim, the court will refuse to consider the insufficiency of the affidavit of defense as to that item. *Independent Brick Co. v. Biddle*, 17 Pa. Dist. 1083.

Where the plaintiff's statement is insufficient defendant may enter a rule to show cause why it should not be stricken off. *Kauffman v. Jacobs*, 4 Pa. Co. Ct. 462.

25. *Bank v. Ellis*, 161 Pa. 241, 28 Atl. 1082; *Morgan v. Croasdill*, 17 Pa. Dist. 101.

In the federal courts the actual filing of an affidavit of defense is a waiver of any objections to an imperfect statement of claim, even though the affidavit is accompanied by an attempted reservation of rights. *Felty v. Nat. Acc. Soc.*, 139 Fed. 57. By virtue of U. S. Rev. St., § 954, requiring the court in all civil actions to proceed and give judgment according to the right of the case without regarding any defect in a declaration except those to which a special demurrer setting forth the grounds has been made, defects in the statement of claim and its failure to state a cause of action do not justify the discharging of a rule for judgment for want of a sufficient affidavit of defense unless the averments in the affidavit amount to a special demurrer. *American A. Co. v. Campbell*, 113 Fed. 398, s. o. 11 Pa. Dist. 260.

26. *Lederer v. Greiner*, 14 Pa. Dist. 142.

27. *Genesee Paper Co. v. Bogert*, 23

Pa. Super. 23. And see *Yardley Nat. Bank v. Vansant*, 14 Pa. Dist. 145, where a partial statement of the instrument sued upon is supplemented by an affidavit of defense.

28. *Marlin v. Waters*, 127 Pa. 177, 17 Atl. 890. See *infra*, V.

Service upon a member of defendant's family is not a sufficient compliance with the Replevin Act of April 19, 1901, § 5, P. L. 88, requiring personal service of plaintiff's declaration upon the defendant or his attorney. *Smith v. Smith*, 17 Pa. Dist. 380.

29. *Graham v. Blank*, 6 Pa. Dist. 133.

The New Jersey statute (supplement to the Practice Act, May 3, 1889, P. L. 334) requires personal service. *Laufman & Co. v. Hope Mfg. Co.*, 54 N. J. L. 70, 23 Atl. 305.

30. *Connor v. Lyon*, 13 Pa. Super 502; *Gerz v. American Relief Assn.*, 15 Pa. Dist. 992.

The requirements as to notice and service are fully discussed in II, G, 2.

31. *Municipal Corporations.*—*Malone v. Philadelphia*, 7 Pa. Co. Ct. 613; *Bethlehem City W. Co. v. South Bethlehem*, 14 Pa. Dist. 720. This applies to public quasi corporations, such as poor districts. *James v. Fell Twp. Poor Bd.*, 7 Pa. Dist. 12.

A *terre tenant* is not required to file an affidavit of defense to prevent judgment being rendered against lands held by him. *Kelly v. Place*, 26 Pa. Co. Ct. 120, s. o. 11 Pa. Dist. 608.

32. *McLaughlin v. Hanecy*, 132 Ill. App. 38. See *Chicago, D & V. R. Co. v. Bank of North America*, 82 Ill. 493; *Honore v. Home Nat. Bank*, 80 Ill. 489.

2. Representatives of deceased<sup>33</sup> or incompetent<sup>34</sup> persons are exempt, under the interpretation given to rules and statutes by some courts, where the cause of action arose prior to the decedent's death or out of transactions with the deceased or incompetent. Where, however, the cause of action arises out of the acts or transactions of the representative himself or out of matters incidental to the administration of his trust, he is not exempt.<sup>35</sup> And rules of court may expressly require affidavits from representatives in the latter class of actions,<sup>36</sup> but not in the former.<sup>37</sup> Other persons acting in a representative character have been excused from filing an affidavit of defense in cases where they could not be deemed to have the necessary knowledge.<sup>38</sup>

A married woman is not exempt from the provision of the statute or rule of court where the claim on its face is one for which she or her separate estate is liable.<sup>39</sup>

I. SUBSTITUTES. — In some jurisdictions for some purposes, as on a motion to set aside a default, a verified plea or answer may be a sufficient substitute for an affidavit of merits.<sup>40</sup> Generally, however, such a verified pleading unless it contains all that is required to appear in the affidavit<sup>41</sup> will not supply the place of an affidavit of defense or

Residence is presumed to be within the county unless the contrary is made to appear in some appropriate manner. *Honore v. Home Nat. Bank*, 80 Ill. 489; *Goldie v. McDonald*, 78 Ill. 605; *Horn v. Noble*, 95 Ill. App. 101. But this presumption is overcome by the fact that an attachment was obtained because of non-residence of the defendant in the state. *McLaughlin v. Haneey*, 132 Ill. App. 38.

Non-Residence — How and When Shown. — *Horn v. Noble*, 95 Ill. App. 101.

A corporation is a resident of the county in which it is doing business or exercising corporate functions. *Chicago, D. & V. R. Co. v. Bank of North America*, 82 Ill. 493.

33. Pa. — *Helfrich v. Greenberg*, 206 Pa. 516, 56 Atl. 45; *Mutual L. Ins. Co. v. Tenan*, 188 Pa. 239, 41 Atl. 539; *Seymour v. Hubert*, 83 Pa. 346; *Umberger v. Zearing*, 8 Serg. & R. 163; *Edwards v. Ewing*, 4 Yeates 235; *Wood v. Chamberlain*, 7 Pa. Co. Ct. 612.

In Maryland it has been questioned but not decided whether an executor comes within the scope of an affidavit of defense law, at least as to the testator's debts. *May v. Wolvington*, 69 Md. 117, 14 Atl. 706.

Heirs and devisees are not required to file an affidavit of defense in an action to revive a judgment secured against their ancestor or testator. *Tracy v. Tracy*, 18 Pa. Co. Ct. 398.

34. Infants. — *Read v. Bush*, 5 Binn. (Pa.) 455.

Insane Person. — Judgment will not be entered against an insane person, or his committee, for failure to file an affidavit of defense. *Philadelphia Tr. Co. v. Kneedler*, 12 Phila. (Pa.) 421; *Alexander v. Ticknor*, 1 Phila. (Pa.) 120, 7 Leg. Int. 199.

35. *Edwards v. Ewing*, 4 Yeates (Pa.) 235.

Executors and Administrators. — *Umberger v. Zearing*, 8 Serg. & R. (Pa.) 163; *Reakirt v. Flanagan*, 6 Pa. Dist. 402.

Guardian. — *Charlton v. Allegheny City*, 1 Grant Cas. (Pa.) 208.

36. Trustee in Bankruptcy. — *Booth v. Wolff Process L. Co.*, 224 Pa. 583, 73 Atl. 959.

37. *National Bank v. Detwiller*, 22 Pa. Co. Ct. 150.

38. Receiver. — *Speck v. Lansdale*, etc. R. Co., 21 Montg. Co. (Pa.) 215.

39. But in such case a joint affidavit by herself and her husband distinctly denying the alleged facts upon which her liability is based is sufficient. *Steinman v. Henderson*, 94 Pa. 313. See also *Harrar v. Croney*, 13 Pa. Co. Ct. 193.

40. See *supra*, II, 2, J, (II.).

41. See *Chicago D. & V. R. Co. v. Bank of N. A.*, 82 Ill. 493.

The affidavit verifying a plea if it states substantially what is required by the statute is a sufficient compliance



merits required by the rule to prevent a summary judgment.<sup>42</sup>

**J. USE OF AFFIDAVIT ALREADY MADE OR FILED. — IN SUPPORT OF MOTION.** — It has been held that an affidavit previously made or used for another purpose, as to prevent a default, cannot be used on a motion to set aside a default,<sup>43</sup> although the contrary is sometimes provided by rule of court.<sup>44</sup>

**To Prevent Default or Judgment.** — Unless otherwise provided by rule or statute<sup>45</sup> an affidavit already made or filed for another purpose will not take the place of the affidavit of merits or defense required to prevent a default or inquest.<sup>46</sup> But where the proper affidavit has once been filed it extends throughout the progress of the cause regardless of a change of venue.<sup>47</sup>

**III. BY WHOM MADE. — A. GENERALLY.** — The person by whom an affidavit of merits or defense may be made depends to some extent upon the statute<sup>48</sup> or rules of court<sup>49</sup> by which it is required, but as a general rule it must be made by the party himself unless there is some sufficient reason for its being made by another.<sup>50</sup>

with the statute requiring an affidavit of merits. *Fergus v. Cleveland Paper Co.*, 13 Ill. App. 629. See also *Kimbark v. Blundin*, 6 Ill. App. 539. *Compare Jackson v. Dotson (Va.)*, 65 S. E. 484; *Walls v. Zufall*, 61 W. Va. 166, 56 S. E. 179.

But a plea in abatement, though verified, must be accompanied with an affidavit of merits. Original Typewriter Circ. Co. v. Buehler, 67 Ill. App. 575.

42. *Watson v. McHenry*, 107 Md. 245, 68 Atl. 606. *Compare Martin v. Skehan*, 2 Col. 614, and *infra*, II, J.

In New York an inquest for want of an affidavit of merits cannot be taken where the answer is verified. *Goldberg v. Wood*, 50 Misc. 618, 98 N. Y. Supp. 200, construing § 980, N. Y. C. C. P.

43. *Martin v. Skehan*, 2 Colo. 614.

A new affidavit of merits in support of a motion to set aside a default must be made. *Collgate v. Marsh*, 2 How. Pr. (N. Y.) 137. See also *Alberti v. Peck*, 1 How. Pr. (N. Y.) 230; *Popham v. Baker*, 1 How. Pr. (N. Y.) 165; *Durant v. Cook*, 1 How. Pr. (N. Y.) 45. But see *Mojarrieta v. Saenz*, 80 N. Y. 547; *Prescott v. Roberts*, 6 Cow. (N. Y.) 46.

An affidavit of merits offered on a motion will not be excluded because it is of the same date as a copy which had been served to prevent an inquest. *Mygatt v. Garrison*, 18 Abb. Pr. (N. Y.) 292n.

44. *Davis v. Solomon*, 25 Misc. 695, 76 N. Y. Supp. 80.

45. Rule 23 of the General Rules of

Practice provides that "when an affidavit of merits has once been filed and served no other shall be necessary; but on making a motion such service and filing must be shown by affidavit." *Davis v. Solomon*, 25 Misc. 695, 56 N. Y. Supp. 80; *Thornall v. Turner*, 23 Misc. 363, 51 N. Y. Supp. 214.

46. *Martin v. Skehan*, 2 Colo. 614; *Mojarrieta v. Saenz*, 80 N. Y. 547, 552.

47. *Prescott v. Roberts*, 6 Cow. (N. Y.) 46.

48. See succeeding sections.

49. *Marsh v. Marshall*, 53 Pa. 396; *Burkhart v. Parker*, 6 Watts & S. (Pa.) 480.

50. **U. S.** — *The Harriet*, Olc. 222, 11 Fed. Cas. No. 6,096. **Ariz.** — *Copper King v. Johnson*, 9 Ariz. 67, 76 Pac. 594. **Cal.** — *Bailey v. Taaffe*, 29 Cal. 422. **Ind.** — *Phelps v. Osgood*, 34 Ind. 150. **Mich.** — *Bank of Michigan v. Williams, Harr.* 219. **Minn.** — See *People's Ice Co. v. Schlenker*, 50 Minn. 1, 52 N. W. 219. **Neb.** — *Bernstein v. Brown*, 23 Neb. 64, 36 N. W. 359. **N. Y.** — *Clews v. Peper*, 112 App. Div. 430, 98 N. Y. Supp. 404; *Hunt v. Wallis*, 6 Paige 371; *People v. Spalding*, 2 Paige 326. **N. D.** — *Kirschner v. Kirschner*, 7 N. D. 291, 75 N. W. 252. **Pa.** — *Citizens' Nat. Gas Co. v. Waynesburg Nat. Gas Co.*, 210 Pa. 137, 59 Atl. 822; *Griell v. Buckius*, 114 Pa. 187, 6 Atl. 153.

Incompetency as a witness at the trial does not disqualify a defendant from making an affidavit of defense. See *Robinson's Exrs. v. Arnold*, 23 Pa. Co. Ct. 558.

**Amended Affidavit.** — The fact that an amended affidavit is not made by the same person who made the original is no valid objection to it.<sup>51</sup>

**B. DISTINCTION BETWEEN FILING AND MAKING.** — Where the statute<sup>52</sup> or rule<sup>53</sup> requires the defendant to merely "file" an affidavit the rule may not be so strict as where he is required to "make"<sup>54</sup> the affidavit.

**C. INTERESTED PERSON.** — But one who is the real party in interest<sup>55</sup> or is interested in the event of the action,<sup>56</sup> although not technically a party, may make the affidavit.

**D. BY Co-PARTY.** — In an action against several the nature of the obligation or action may be such that an affidavit by one though in his own behalf may be sufficient to prevent a default judgment against any of them<sup>57</sup> or to support a motion made on behalf of

51. *Palmer v. Barclay*, 92 Cal. 199, 28 Pac. 226.

52. See *Jean v. Hennessey*, 74 Iowa 348, 37 N. W. 771, 7 Am. St. Rep. 486; *Sleeper v. Dougherty*, 2 Whart. (Pa.) 177; *Urich v. Zern*, 2 Pa. Dist. 55.

53. *Burkhart v. Parker*, 6 Watts & S. (Pa.) 480.

54. See *Baker v. Knickerbocker*, 25 Kan. 288. But see *Roosevelt v. Dale*, 2 Cow. (N. Y.) 581; *Merriman Co. v. Thomas & Co.*, 103 Va. 24, 48 S. E. 490.

Where the statute provides for an affidavit by "the party offering" the plea, it must be made by him and not by a third person. *Bancroft v. Eastman*, 7 Ill. 259.

55. *Hunter v. Reilly*, 36 Pa. 509.

The real defendant though not a party to the record can make an affidavit of merits to prevent an inquest. *Miller v. Hooker*, 2 How. Pr. (N. Y.) 124.

The assignee of a chose in action who brings a suit to his own use in the name of his assignor is the equitable plaintiff and may make the required affidavit of defense. *Gordon v. Frazier*, 13 App. Cas. (D. C.) 382.

Although the rule requires an affidavit of merits to be made by the party, one who married a femme defendant pending the action may properly make the affidavit. *Roosevelt v. Dale*, 2 Cow. (N. Y.) 581.

56. *Citizens' Nat. Gas Co. v. Waynesburg Nat. Gas Co.*, 210 Pa. 137, 59 Atl. 822; *Sleeper v. Dougherty*, 2 Whart. (Pa.) 177.

Successor of corporation no longer existing may file an affidavit of defense. *Montello Brick Co. v. Pullman's P. C. Co.*, 4 Penne. (Del.) 90, 54 Atl. 687.

**Contingent liability on covenant is sufficient interest.** *Fraleay v. Steinmetz*, 22 Pa. 437.

One who has bound himself to pay any judgment which may be recovered in the case is sufficiently interested to be entitled to make an affidavit of defense where the statute merely requires the defendant to "file" such an affidavit, saying nothing as to who shall "make" it. *Urich v. Zern*, 2 Pa. Dist. 55.

In an action against the indorser, the maker of the note who has also been sued in a separate action may make the required affidavit. *Ontario Bank v. Baxter*, 6 Cow. (N. Y.) 395.

57. *Mattix v. Steelman*, 35 N. J. L. 467 (in support of joint plea or demurrer); *Van Cott v. Webb-Miller*, 25 Pa. Super. 51. Compare *Booth v. Cottingham*, 126 Ind. 431, 26 N. E. 84.

For a form, see *infra*, IV, E, 5.

Where defendants file a joint plea, an affidavit sworn to by one of them is sufficient. *Smith v. Bateman*, 79 Ill. 531; *Whiting v. Fuller*, 22 Ill. 33; *Tyrer v. Chew*, 7 App. Cas. (D. C.) 175; *Brien v. Peterman*, 3 Head (Tenn.) 498.

Where the verdict must be against all or none of the defendants an affidavit by one of them setting up a sufficient defense as to him prevents judgment against any of them. In such case, however, the court may grant plaintiff leave to amend the record by striking out the name of the defendant making the affidavit and enter another rule to show cause why judgment should not be entered against the remaining defendants for want of a sufficient affidavit. *Miller v. Billingsfelt*, 11 Pa. Dist. 57.

all,<sup>58</sup> as for a change in the place of trial.<sup>59</sup> But where they sever in their defenses,<sup>60</sup> or it does not appear that a defense by one will inure to the benefit of the others,<sup>61</sup> each is entitled only to the benefit of his own affidavit.

E. BY THIRD PERSON. — 1. **Generally.** — Notwithstanding the general rule that the affidavit should be made by a party to the record or in interest,<sup>62</sup> where this is impossible or other sufficient excuse exists,<sup>63</sup> it may be made by some third person possessing the requisite knowledge.<sup>64</sup> And the statute or rule of court may be such as to permit the affidavit to be made by a third person without any showing of excuse.<sup>65</sup> But in any case the person making the affidavit must appear to be acting in behalf of the party<sup>66</sup> and not to be a mere disinterested stranger.<sup>67</sup>

2. **Attorney or Agent.** — a. *Generally* an attorney<sup>68</sup> or agent<sup>69</sup> may

In an action against defendants as partners, an affidavit made by one defendant in his own behalf is sufficient to prevent judgment if it goes to the merits of the claim. *Van Cott v. Webb-Miller*, 25 Pa. Super. 51. *Compare Watkins v. Degener*, 63 Cal. 500.

58. *Rhodes v. Walsh*, 58 Minn. 196, 59 N. W. 1000.

59. *Palmer v. Barclay*, 92 Cal. 199, 28 Pac. 226; *Watkins v. Degener*, 63 Cal. 500 (action against partners on partnership obligation).

In an action against a sheriff and his sureties on his official bond, an affidavit of merits by the sheriff, on motion to change place of trial, was held sufficient though it did not purport to be made on behalf of the other defendants. *Rowland v. Coyne*, 55 Cal. 1. See also *People v. Larue*, 66 Cal. 235, 5 Pac. 157.

60. *Meyers v. Davis*, 13 App. Cas. (D. C.) 361; *Anthony v. Ward*, 22 Ill. 181; *Whiting v. Fuller*, 22 Ill. 33; *Davis v. Scarritt*, 17 Ill. 202 (even though a defense established by one may redound to the benefit of all on the final judgment).

61. *Anthony v. Ward*, 22 Ill. 181.

When a maker and endorser of a note are sued in one action, an affidavit of merits by the maker will not prevent an inquest by the indorser unless it appear that the defense of both is identical. *Clark v. Parker*, 19 Wend. (N. Y.) 125.

62. See *supra*, III, A.

63. See *infra*, III, E, 3.

64. *James v. Young*, 1 Dall. (U. S.) 248, 1 L. ed. 121; *The Harriet*, Olc. 222, 11 Fed. Cas. No. 6,096; *Citizens' Nat. Gas Co. v. Waynesburg Nat. Gas Co.*, 210 Pa. 137, 59 Atl. 822; *Griell v.*

*Buckius*, 114 Pa. 187, 6 Atl. 153; *Safety Bkg. & Tr. Co. v. Conwell*, 28 Pa. Super. 237; *Horsuch v. Fry*, 23 Pa. Super. 509; *Taylor v. Sellers*, 12 Pa. Super. 230.

65. *Marsh v. Marshall*, 53 Pa. 396. *Compare Banks v. Walker*, 1 Barb. Ch. (N. Y.) 74. So where the rule merely requires defendant to file an affidavit it may be made by any person. *Burkhardt v. Parker*, 6 Watts & S. (Pa.) 480.

See *infra*, III, E, 2.

66. *Safety Bkg. & Tr. Co. v. Conwell*, 28 Pa. Super. 237; *Marshall v. Witte*, 1 Phila. (Pa.) 117.

67. *Nicholowski v. Kempenski*, 10 Kulp (Pa.) 105.

68. *Ariz.* — *Copper King v. Johnson*, 9 Ariz. 67, 76 Pac. 594. *Cal.* — *Nicholl v. Nicholl*, 66 Cal. 36, 4 Pac. 882. *Ind.* — *Phelps v. Osgood*, 34 Ind. 150. *Mich.* — *Bank of Michigan v. Williams*, Harr. 219. *Minn.* — *Olivier v. Cunningham*, 51 Minn. 232, 53 N. W. 462. *Mont.* — *State v. District Court*, 38 Mont. 415, 100 Pac. 207. *N. Y.* — *Clews v. Peper*, 112 App. Div. 430, 98 N. Y. Supp. 404; *Davis v. Solomon*, 25 Misc. 695, 56 N. Y. Supp. 80; *Johnson v. Lynch*, 15 How. Pr. 199; *Hunt v. Wallis*, 6 Paige 371. *N. D.* — *Kirschner v. Kirschner*, 7 N. D. 291, 75 N. W. 252. *Pa.* — *Griell v. Buckius*, 114 Pa. 187, 6 Atl. 153.

Statement of client as basis, see *infra*, III, F, 2, b.

69. *Citizens' Nat. Gas Co. v. Waynesburg Nat. Gas Co.*, 210 Pa. 137, 59 Atl. 822; *Griell v. Buckius*, 114 Pa. 187, 6 Atl. 153; *Safety Bkg. & Tr. Co. v. Conwell*, 28 Pa. Super. 237.

An agent or attorney in fact who is specially employed to defend the suit



make the affidavit when some sufficient reason exists why it is not made by the party himself, or where the statute or rule permits it to be made by a third person.<sup>70</sup> Some courts, however, permit the party's attorney, if he has knowledge of the facts, to make the affidavit without any showing of excuse.<sup>71</sup>

*b. Of Corporation.—Public or Private.*—A corporation public,<sup>72</sup> or private,<sup>73</sup> must of necessity make an affidavit of merits or defense through its officers, attorney or agent, or other stranger to the record. It seems, however, that an affidavit of defense should be made by an officer of the corporation rather than a mere attorney<sup>74</sup> or agent<sup>75</sup> unless the latter has peculiar or exclusive knowledge of the facts.<sup>76</sup>

**3. Excuse.**—Any facts or circumstances which make it impossible, or practically so, for an affidavit to be made by the person from whom it should come in the first instance, will justify its making by some other competent person;<sup>77</sup> thus sickness,<sup>78</sup> absence,<sup>79</sup> or igno-

may make affidavit. *Johnson v. Lynch*, 15 How. Pr. (N. Y.) 199.

**By Attorney's Clerk.**—See *Neeson v. Whytock*, 3 Taunt. (Eng.) 403; *Bromley v. Gerrish*, 6 Man. & G. 750; 16 E. C. L. 749; *Nash v. Swinburne*, 1 Man. & G. 630, 42 E. C. L. 329.

**70.** *Banks v. Walker*, 1 Barb. Ch. (N. Y.) 74 (rule of court). *Compare Merriman Co. v. Thomas & Co.*, 103 Va. 24, 48 S. E. 490.

**Agent or Attorney in Illinois.**—*Bancroft v. Eastman*, 7 Ill. 259.

**71.** Cal.—*Will v. Lytle Creek W. Co.*, 100 Cal. 344, 34 Pac. 830. **1a.**—*Ellis v. Butler*, 78 Iowa 632, 43 N. W. 459; *Jean v. Hennessey*, 74 Iowa 348, 37 N. W. 771, 7 Am. St. Rep. 486, ("the statute contains no provision forbidding it, and there is no reason growing out of the case which precludes him from making it"). **Minn.**—*Frankoviz v. Smith*, 35 Minn. 278, 28 N. W. 508. **Nev.**—*Horton v. New Pass G. & S. Min. Co.*, 21 Nev. 184, 27 Pac. 376; *Howe v. Coldren*, 4 Nev. 171.

See also *Melde v. Reynolds*, 129 Cal. 308, 61 Pac. 932; *Jenkins v. Gamewell F. A. Tel. Co. (Cal.)*, 31 Pac. 570; *Bailey v. Taaffe*, 29 Cal. 422. But see *Nicholl v. Nicholl*, 66 Cal. 36, 4 Pac. 882.

Where a verified answer denying the material averments of the complaint is presented with the motion, the affidavit of merits may be made by the attorney. *Merchants Ad-Sign Co. v. Los Angeles Bill Post. Co.*, 128 Cal. 619, 61 Pac. 277.

A proctor in admiralty may make the affidavit of merits in all cases

where the facts cannot be supposed to rest peculiarly in the knowledge of the party. *The Harriet, Olc.* 222, 11 Fed. Cas. No. 6,096.

**72.** A district or county attorney is proper person to make an affidavit of merits on behalf of the county. *Braseth v. Bottineau County*, 13 N. D. 344, 100 N. W. 1082. But see *Pettigrew v. Sioux Falls*, 5 S. D. 646, 60 N. W. 27.

**73.** *Horton v. New Pass G. & S. Min. Co.*, 21 Nev. 184, 27 Pac. 376, 1018 (holding that the attorney who knows the facts may make the affidavit); *State v. Consol. Va. Min. Co.*, 13 Nev. 194; *Citizens' Nat. Gas Co. v. Waynesburg Nat. Gas Co.*, 210 Pa. 137, 59 Atl. 822.

**74.** *Quesenberry v. People's B. & L. Assn.*, 44 W. Va. 512, 30 S. E. 73.

**75.** *Kelly v. Singer Mfg. Co.*, 4 Pa. Dist. 440. See *Billington v. Gautier Steel Co.*, 9 Atl. 35.

Though summons was served upon one officer the affidavit may be made by another. *Kinney v. Harrison Mfg. & B. Co.*, 22 Pa. Super. 601.

**76.** *Deitrich v. Singer Mfg. Co.*, 4 Pa. Dist. 324.

**77.** See *Griel v. Buckius*, 114 Pa. 187, 6 Atl. 153.

**78.** U. S.—*James v. Young*, 1 Dall. 248, 1 L. ed. 121. **N. Y.**—*Mason v. Bidleman*, 1 How. Pr. 62. **Pa.**—*Citizens' Nat. Gas Co. v. Waynesburg Nat. Gas Co.*, 210 Pa. 137, 59 Atl. 822; *Safety Bkg. & Tr. Co. v. Conwell*, 28 Pa. Super. 237.

**Paralysis.**—*Taylor v. Sellers*, 12 Pa. Super. 230.

**79.** Cal.—*Melde v. Reynolds*, 129

rance<sup>80</sup> may be sufficient excuses. But mere absence alone is insufficient where there has nevertheless been ample opportunity for securing the defendant's affidavit.<sup>81</sup>

**F. KNOWLEDGE OF AFFIANT.** — 1. **Generally.** — Unless an affidavit on information and belief is justified, the person making the affidavit, whether party, attorney, or agent, must have knowledge of the facts stated.<sup>82</sup>

2. **Information and Belief.** — a. *Generally.* — Where a party can not obtain the requisite knowledge he may make an affidavit of defense upon information and belief,<sup>83</sup> but where knowledge is within his power such an affidavit is insufficient.<sup>84</sup>

On a motion to set aside a default an affidavit of merits on information and belief has been held insufficient to require the granting of

Cal. 308, 61 Pac. 932; *Nicholl v. Nicholl*, 66 Cal. 36, 4 Pac. 882. **N. Y.** — *Davis v. Solomon*, 25 Misc. 695; 56 N. Y. Supp. 80; *Geib v. Etcad*, 11 Johns. 82. **Pa.** — *Citizens' Nat. Gas Co. v. Waynesburg Nat. Gas Co.*, 210 Pa. 137, 59 Atl. 822; *Safety Bkg. & Tr. Co. v. Conwell*, 28 Pa. Super. 237.

See *State v. District Court*, 38 Mont. 415, 100 Pac. 207.

**Absence from the state or beyond the seas is sufficient.** *Johnson v. Lynch*, 15 How. Pr. (N. Y.) 199. See also *Phillips v. Blagge*, 3 Johns. (N. Y.) 141.

**An averment that the defendant is not a resident of the county does not show a sufficient reason.** *Albright v. Fritz*, 21 Pa. Co. Ct. 444.

80. *Byrne v. Alas*, 68 Cal. 479, 9 Pac. 850, where defendants were Indians.

**The better knowledge of the attorney or agent will not alone excuse the party from making an affidavit of defense.** But this fact will justify an affidavit by an agent rather than an officer of a corporation. See *supra*, III, E, 2, b.

81. An affidavit stating that the affiant was the manager of defendant's business; that on the day of the filing of the affidavit the defendant was in a foreign country and would not return for about five weeks, but not showing why the defendant himself did not or could not file an affidavit prior to that time, nor showing that the transactions in question were conducted by the affiant or in his presence, or that he had personal knowledge of them, is insufficient. *Phillips v. Allen*, 32 Pa. Super. 356.

82. **U. S.** — *James v. Young*, 1 Dall

248, 1 L. ed. 121. **Cal.** — *Jenkins v. Gamewell F. A. Tel. Co.*, 31 Pac. 570. **Iowa.** — *Jean v. Hennessy*, 74 Iowa 348, 37 N. W. 771. **Kan.** — *Baker v. Knickerbocker*, 25 Kan. 288. **Minn.** — *Rhodes v. Walsh*, 58 Minn. 196, 59 N. W. 1000; *Oliver v. Cunningham*, 51 Minn. 232, 53 N. W. 462; *People's Ice Co. v. Schlenker*, 50 Minn. 1, 52 N. W. 219; *Frankoviz v. Smith*, 25 Minn. 278, 28 N. W. 508. **Nev.** — *Horton v. New Pass G. & S. Min. Co.*, 21 Nev. 184, 27 Pac. 376, 1018; *Howe v. Coldren*, 4 Nev. 171. **N. Y.** — *Hunt v. Wallis*, 6 Paige 371; *Ontario Bank v. Baxter*, 6 Cow. 395. **Pa.** — *Citizens' Nat. Gas Co. v. Waynesburg Nat. Gas Co.*, 210 Pa. 137, 59 Atl. 822; *Marsh v. Marshall*, 53 Pa. 396. **W. Va.** — *Quesenberry v. People's B. & L. Assn.*, 44 W. Va. 512, 30 S. E. 73.

See *infra*, VI, E, 4, c.

83. *The Richmond v. Cake*, 1 App. Cas. (D. C.) 447; *National Met. Bank v. Hitz*, *McArthur & M.* (D. C.) 198; *Newbold v. Pennock*, 154 Pa. 591, 26 Atl. 606; *Black v. Halstead*, 39 Pa. 64. And see more fully *infra*, IV, E, 6. But see *contra*, *Brown v. Cowe*, 2 Dougl. (Mich.) 432.

**The rule is otherwise where the circumstances disclosed in the affidavit show that it is impossible for defendant to swear positively to his defense.** *Bell v. Kelly*, 17 N. J. L. 270, in which case plaintiff refused to allow defendant to see the note which defendant had reason to believe was forged. Compare IV, F, 2, d, (V.).

84. *Wickersham v. Russell*, 51 Pa. 71; *Yearsley v. Glaser*, 32 Pa. Super. 141.

the relief asked,<sup>85</sup> although there is authority to the contrary;<sup>86</sup> but it seems that where the information is obtained from another person his affidavit should be secured,<sup>87</sup> or the reason why the affidavit is not made by some person having knowledge of the facts should be explained.<sup>88</sup>

b. *Of Attorney. — Client's Statement.* — The general rule is that an attorney may make an affidavit of merits or defense only where he has knowledge of the facts,<sup>89</sup> and therefore his affidavit based upon his client's statement of the case to him is insufficient.<sup>90</sup> But where the party himself is unable to make the affidavit and the attorney has no other knowledge than the statement previously made to him, such statement is a sufficient basis,<sup>91</sup> though it seems he should explain why the affidavit is not made by some one having knowledge of the facts.<sup>92</sup>

**IV. FORM AND CONTENTS. — A. GENERALLY. — ILLUSTRATIONS.** — The form and contents of an affidavit of merits or defense depend to a considerable extent upon the requirements and provisions of the statutes or rules of practice<sup>93</sup> and purpose for which the affidavit is offered.<sup>94</sup>

In the notes will be found forms of affidavits which have been adjudged sufficient, but these forms can manifestly only be safely followed in the state from which they are taken, or in those states or jurisdictions having substantially the same statutes and rules of practice

85. *Phillips v. Portage Transit Co.*, 137 Wis. 189, 118 N. W. 539. See *Hitchcock v. Herzer*, 90 Ill. 543; *Columbus Mut. L. Assn. v. Plummer*, 86 Ill. App. 446; *Stilson v. Rankin*, 40 Wis. 527.

There is no difference between legal and equitable actions in this respect. *Superior Consol. L. Co. v. Dunphy*, 93 Wis. 188, 67 N. W. 428.

An affidavit based upon hearsay is not sufficient to show a meritorious defense justifying the setting aside of a default judgment. *Stevens Co. v. Kehr*, 93 Ill. App. 510. See also *Jenkins v. Gamewell F. A. Tel. Co. (Cal.)*, 31 Pac. 570; *Bamberger v. Golden*, 93 Ill. App. 452.

86. *State v. District Court*, 38 Mont. 415, 100 Pac. 207.

87. *Goodhue v. Churchman*, 1 Barb. Ch. (N. Y.) 596, a motion to set aside decree *pro confesso*. See *Hitchcock v. Herzer*, 90 Ill. 543.

88. *Olivier v. Cunningham*, 51 Minn. 232, 53 N. W. 462; *People's Ice Co. v. Schlenker*, 50 Minn. 1, 52 N. W. 219.

89. See *supra*, III, F, 1.

An affidavit by an attorney that "upon examination of the testimony given before the justice and from the statement of facts made to him by the

defendant he verily believes that such defendant has a valid defense to said action upon the merits," is insufficient as an affidavit of merits in support of a motion to reinstate an appeal from the justice to the circuit court. *Pinger v. Vanclick*, 36 Wis. 141.

90. *Cal.* — *Jenkins v. Gamewell F. A. Tel. Co.*, 31 Pac. 570. *N. D.* — *Kirschner v. Kirschner*, 7 N. D. 291, 75 N. W. 252. *Wis.* — *Stilson v. Rankin*, 40 Wis. 527; *Holden v. Kirby*, 21 Wis. 149.

91. *Nicholl v. Nicholl*, 66 Cal. 36, 4 Pac. 882.

It is no valid objection to an affidavit of merits sworn to by an attorney or agent that the knowledge of the defense is derived from the statements of the defendant. *N. Y.* — *Clews v. Peper*, 112 App. Div. 430, 98 N. Y. Supp. 404; *Johnson v. Lynch*, 15 How. Pr. (N. Y.) 199. *Pa.* — *Safety Bkg. & Tr. Co. v. Conwell*, 28 Pa. Super. 237. *Eng.* — *Johnson v. Popplewell*, 2 Tyrw. 715.

But see *Stilson v. Rankin*, 40 Wis. 527.

92. *Olivier v. Cunningham*, 51 Minn. 232, 53 N. W. 462.

93. See the statutes of several states, and the sections following.

94. See *infra*, VIII.



the provisions of which are discussed in detail in sections following."

95. "That he has fully and fairly stated the case to his counsel (naming him) and that he is advised by such counsel, after such statement as aforesaid, and verily believes that he has a good, full and perfect defense to said action upon the merits." *Woodward v. Backus*, 20 Cal. 137.

That he has "fully and fairly stated the case in this cause to (naming his attorneys), and after such statement he is by them, and each of them, advised and verily believes that he has a good and substantial defense on the merits to said action," is sufficient. *Nolan v. McDuffie*, 125 Cal. 334, 58 Pac. 4; *Watkins v. Degener*, 63 Cal. 500.

An affidavit by the party "I have fully and fairly stated the case in this action, and fully and fairly stated all the facts relating to such action to my counsel and attorney in said action (naming him and giving his residence), and after such statement to my said attorney I am advised by him that I have a good, substantial and complete defense on the merits of said action," is sufficient without containing the further statement that the affiant believed the advice so given. *Watt v. Bradley*, 95 Cal. 415, 30 Pac. 557; *Bernstein v. Brown*, 23 Neb. 64, 36 N. W. 359. But see *Lynch v. Mosher*, 4 How. Pr. (N. Y.) 86, apparently requiring in addition to the above a statement of his belief in the defense. See also *Searles v. Lawrence*, 8 S. D. 11, 65 N. W. 34, and *infra*, IV, E, 3.

In *Silver Peak Gold M. Co. v. Harris*, 116 Fed. 439, the following form was approved: "that defendant has fully and fairly stated the case to his counsel, and that he has a good and substantial defense upon the merits in the action, as he is advised by his said counsel and verily believes." See also *Butler v. Mitchell*, 17 Wis. 52.

"Personally came in open Court, J. W., the defendant in the above entitled case, who, being duly sworn, deposes and says that in said cause he has a good and substantial defense" (setting forth the facts of the defense and the excuse for the default). *Watterson v. Seat*, 10 Fla. 326, 329.

An affidavit by defendant "that he has a good and meritorious defense in said cause as he is advised by his counsel in said cause, and verily believes to be true; that his answer was

put in with a view to meet said defense, which is twofold: (stating the general effect of the answer) not for the purpose of delay," was held sufficient. *Worthington v. Pierson*, 3 Edw. Ch. (N. Y.) 297.

"Title of Court and Cause. Affidavit of Joseph Coyne. Joseph Coyne, being first duly sworn, on oath says: I am the principal defendant in this action, and have a personal knowledge of the matters to be put in issue therein. That I have fully and fairly stated the facts in this case to my counsel, Levi Chase, E. Parker, and Will M. Smith, and after said statement they informed me that I had a good and valid defense upon the merits of said action, and to all of it, all of which I verily believe to be true.

Joseph Coyne.

Subscribed and sworn to before me, this 27th day of January, 1880.

Gilbert Renne.

(Notary Seal) Notary Public."

*Rowland v. Coyne*, 55 Cal. 1. This affidavit was held sufficient and not objectionable as stating merely that affiant believed the information which counsel gave him as a defense. But see *infra*, IV, E, 2, c, (III).

"G. P. B., being duly sworn, deposes and says that he is the defendant in this case, that he has fully and fairly stated his case to B. & T., his counsel, and has been advised by said counsel after such statement, that he has a full and complete defense upon the merits to the plaintiff's cause of action as stated in plaintiff's declaration and bill of particulars, and this deponent verily believes such advice to be true." This affidavit was held sufficient to prevent the taking of an inquest. *Wells v. Booth*, 35 Mich. 424, reversing the contrary ruling of the trial court.

Rules of court sometimes provide that in an affidavit of merits the affiant shall state that he has fully and fairly stated the case to his counsel, giving the name and place of residence of such counsel, and that the defendant has a good and substantial defense to the action on the merits as he is advised by his counsel after such statement, and verily believes. *Searles v. Lawrence*, 8 S. D. 11, 65 N. W. 34.

Accompanying Plea.—In an action

**B. CAPTION AND TITLE.**—An affidavit of merits should be properly entitled in the court and cause.<sup>96</sup> But it has been held that an affidavit otherwise sufficient need not have a caption<sup>97</sup> nor be entitled in the court<sup>98</sup> or cause<sup>99</sup> if the case to which it belongs otherwise appears. And *a fortiori* defects or omissions in the caption or title do not invalidate the affidavit under such circumstances.<sup>1</sup>

**C. SIGNATURE AND JURAT.**—The affidavit should conform to the requirements of affidavits generally in respect to signature and jurat.<sup>2</sup> The inadvertent omission of the party's signature may be corrected.<sup>3</sup>

**D. INTERLINEATIONS** in the affidavit before it is sworn to, to make it conform more strictly to the statute, afford no grounds for striking the affidavit from the files.<sup>4</sup> But an affidavit containing

of debt to charge defendant as a stockholder in a named bank, the following affidavit accompanying a plea of *not debet* was held sufficient to show a meritorious defense: "That to the best of affiant's knowledge and belief he never was a stockholder, never owned stock in the (named bank). That affiant verily believes he has a good defense to said suit upon the merits to the whole of said plaintiff's demand." *Alston v. Brownell*, 4 Ill. App. 17. See also *Smith v. Bateman*, 79 Ill. 531; *Harrison v. Willett*, 79 Ill. 482; *McDonnell v. Olwell*, 17 Ill. 375; and *infra*, IV, E, 5. But a verified plea dispenses with the necessity of such affidavit. *Kimbark v. Blundin*, 6 Ill. App. 339. See *supra*, II, I.

**To Prevent Summary Judgment.**—In *Martien v. Mannheim*, 80 Pa. 478, the affidavit by defendant was held sufficient to prevent summary judgment and was as follows: "that he has a legal defense to the whole claim sued on, of the nature following (setting out the facts of the defence). All of which deponent will prove in the trial of the case."

Averment of meritorious defense, see *infra*, IV, E, 2, b, (II.)

**Where Made on Information and Belief.**—See *infra*, IV, E, 6.

**Where Made By Third Person.**—See *infra*, IV, E, 4.

**Where Made By Co-Party.**—See *infra*, IV, E, 5.

96. *Clickman v. Clickman*, 1 N. Y. 611; *Higham v. Hayes*, 2 How. Pr. (N. Y.) 27.

Although a femme sole marries pending the action to which she is a party the title of the cause continues the same, and an affidavit should be entitled in the cause without noticing such fact. *Roosevelt v. Dale*, 2 Cow. (N. Y.) 581.

A mistake in the title of the cause by using the name Sunderland instead of Sandland is fatal. *Sandland v. Adams*, 2 How. Pr. (N. Y.) 98.

97. *Beardsley v. Gosling*, 86 Ill. 58, affidavit filed with plea.

98. *Wilborn v. Blackstone*, 41 Ill. 264; *Brownell v. Yarwood*, 41 Ill. 115 (where the affidavit was on the same paper as the plea).

99. *McCormick v. Wells*, 83 Ill. 239. See also *Walls v. Zufall*, 61 W. Va. 166. 56 S. E. 179.

It is sufficient if it can be identified as having been filed in the cause. *Hays v. Loomis*, 84 Ill. 18. And see *State v. Consol. Va. Min. Co.*, 13 Nev. 194, in which the affidavit was simply entitled "State of Nevada, Storey County."

1. *Beardsley v. Gosling*, 86 Ill. 58 (where the caption of the affidavit after giving the state and county fails to repeat the name of the county in giving the title of the court); *Owen v. Wilcox & G. S. M. Co.*, 86 Ill. 11.

Omission of the names of defendants from the title of the action does not invalidate it where the notice of the motion to which the affidavit is annexed and with which it was served is properly entitled and refers to the affidavit. *Watt v. Bradley*, 95 Cal. 415, 30 Pac. 557.

Where the affidavit was entitled in two causes, one of which was rightly stated and the body of the affidavit spoke of the cause in the singular, it was held not defective. *Roosevelt v. Dale*, 2 Cow. (N. Y.) 581.

2. See the title "Affidavits."

3. *Weyna v. Bogert*, 10 Kulp (Pa.) 205.

4. *Garrity v. Wilcox*, 83 Ill. 159,

unexplained interlineations has been held insufficient on demurrer.<sup>5</sup>

**E. USUAL AND NECESSARY AVERMENTS. — 1. Verbal Compliance With Form.** — As a general rule the affidavit is not required to follow the words of an approved form,<sup>6</sup> or of the statute or rule specifying the required averments,<sup>7</sup> any equivalent form of words being sufficient. Some authorities, however, have required a literal following of the words of a rule prescribing the contents of the affidavit.<sup>8</sup> And a departure from such forms is taken at the party's own risk<sup>9</sup> since the language used must be a full and substantial equivalent.<sup>10</sup>

**2. Defense.** — *a. Generally.* — The affidavit must aver the existence of a defense;<sup>11</sup> it is insufficient for the defendant to state merely that he is advised by counsel that he has a defense.<sup>12</sup>

*b. Character and Extent of Defense.* — **(I.) Generally.** — The character of the defense must be disclosed. The manner in which this may or must be done, and whether the defense disclosed must be a meritorious one, depends both upon the statutes and rules governing the matter and the purpose for which the affidavit is to be used.<sup>13</sup>

disapproving a contrary *dictum* in *Stanberry v. Moore*, 56 Ill. 472.

5. *Stillwell v. Smith*, 18 York (Pa.) 99.

6. *Punxsutawney Iron Co. v. Ft. Pitt M. & G. Iron Co.*, 216 Pa. 432, 65 Atl. 941.

7. **III.** — *Hays v. Loomis*, 84 Ill. 18; *Harrison v. Willett*, 79 Ill. 482; *McDonnell v. Howell*, 17 Ill. 375; *Kimbark v. Blundin*, 6 Ill. App. 539. **Md.** — *Codd Co. v. Parker*, 97 Md. 319, 55 Atl. 623; *May v. Wolvington*, 69 Md. 117, 14 Atl. 706; *Adler v. Crook*, 68 Md. 494, 13 Atl. 153. But see *Baltimore Pub. Co. v. Hooper*, 76 Md. 115, 24 Atl. 452; *Hutton Co. v. Marx Bros.*, 69 Md. 252, 14 Atl. 684. **N. Y.** — *Jordan v. Garrison*, 6 How. Pr. 6; *Brownell v. Marsh*, 22 Wend. 636. **W. Va.** — *Ceranto v. Trimboli*, 63 W. Va. 340, 60 S. E. 138; *Walls v. Zufall*, 61 W. Va. 166, 56 S. E. 179.

Where a plea of non-assumpsit is filed, an affidavit accompanying it which merely recites "that the matters stated in the annexed plea are true" is a substantial and sufficient compliance with a statute requiring an affidavit "that the plaintiff is not entitled, as the affiant verily believes, to recover anything from the plaintiff on such claim." *Jackson v. Dotson* (Va.), 65 S. E. 484.

8. *Brown v. St. John*, 19 Wend. (N. Y.) 617; *Bower v. Kemp*, 1 Compt. & J. (Eng.) 287, 1 D. P. C. 281, 9 L. J. (O. S.) Ex. 80.

9. *Silver Peak Gold Min. Co. v. Harris*, 116 Fed. 439; *Punxsutawney*

*Iron Co. v. Ft. Pitt M. & G. Iron Co.*, 216 Pa. 432, 65 Atl. 941; *Newbold v. Pennock*, 154 Pa. 591, 26 Atl. 606. See *Merriman v. Thomas*, 103 Va. 24, 48 S. E. 490.

10. *Chicago, D. & V. R. Co. v. Bank of North America*, 82 Ill. 493; *Newbold v. Pennock*, 154 Pa. 591, 26 Atl. 606.

11. See sections following.

12. *Pettit v. Hall*, 80 Ill. App. 376.

An affidavit as follows: "This deponent is advised by his said counsel that said defendants have a good and substantial defense, etc., which advice this deponent believes to be true," is insufficient. It should have stated that defendants have a defense, as they are advised. *Brittan v. Peabody*, 4 Hill (N. Y.) 61. See also *Lynch v. Mosher*, 4 How. Pr. (N. Y.) 86; *Searles v. Lawrence*, 8 S. D. 11, 65 N. W. 34; and *infra*, "Belief and Expectation of Proving." But see *Cal.* — *Watt v. Bradley*, 95 Cal. 415, 30 Pac. 557; *Rowland v. Coyne*, 55 Cal. 1. **Mich.** — *Wells v. Booth*, 35 Mich. 424. **Neb.** — *Bernstein v. Brown*, 23 Neb. 64, 36 N. W. 539.

13. See sections following, and *supra*, II, B, 10, g; II, 9; *infra*, VIII. See also the following cases: **Ala.** — *Ex parte Payne*, 130 Ala. 189, 29 So. 622. **Del.** — *Potts v. Wells*, 3 Penne. 11, 50 Atl. 62. **Ill.** — *Hays v. Loomis*, 84 Ill. 18; *Chicago, D. & V. R. Co. v. Bank of North America*, 82 Ill. 493. **Md.** — *Watson v. Mellenry*, 107 Md. 245, 68 Atl. 606; *Codd Co. v. Parker*, 97 Md. 319, 55 Atl. 623; *Adler v. Crook*, 68 Md. 494, 13 Atl. 153.



(II.) **To the Merits.**—Where a simple affidavit of merits is made without stating the facts, it must aver a defense upon the merits to the real cause of action irrespective of the manner in which it may have been stated or pleaded.<sup>14</sup> The omission of words essential to a disclosure of the meritorious character of the defense is fatal.<sup>15</sup> Some courts apparently require the use of certain words, accepting no equivalent for them,<sup>16</sup> though the general rule in this respect is otherwise.<sup>17</sup> But where the affidavit sets out the facts showing a meritorious de-

When facts or defense are stated, see *infra* IV, E, 2.

As to the necessity for stating the facts, see *infra*, IV, F, 1.

14. *Reidy v. Scott*, 53 Cal. 69; *People v. Rains*, 23 Cal. 128; *Gold v. Hutchinson*, 26 Misc. 1, 55 N. Y. Supp. 575; *Duche v. Voisin*, 18 Abb. N. C. (N. Y.) 358. See *Searles v. Lawrence*, 8 S. D. 11, 65 N. W. 34.

An affidavit that defendant has a defense on the merits "to the whole of plaintiff's demand" was approved in *Butler v. Mitchell*, 17 Wis. 52.

The following averments have been held insufficient: "That the defendant has a good and substantial defense to the bond" (*Meech v. Calkins*, 4 Hill [N. Y.] 534); "that they have a good and substantial defense upon the merits in the above-entitled cause to the promissory note on which the action is brought," etc. (*Durant v. Cook*, 1 How. Pr. [N. Y.] 45); "that he has a good, valid, and sufficient defense upon the merits in the above-entitled cause to the plaintiff's declaration filed in this suit" (*Howe v. Hasbrouck*, 1 How. Pr. [N. Y.] 67); "that the said defendants have a good and substantial defense upon the merits to the plaintiff's demand on the promissory note, on which this action is brought" (*Mason v. Moore*, 2 How. Pr. [N. Y.] 70); that the defendants have a "good and substantial defense upon the merits in this cause to the whole or some part of plaintiff's demand," etc. (*Chemung Canal Bank v. Board of Supervisors*, 1 How. Pr. [N. Y.] 162); that each of the defendants "has a good and valid defense to the whole of the plaintiff's claim as set forth in said complaint upon the merits thereof;" or that defendant has "a valid defense upon the merits to the whole of plaintiff's claim herein" (*State Bank of Syracuse v. Gill*, 23 Hun [N. Y.] 406).

An affidavit under the Illinois Practice Act which merely states that de-

fendant's counsel "is of opinion that the defendant has a good and meritorious defense to this suit," is insufficient. *Pettit v. Hall*, 80 Ill. App. 376.

**Meritorious Defense—What Is.**—See *Wheeler v. Castor*, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746.

15. *Gold v. Hutchinson*, 26 Misc. 1, 55 N. Y. Supp. 575; *Grottick v. Bailey*, 5 Barn. & Ald. 703, 7 E. C. L. 235.

The usual form of the averment is that the defendant "has a good and substantial defense to the merits in this cause." U. S.—*Silver Peak Gold Min. Co. v. Harris*, 116 Fed. 439. Cal.—*Reidy v. Scott*, 53 Cal. 69. Neb.—*Bernstein v. Brown*, 23 Neb. 64, 36 N. W. 359. N. Y.—*Gold v. Hutchinson*, 26 Misc. 1, 55 N. Y. Supp. 575. Eng.—*Tate v. Bodfield*, 3 Dowl. 218.

The omission of the words "on the merits" is fatal. *Tompkins v. Acer*, 10 How. Pr. (N. Y.) 309; *McMurray v. Gifford*, 5 How. Pr. (N. Y.) 14; *Meech v. Calkins*, 4 Hill (N. Y.) 534; *Jackson v. Stiles*, 3 Caines (N. Y.) 93; *Pringle v. Marsack*, 1 Dowl. & R. (Eng.) 155; *Page v. South*, 7 Dow. Pr. Cas. (Eng.) 412; *Grottick v. Bailey*, 5 Barn. & Ald. 703, 7 E. C. L. 235. But see *Briggs v. Briggs*, 3 Johns. (N. Y.) 449.

"Good, full and perfect" defense on the merits has been held a sufficient averment. *Woodward v. Backus*, 20 Cal. 137. So also "good and valid" (*Rowland v. Coyne*, 55 Cal. 4); and "good and meritorious" (*Worthington v. Pierson*, 3 Edw. Ch. [N. Y.] 297); and "good, legal and meritorious" (*Howe v. Coldren*, 4 Nev. 171).

16. As, "good defense on the merits." *Bower v. Kemp*, 1 Crompt. & J. (Eng.) 287. See also *Kenney v. Hutchinson*, 4 Jur. (Eng.) 106.

"Full and substantial" is not equivalent to good and substantial. *Bank of Utica v. Root*, 4 Hill (N. Y.) 535.

17. See *supra*, IV, E, 1; and *McDonald v. Olwell* 17 Ill. 375, holding the word "good" not essential.

fense it need not state in words that defendant has a meritorious defense.<sup>18</sup>

(III.) **Extent of Defense.** — An affidavit is not required to disclose a defense to the whole of plaintiff's claim,<sup>19</sup> but sometimes the statute requires certain averments as to the extent of the defense or as to the portion of the claim admitted, which must be substantially complied with.<sup>20</sup>

c. *Belief and Expectation of Proving.* — (I.) **Generally.** — The affiant is in some jurisdictions required to aver his belief in the existence of a defense,<sup>21</sup> though in others such an averment is apparently not

18. Fla. — *Waterson v. Seat*, 10 Fla. 326, 329. Miss. — *Shaw v. Brown*, 42 Miss. 309. Eng. — *Johns v. Nevison*, 2 Dowl. Pr. Cas. 260; *In re King*, 1 Ad. & El. 560, 28 E. C. L. 154.

See *Wilkes v. Hotchkiss*, 5 Johns. (N. Y.) 360; *Briggs v. Briggs*, 3 Johns. (N. Y.) 449. But see *Barry v. Johnson*, 3 Mo. 200; *Jackson v. Stiles*, 3 Caines (N. Y.) 93.

19. See *infra*, IV, F, 2, b; IV, F, 2, d, (X); IX, 3, H.

20. Chicago, D. & V. R. Co. v. Bank of North America, 82 Ill. 493; *Harrison v. Willett*, 79 Ill. 482. See *Griffith v. Adams*, 95 Md. 170, 52 Atl. 66.

**Whether to Whole or Part of Claim.** Where a rule of court requires the affidavit to state whether it is to the whole or to a part of the plaintiff's claim, it is not sufficient to state that "defendant has a legal defense to the claim made by the plaintiff." *Swingle v. Itzel*, 16 Pa. Dist. 339. See also *Potts v. Wells*, 3 Penne. (Del.) 11, 50 Atl. 62.

**Statement of Amount Admitted and Amount Disputed.** — Where the statute requires the defendant to state not only that his plea is true, but to further state the amount of the plaintiff's demand, if anything, admitted to be due or owing, and the amount disputed, an affidavit that the plea is true is insufficient. *Adler v. Crook*, 68 Md. 494, 13 Atl. 153 (in which, however, the plea merely denied that the defendant promised as alleged, or was indebted as alleged); *Hutton v. Marx*, 69 Md. 252, 14 Atl. 684 (where the plea was the statute of limitations, which might be good as to some of the items of the claim and bad as to others).

But where in an action on a note the plea asserts that the plaintiff's claim has been fully satisfied and paid, and the affidavit states that the plea is true, it need not in addition thereto state "the amount of the plaintiff's

demand, if anything, admitted to be due or owing, and the amount disputed." *May v. Wolvington*, 69 Md. 117, 14 Atl. 706.

Under such a statute an affidavit stating "that every plea so pleaded by the defendant is true, and all of the plaintiff's alleged claim is disputed, and that the affiant believes the defendant will be able at the trial to produce sufficient evidence to support the said pleas and that he is advised by counsel to file the said pleas," was held sufficient. *Codd Co. v. Parker*, 97 Md. 319, 55 Atl. 623, citing *Adler v. Crook*, 68 Md. 494, 13 Atl. 153. But see *Baltimore Pub. Co. v. Hooper*, 76 Md. 115, 24 Atl. 452, in which the defendant pleaded "never indebted as alleged," and "never promised as alleged," and the affidavit stated "that every plea so pleaded is true, and that the defendant does not admit any of the plaintiff's claim to be due and owing."

21. U. S. — *Silver Peak Gold Min. Co. v. Harris*, 116 Fed. 439. N. Y. — *Lynch v. Mosher*, 4 How. Pr. 86; *Brittan v. Peabody*, 4 Hill 61. S. D. — *Searles v. Lawrence*, 8 S. D. 11, 65 N. W. 34.

See also Colo. — *Patrick v. McManus*, 14 Colo. 65, 23 Pac. 90. Nev. — *Howe v. Coldren*, 4 Nev. 171. Eng. — *Schofield v. Huggins*, 3 Dowl. P. C. 427; *Worthington v. Price*, 2 C. M. & R. 315, 5 Tyrw. 1029, 4 L. J. Ex. 292.

"Verily believed" is insufficient. *Wharton v. Barry*, 1 How. Pr. (N. Y.) 62.

An attorney's affidavit based upon his client's statement must aver his belief that the facts stated to him constitute a substantial defense on the merits. *Clews v. Peper*, 112 App. Div. 430, 98 N. Y. Supp. 404. He must swear positively to his belief. *Worthington v. Price*, 2 C. M. & R. 15, 5 Tyr. 1029, 4 L. J. Ex. 292.

An Alabama statute requires an ap-

necessary, especially when he is acting under advice of counsel.<sup>22</sup>

(II.) **Where Facts Are Positively Averred.** — In an affidavit of defense to prevent default or judgment where the averments are positive and not upon information and belief it is unnecessary for affiant to state that he believes and expects to be able to prove the facts alleged,<sup>23</sup> even though the defendant making the affidavit would be an incompetent witness in his own behalf at the trial.<sup>24</sup> And the addition of the usual averment, "is informed, believes and expects to be able to prove," though weakening the affidavit somewhat, does not render it insufficient.<sup>25</sup>

(III.) **Belief in the advice of counsel** as to the existence of a defense is not an essential averment,<sup>26</sup> though it is sometimes required by rule of court,<sup>27</sup> nor is such an averment a sufficient substitute for a required averment of belief in the existence of a defense.<sup>28</sup>

**3. Statement to and Advice of Counsel.** — a. *Generally.* — Where the affidavit is made by the defendant himself he is usually required to aver that he has made a statement of the case to counsel.<sup>29</sup>

b. *Fully and Fairly.* — The affiant must say that he has fully and fairly stated the case, an omission of either of these words being ordinarily fatal.<sup>30</sup>

c. *The Case.* — Affiant must aver that he has stated the case<sup>31</sup> to his

plication to set aside a default to be accompanied with an affidavit by the defendant, his agent, or attorney "to the effect that in the belief of the affiant the defendant has a lawful defense" to the action. *Ex parte Payne*, 130 Ala. 189, 29 So. 622.

22. See *Watt v. Bradley*, 95 Cal. 415, 30 Pac. 557; *Rowland v. Coyne*, 55 Cal. 1, and *supra*, IV, A.

23. *Knight v. Somerton Hills Cem.*, 205 Pa. 552, 55 Atl. 535; *Wolf v. Jacobs*, 187 Pa. 260, 41 Atl. 27; *Newbold v. Pennock*, 154 Pa. 591, 26 Atl. 606; *Eyre v. Yohe*, 67 Pa. 477; *Yearsley v. Glaser*, 32 Pa. Super. 141.

"Verily believes" is the usual but not the necessary form. *Moeck v. Littel*, 82 Pa. 354.

24. *Robinson's Exrs. v. Arnold*, 23 Pa. Co. Ct. 558.

25. *Knight v. Somerton Hills Cem.*, 205 Pa. 552, 55 Atl. 535; *Yearsley v. Glaser*, 32 Pa. Super. 141.

26. *Watt v. Bradley*, 95 Cal. 415, 30 Pac. 557.

27. Belief in the advice of counsel though required by rule of court, need not be averred to justify the setting aside of a default where the affidavit sufficiently shows a defense. *McMurren v. Bourne*, 81 Minn. 515, 84 N. W. 338. Compare *supra*, II, B, 12.

28. An affidavit by defendant "that he has a good and substantial defense

upon the merits to this action as he is advised by his counsel (naming him and giving his residence), and as he believes truly, after having fully and fairly stated the case to said counsel," is insufficient. *Pettit v. Hall*, 80 Ill. App. 376; *Lynch v. Mosher*, 4 How. Pr. (N. Y.) 86. See also *Brittan v. Peabody*, 4 Hill (N. Y.) 61. But see *Rowland v. Coyne*, 55 Cal. 1.

29. Cal. — *Nickerson v. California Raisin Co.*, 61 Cal. 268. N. Y. — *Rodd v. Sleicher*, 53 App. Div. 638, 65 N. Y. Supp. 1068; *Gold v. Hutchinson*, 26 Misc. 1, 55 N. Y. Supp. 575; *Lynch v. Mosher*, 4 How. Pr. (N. Y.) 86. S. D. — *Searles v. Lawrence*, 8 S. D. 11, 65 N. W. 34.

For a form, see *supra*, IV, A.

30. *Lynch v. Mosher*, 4 How. Pr. (N. Y.) 86; *Cary v. Livermore*, 2 How. Pr. (N. Y.) 170; *Bleeker v. Storms*, 2 How. Pr. (N. Y.) 161; *Brown v. St. John*, 19 Wend. (N. Y.) 617 (in which an affidavit was held insufficient although it stated that defendant had made a "full and fair statement of all the facts in the above cause [to his counsel] as far as the facts have come to his knowledge, and he believes them to exist.")

31. *Fitzhugh v. Truax*, 1 Hill (N. Y.) 644; *Duche v. Voisin*, 18 Abb. N. C. (N. Y.) 358; *Day v. Mertlock*, 87



counsel or make an averment fully as broad and equivalent thereto.<sup>82</sup> It is not enough to say that he has stated his defense,<sup>83</sup> or the facts of his defense,<sup>84</sup> or the facts in the case constituting his defense,<sup>85</sup> or all of the facts,<sup>86</sup> or his case.<sup>87</sup> It is sufficient, however, to say that he has stated "the facts of the case,"<sup>88</sup> or has stated "this case,"<sup>89</sup> or "the case in this action"<sup>90</sup> instead of "the case."

But the purpose of the affidavit must be considered in determining its sufficiency in this respect.<sup>41</sup>

d. *Advice of Counsel*.—The affidavit of merits made by the defendant must show that he was advised by counsel as to the merits of his defense,<sup>42</sup> and such advice must have been based upon the statement made to counsel.<sup>43</sup>

Wis. 577, 58 N. W. 1037; *Burnham v. Smith*, 11 Wis. 258.

Affidavit that defendant has "fully and fairly stated the case in this action" is the same as "fully and fairly stated the facts of said case." *Rathgeb v. Tiscornia*, 66 Cal. 96, 4 Pac. 987. And see *Buell v. Dodge*, 63 Cal. 553; *Francis v. Cox*, 33 Cal. 323.

32. An affidavit that "deponent has fully and fairly stated his defense to said action and all the facts relevant thereto to his counsel," is sufficient. *Larocque v. Conhaim*, 45 Misc. 234, 92 N. Y. Supp. 99.

33. Cal.—*Nickerson v. California Raisin Co.*, 61 Cal. 268, N. Y.—*Tompkins v. Acer*, 10 How. Pr. 309; *Brownell v. Marsh*, 22 Wend. 636. Wash.—*Sanborn v. Centralia Furn. Mfg. Co.*, 5 Wash. 150, 31 Pac. 466. Wis.—*Burnham v. Smith*, 11 Wis. 258.

34. *Morgan v. McDonald*, 70 Cal. 32, 11 Pac. 350; *Cooper-Power v. Hanlon*, 7 Cal. App. 724, 95 Pac. 678 (the facts constituting his defense); *Rickards v. Swetzer*, 3 How. Pr. (N. Y.) 413; *Fitzhugh v. Truax*, 1 Hill (N. Y.) 644.

35. *Palmer v. Barclay*, 92 Cal. 199, 28 Pac. 226; *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151.

36. *Jensen v. Dorr*, 9 Cal. App. 18, 98 Pac. 45.

37. *People v. Larue*, 66 Cal. 235, 5 Pac. 157; *Richmond v. Cowles*, 2 Hill (N. Y.) 359.

"His case" means his side of the case. *Dick v. Williams*, 87 Wis. 651, 58 N. W. 1029; *Day v. Mertlock*, 87 Wis. 577, 58 N. W. 1037. *Contra*, *Brownell v. Marsh*, 22 Wend. (N. Y.) 636. And see *Rodd v. Sleicher*, 53 App. Div. 638, 65 N. Y. Supp. 1066.

The court should allow an amendment to remedy such a defect. *Wells*

*v. Booth*, 35 Mich. 424. See *Duche v. Voisin*, 18 Abb. N. C. (N. Y.) 358.

38. *Buell v. Dodge*, 63 Cal. 553; *Reidy v. Scott*, 53 Cal. 69; *Francis v. Cox*, 33 Cal. 323; *Jordan v. Garrison*, 6 How. Pr. (N. Y.) 6 ("the facts of this case").

39. *Brown v. Masten*, 2 How. Pr. (N. Y.) 195; *Brownell v. Marsh*, 22 Wend. (N. Y.) 636. Compare *Jordan v. Garrison*, 6 How. Pr. (N. Y.) 6.

40. *Watkins v. Degener*, 63 Cal. 500.

41. Cal.—*Nolan v. McDuffie*, 125 Cal. 334, 58 Pac. 4; *People v. Larue*, 66 Cal. 235, 5 Pac. 157; *Nicholl v. Nicholl*, 66 Cal. 36, 4 Pac. 882, N. Y.—*Swartwout v. Hoage*, 16 Johns. 3; *Metcalf v. Clark*, 5 Johns. 361; *Lynch v. Mosher*, 4 How. Pr. 86. Wash.—*State v. Superior Court*, 9 Wash. 668, 38 Pac. 206.

42. *McMurrin v. Bourne*, 81 Minn. 515, 84 N. W. 338; *Brittan v. Peabody*, 4 Hill (N. Y.) 61; *Bruen v. Adams*, 3 Caines (N. Y.) 97. See *Copper King v. Johnson*, 9 Ariz. 67, 76 Pac. 594; *Patrick v. McManus*, 14 Colo. 65, 23 Pac. 90, 20 Am. St. Rep. 253.

A statement that defendant has stated all the facts to his counsel of record, "is advised and believes that he has a good defense," is insufficient to show that he was advised by counsel. *Jensen v. Dorr*, 9 Cal. App. 18, 98 Pac. 45. See also *Lecompte v. Wash*, 4 Mo. 557.

For forms of the averment, see *supra*, IV, A.

43. See *supra*, IV, E, 3, a, and *Nickerson v. California Raisin Co.*, 61 Cal. 268; *Brown v. Seys*, 2 How. Pr. (N. Y.) 276 (holding that this fact may sufficiently appear from the affidavit without an express averment to that effect).

Where made by counsel himself the affidavit need not, of course, contain such an averment.<sup>44</sup>

**Counsel in the Action.**—The counsel to whom the statement is made and whose advice is sworn to must be the party's counsel in the action.<sup>45</sup>

**Name and Residence of Counsel.**—The rules of practice sometimes require his name<sup>46</sup> and residence<sup>47</sup> to be stated.

**4. When Made by Third Person.**—*a. Generally.*—Where an affidavit of merits or defense is made by an attorney, agent, or person other than a party it must in general set forth facts showing his right to make the affidavit,<sup>48</sup> also incorporating those averments or matters which are essential to an affidavit irrespective of the person making it.<sup>49</sup> It must appear that the person making the affidavit is acting in behalf of the party himself.<sup>50</sup> Rules of court sometimes provide what an affidavit so made must contain.<sup>51</sup>

*b. Excuse.*—Where an excuse is necessary<sup>52</sup> the affidavit must set forth the reason why it is not made by the party himself,<sup>53</sup> or the per-

**44.** *Cromwell v. Van Rensselaer*, 3 Cow. (N. Y.) 346, in which the court took notice of the fact that defendant who made the affidavit was himself a counselor off the court. See also *Beall v. Dey*, 7 Wend. (N. Y.) 513; *Worthington v. Price*, 2 C. M. & R. 315, 5 Tyrw. 1839, 4 L. J. Ex. 232.

**45.** *Treftz v. Stahl*, 46 Ill. App. 462, 18 L. R. A. 500; *State Bank of Syracuse v. Gill*, 23 Hun (N. Y.) 406.

**46.** *Neb.*—*Bernstein v. Brown*, 23 Neb. 64, 36 N. W. 359. *N. Y.*—*Lynch v. Mosher*, 4 How. Pr. 86. *S. D.*—*Searles v. Lawrence*, 8 S. D. 11, 65 N. W. 34. See *Cal.*—*Reidy v. Scott*, 53 Cal. 69. *Wis.*—*Butler v. Mitchell*, 17 Wis. 52. *Eng.*—*Nash v. Swinburn*, 4 Scott N. R. 326, 3 M. & G. 630, 42 E. C. L. 329.

**47.** *Davis v. Solomon*, 25 Misc. 695, 56 N. Y. Supp. 80; *Lynch v. Mosher*, 4 How. Pr. (N. Y.) 86; *Searles v. Lawrence*, 8 S. D. 11, 65 N. W. 34.

**48.** See *supra*, III, E.

**By Stockholders.**—Where a corporation is defendant, an affidavit of defense showing that the affiants are stockholders, that they are the only persons having knowledge of the facts, that there are no corporate officers, and that in making the affidavit they acted as defendant's agents, is sufficient. *Citizens' Nat. Gas Co. v. Waynesburg Nat. Gas Co.*, 210 Pa. 137, 59 Atl. 822.

**49.** *Creighton v. National Safe Co.*, 10 Pa. Dist. 600.

**Sufficient Affidavit.**—An affidavit by an attorney which states that the affiant is personally familiar with the

facts connected with the transactions on which the action is brought; that he knows of his own knowledge facts which constitute a full, meritorious and legal defense to the action, and that defendant has a complete defense to the action, is sufficient as an affidavit of merits on a motion to set aside a default judgment. *Will v. Lytle Creek W. Co.*, 100 Cal. 344, 34 Pac. 830. And see *Phillips v. Blagge*, 3 Johns. (N. Y.) 141 (where defendant was out of the country); *Howe v. Coldren*, 4 Nev. 171.

**Insufficient Affidavit.**—An affidavit by defendant's attorney "that the defendant has a good and substantial defense to the merits of this cause of action as shown by the answer of defendant, a copy of which is hereto annexed," the answer being a general denial, is not sufficient. *Clews v. Peper*, 112 App. Div. 430, 98 N. Y. Supp. 404.

**50.** *Marshall v. Witte*, 1 Phila. (Pa.) 117. See *Safety Bkg. & Tr. Co. v. Conwell*, 29 Pa. Supp. 237; and *Nelson v. Whytock*, 3 Taunt. (Eng.) 403; and *supra*, III, E.

But where made by a joint party such showing may not be necessary. See *supra*, III, D; and *infra*, III, E, 5.

**51.** *Citizens' Nat. Gas Co. v. Waynesburg Nat. Gas Co.*, 210 Pa. 137, 59 Atl. 822.

**52.** See *supra*, III, E.

**53.** *Ariz.*—*Copper King v. Johnson*, 9 Ariz. 67, 76 Pac. 594. *D. C.*—*Newman v. Goddard*, 12 App. Cas. 404. *Ind.*—*Phelps v. Osgood*, 34 Ind. 150. *Kan.*—*Baker v. Knickerbocker*, 25 Kan. 288. *Mich.*—*Bank of Michigan*

son from whom it would more properly come under ordinary circumstances.<sup>54</sup>

c. *Knowledge or Source of Information.*—The affidavit must show that the attorney or other person has knowledge of the matters set forth,<sup>55</sup> or if made upon information and belief, the source of his information;<sup>56</sup> unless from the circumstances disclosed by the affidavit knowledge is presumed.<sup>57</sup> The sufficiency of an averment that affiant's knowledge or information is gained from the party's statement of the facts depends upon whether information so derived is regarded as a valid basis for the affidavit.<sup>58</sup> A positive averment of the facts constituting the defense,<sup>59</sup> or, where a statement of the facts is not required, an averment of personal knowledge, has been held suffi-

v. Williams, Harr. Ch. 219. Minn.—Oliver v. Cunningham, 51 Minn. 232, 53 N. W. 462. N. Y.—Davis v. Solomon, 25 Misc. 695, 56 N. Y. Supp. 80; Hunt v. Wallis, 6 Paige 371; People v. Spalding, 2 Paige 326; Johnson v. Lynch, 15 How. Pr. 199; Roosevelt v. Spalding, 2 Paige 326; Geib v. Ecard, 11 Johns. 82. N. D.—Kirschner v. Kirschner, 7 N. D. 291, 75 N. W. 252.

It should show that a real disability existed preventing the defendant from making the affidavit and the circumstances giving rise to the disability. Citizens' Nat. Gas Co. v. Waynesburg Nat. Gas Co., 210 Pa. 137, 59 Atl. 822; Griel v. Backius, 114 Pa. 187, 6 Atl. 153; Phillips v. Allen, 32 Pa. Super. 356; Albright v. Fritz, 21 Pa. Co. Ct. 444.

54. See Olivier v. Cunningham, 51 Minn. 232, 53 N. W. 462.

An affidavit of defense by an agent of a corporation should set forth reasons why it was not made by an officer of the company. Kelly v. Singer Mfg. Co., 4 Pa. Dist. 440. Compare Horton v. New Pass G. & S. Min. Co., 21 Nev. 184, 27 Pac. 376, 1018.

But where the affiant by such an agent shows upon its face that the affiant has personal knowledge of all the facts alleged and was selected by plaintiff and defendant to conduct the business in question it is sufficient without specifying the reason why it is made by the affiant instead of by an officer of the company. Andrews v. Blue Ridge Pack. Co., 206 Pa. 370, 55 Atl. 1059; Deitrich v. Singer Mfg. Co., 4 Pa. Dist. 324.

55. Nicholl v. Nicholl, 66 Cal. 36, 4 Pac. 882; Jenkins v. Gamewell F. A. Tel. Co., 31 Pac. 570; Bailey v. Taaffe, 29 Cal. 422. D. C.—Gordon v. Frazer,

13 App. Cas. 382. Ia.—Ellis v. Butler, 78 Iowa 632, 43 N. W. 459; Jean v. Hennessy, 74 Iowa 348, 37 N. W. 771, 5 Am. St. Rep. 693. Kan.—Baker v. Knickerbocker, 25 Kan. 288. Nev.—Horton v. New Pass G. & S. Min. Co., 21 Nev. 184, 27 Pac. 376, 1018; State v. Consol. Va. Min. Co., 13 Nev. 194; Howe v. Coldren, 4 Nev. 171. N. Y.—People v. Spalding, 2 Paige 326; Ontario Bank v. Baxter, 6 Cow. 395. Pa.—Citizens' Nat. Gas Co. v. Waynesburg Nat. Gas Co., 210 Pa. 137, 59 Atl. 822; Safety Bkg. & Tr. Co. v. Conwell, 28 Pa. Super. 237. S. D.—Pettigrew v. Sioux Falls, 5 S. D. 646, 60 N. W. 27. Eng.—Rowbotham v. Dupree, 5 Dowl. P. C. 557.

See *supra*, III, F.

56. Briggs v. Briggs, 3 Johns. (N. Y.) 258; Safety Bkg. & Tr. Co. v. Conwell, 28 Pa. Super. 237; Albright v. Fritz, 21 Pa. Co. Ct. 444; and see *infra*, IV, E, 6. But see Burkhardt v. Parker, 6 Watts & S. (Pa.) 480.

57. The business manager of a corporation need not set forth his information and belief. Andrews v. Blue Ridge Pack. Co., 206 Pa. 370, 55 Atl. 1059.

But an averment that affiant is the manager of defendant's business without showing that the transactions in question were conducted by him or in his presence, or that he otherwise had personal knowledge of them is insufficient. Phillips v. Allen, 32 Pa. Super. 356.

58. See *supra*, III, F, 2, b.

As to the necessity of personal knowledge, see *supra*, III, F.

59. Frankoviz v. Smith, 35 Minn. 278, 28 N. W. 508. See also Andrews v. Blue Ridge Pack. Co., 206 Pa. 370, 55 Atl. 1059; and *supra*, IV, E, 2, c.



cient, though the basis of affiant's knowledge is not set forth.<sup>60</sup>

5. When Made by One of Joint Parties. — Where the affidavit is made by one of several joint parties it should follow the usual form of affidavit.<sup>61</sup> If the defense of one is a defense for all, the affidavit of one need not purport to be on behalf of the others.<sup>62</sup> It must appear, however, that the defenses of the parties are the same.<sup>63</sup>

6. When Made on Information and Belief. — An affidavit upon information and belief should, it seems, show the reason why it is not made positively<sup>64</sup> or by some one having the necessary knowledge.<sup>65</sup> The affiant must either set forth specifically the sources of his information and the facts upon which his belief rests,<sup>66</sup> or state that he expects to be able to prove the matters alleged.<sup>67</sup> An affidavit which conforms to either<sup>68</sup> or both<sup>69</sup> of these requirements is sufficient. But a mere statement of expectation of ability to prove the facts will not supply the absence of other essential averments.<sup>70</sup> An averment of

60. *Will v. Lytle Creek W. Co.*, 100 Cal. 344, 34 Pac. 830.

61. The court in *Watkins v. Degener*, 63 Cal. 500, where a partner swore that he had "fully and fairly stated the case in this action to his attorney and counsel and after such statement is advised by said counsel and verily believes that defendants and each of them have a good and substantial defense to the action, on the merits."

Accompanying Plea. — In *Smith v. Bateman*, 79 Ill. 531, the following affidavit filed with the joint plea was held sufficient:

State of Illinois, } ss.  
County of Cook. }

Adam Smith, being duly sworn, says that he is one of the defendants in the above entitled cause; that he verily believes said defendants have a good defense to said cause upon its merits, to the whole of the plaintiff's demands.

Adam Smith.

Pierson D. Smith.

Subscribed and sworn to before me, this 7th day of September, A. D. 1875. (Notarial Seal.) William H. Moore, Notary Public.

62. *Rowland v. Coyne*, 55 Cal. 1.

63. *Clark v. Parker*, 19 Wend. (N. Y.) 125. See also *Anthony v. Ward*, 22 Ill. 181.

64. *Bell v. Kelly*, 17 N. J. L. 270.

65. *Olivier v. Cunningham*, 51 Minn. 232, 53 N. W. 462. See also *Hitchcock v. Herzer*, 90 Ill. 543; *Goodhue v. Churchman*, 1 Barb. Ch. (N. Y.) 596.

66. D. C. — *Magruder v. Schley*, 17 App. Cas. 227. Ill. — *Hitchcock v. Herzer*, 90 Ill. 543. N. Y. — *Johnson v. Lynch*, 15 How. Pr. 199; *Briggs v.*

*Briggs*, 3 Johns. 258. Pa. — *First Nat. Bank v. Gregg*, 79 Pa. 384; *Black v. Halstead*, 39 Pa. 64.

The names of the witnesses by whom the facts are to be proved need not be stated. *Warren Nat. Bank v. Seneca Oil Wks.*, 175 Pa. 580, 34 Atl. 859.

67. D. C. — *Magruder v. Schley*, 17 App. Cas. 227, *distinguishing The Richmond v. Cake*, 1 App. Cas. 447. Pa. — *Newbold v. Pennock*, 154 Pa. 591, 26 Atl. 606; *Vulcanite Pav. Co. v. Philadelphia Tract. Co.*, 115 Pa. 280, 8 Atl. 777; *Windsor v. Farmers' & M. Nat. Bank*, 81 Pa. 304; *First Nat. Bank v. Gregg*, 79 Pa. 384. In *Black v. Halstead*, 39 Pa. 64, the court says: "It surely is not unreasonable to require that he should aver something more than his own belief. His information and belief could avail him nothing at a trial by jury. Why then should they avail to send his case to such a tribunal?"

In an action against a principal and surety, an affidavit by the surety of his information and belief as to what the principal claims in regard to the transaction in question is insufficient unless coupled with an averment that affiant expects to be able to prove such claims at the trial. *Baum v. Union S. & G. Co.*, 19 Pa. Super. 23.

68. *Louchheim v. Maguire*, 186 Pa. 311, 40 Atl. 475; *Oberle v. Schmidt*, 86 Pa. 221; *Reznor v. Supplee*, 81 Pa. 180.

69. *National Met. Bank v. Hitz*, McArthur & M. (D. C.) 198; *The Richmond v. Cake*, 1 App. Cas. (D. C.) 447. 70. *Second Nat. Bank v. Morgan*, 165 Pa. 199, 30 Atl. 957, 44 Am. St. Rep. 652.

belief in the facts is essential,<sup>71</sup> but where such an averment is made in connection with a statement of expectation of ability to prove the facts it is unnecessary to aver information.<sup>72</sup> Where it is necessary to state the facts of the defense, although alleged upon information and belief they must be stated directly and without evasion,<sup>73</sup> or some sufficient reason shown why this is impossible.<sup>74</sup>

**Form.**—While no particular form of words is essential to the sufficiency of an affidavit upon information and belief, the necessary averments must be made either in the customary and approved form or in words substantially equivalent.<sup>75</sup>

**F. STATEMENT OF FACTS OR DEFENSE.—1. Necessity.**—*a. Generally.*—Whether the affidavit must set forth the defense or the facts showing a defense depends to some extent on the purpose for which it is offered,<sup>76</sup> and the statute or rules of practice.<sup>77</sup> In some classes of cases a simple affidavit is all that is required,<sup>78</sup> while others require

71. *Cook v. Com. (Pa.)*, 11 Atl. 574. See *Newbold v. Pennoek*, 154 Pa. 591, 26 Atl. 606; *Vulcanite Pav. Co. v. Philadelphia Tract. Co.*, 115 Pa. 280, 8 Atl. 777. *Contra*, *Northern Nat. Bank v. Falk*, 17 Pa. Dist. 378.

72. *Northern Nat. Bank v. Falk*, 17 Pa. Dist. 378.

73. See *infra*, IV, F, 2, and Second Nat. Bank v. Morgan, 165 Pa. 199, 30 Atl. 957, 44 Am. St. Rep. 652.

74. See *infra*, IV, F, 2, d, (V.).

75. *Punxsutawney Iron Co. v. Ft. Pitt M. & G. Iron Co.*, 216 Pa. 432, 65 Atl. 941.

The approved form is that affiant "is informed, believes and expects to be able to prove" the facts set forth in his affidavit. *Punxsutawney Iron Co. v. Ft. Pitt, M. & G. Iron Co.*, 216 Pa. 432, 65 Atl. 941; *Newbold v. Pennoek*, 154 Pa. 591, 26 Atl. 606.

A departure from this form is taken at the party's own risk. *Punxsutawney Iron Co. v. Ft. Pitt, M. & G. Iron Co.*, 216 Pa. 432, 65 Atl. 941; *Newbold v. Pennoek*, 154 Pa. 591, 26 Atl. 606, holding that the statement "has abundant reason to believe" is not an equivalent.

76. See *infra*, VIII.

77. **Motion for Security for Costs.** Under a statute providing that a non-resident plaintiff may be required to file security for costs where the defendant files an affidavit stating that he has a legal and just defense to the whole of plaintiff's demand, and stating the nature and character of such defense, the affidavit must show suffi-

cient facts to enable the court to determine whether, if true, they constitute a legal defense. *Rauche v. Blumenthal*, 4 Penne. (Del.) 521, 57 Atl. 368; *Fidelity Mut. F. Ins. Co. v. Simmons*, 1 Penne. (Del.) 474, 42 Atl. 367. But where the statute does not require the affidavit supporting a motion for security of costs to state the facts, an affidavit following the language of the statute is sufficient. *D. M. V. Livestock Ins. Co. v. Henderson*, 38 Iowa 446.

78. See *infra*, IV, F, 1, b, and the following cases: Md.—*Codd Co. v. Parker*, 97 Md. 319, 55 Atl. 623; *Adler v. Crook*, 68 Md. 494, 13 Atl. 153. Neb.—*Bernstein v. Brown*, 23 Neb. 64, 36 N. W. 539. Va.—*Spencer v. Field*, 97 Va. 38, 33 S. E. 380.

On a motion to strike out a plea as false a simple affidavit of merits is sufficient to resist such motion, where there is no intricacy in the defense interposed. *Bowen v. Bissell*, 6 Wend. (N. Y.) 511, in which the defense in question was payment. But an affidavit filed to prevent the striking out of an unverified answer should set out the facts. *Patrick v. McManus*, 14 Colo. 65, 23 Pac. 90, 20 Am. St. Rep. 253.

**Change of Venue.**—On a motion for a change of the place of trial, a simple affidavit of merits without a statement of the facts of the defense is sufficient. Cal.—*Nolan v. McDuffie*, 125 Cal. 334, 58 Pac. 4. N. Y.—*Lynch v. Mosher*, 4 How. Pr. 86. Wash.—*State v. Superior Court*, 9 Wash. 668, 38 Pac. 206.

an affidavit setting forth facts showing a defense rather than the affiant's conclusion.<sup>79</sup>

b. *Opening and Setting Aside Default.* — (1.) *Generally.* — As a general rule an affidavit of merits in support of a motion or application to open or set aside a default judgment should set forth facts showing a meritorious defense,<sup>80</sup> or, in case the application is by the plaintiff, a meritorious cause of action,<sup>81</sup> so that the court may itself pass upon their sufficiency or merits. In some jurisdictions, however, a simple affidavit of merits is all that is required.<sup>82</sup> The latter is the rule at

79. See *Rogers v. Ladd*, 117 Mass. 334n; *Shaw v. Brown*, 42 Miss. 309.

An affidavit for a continuance must show a valid cause of action or defense. *Ind.* — *Pine v. Pro*, 6 Blackf. 426. *Ky.* — *Engleman v. National Bank*, 2 Bush 165. *W. Va.* — *Bank of Ravenswood v. Hamilton*, 43 W. Va. 75, 27 S. E. 296. *Wis.* — *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120.

But see *Engs v. Overing*, 2 N. Y. Code Rep. 79; *Sutton v. Wegner*, 72 Wis. 294, 39 N. W. 775.

If granting leave to amend rests in the discretion of the court it may require the affidavit to set forth the facts of the defense. *McKichan v. Follett*, 87 Ill. 103, where there was an amendment of an affidavit already filed. See *supra*, II, B, 8, and *infra*, VI.

Leave to plead after demurrer overruled. *Ogden v. Glidewell*, 5 How. (Miss.) 179, under a statute. But see *supra*, II, B, 7.

80. *Ariz.* — *Copper King v. Johnson*, 9 Ariz. 67, 76 Pac. 594. *Fla.* — *Russ v. Gilbert*, 19 Fla. 54. *Ga.* — *Beall v. Marietta Paper Mill Co.*, 45 Ga. 28. *Idaho.* — *Beck v. Lavin*, 15 Idaho 363, 97 Pac. 1028; *Holzeman & Co. v. Henneberry*, 11 Idaho 428, 83 Pac. 497. *Ill.* — *Holmes v. Parker*, 125 Ill. 478, 17 N. E. 759; *Springfield & N. W. R. Co. v. Ross*, 88 Ill. 179; *Vogelsang v. Fredkyn*, 133 Ill. App. 356; *Vennum v. Carr*, 130 Ill. App. 309. *Ind.* — *Rupert v. Martz*, 116 Ind. 72, 18 N. E. 381; *Slagle v. Bodmer*, 75 Ind. 330; *Yancy v. Teter*, 39 Ind. 305. *Ia.* — *Polk County Sav. Bank v. Geneser*, 101 Iowa 210, 70 N. W. 89; *Palmer v. Rogers*, 70 Iowa 381, 30 N. W. 645; *McGrew v. Downs*, 67 Iowa 687, 25 N. W. 880; *King v. Stewart*, 48 Iowa 334. *Kan.* — *Baker v. Knickerbocker*, 25 Kan. 288. *Mich.* — *Holmes v. Heywood*, 2 Mich. (N. P.) 292. *Mo.* — *Florez v. Uhrig*, 35 Mo. 517; *Lamb v. Nelson*, 34 Mo. 501. *Mont.* — *Schaeffer v. Gold Cord Min. Co.*, 36 Mont. 410,

93 Pac. 344. *N. J.* — *Miller v. Alexander*, 1 N. J. L. 400. *E. I.* — *Lapham v. Kenyon*, 7 R. I. 251. *Tex.* — *Contreras v. Haynes*, 61 Tex. 103; *Houston & T. C. R. Co. v. Burke*, 55 Tex. 323. *Can.* — *Wooster Coal Co. v. Nelson*, 4 Ont. Pr. 343. See *Moore v. Kennedy*, 12 Manitoba 173.

Upon a motion to set aside findings and judgment in a case in which defendant failed to appear at the trial, the affidavit in support of the motion should show facts constituting a defense and not merely stating generally that the defendant has a good and valid defense. *Roberts v. Corby*, 86 Ill. 182.

Under a rule of court providing that judgment for want of an appearance "may be opened . . . on application supported by an affidavit of a just and legal defense," the affidavit or petition should state facts showing a defense. *Shenk v. Hacker*, 3 Pa. Super. 439.

Opening judgment for failure to file affidavit of defense, see *infra*, IX, C, 10.

81. *Bernstein v. Brown*, 23 Neb. 64, 36 N. W. 359.

82. *Cal.* — *Rauer's L. & C. Co. v. Gilleran*, 138 Cal. 352, 71 Pac. 445; *Tuttle v. Scott*, 119 Cal. 586, 51 Pac. 849. *Minn.* — *McMurrin v. Bourne*, 81 Minn. 515, 84 N. W. 338. *Nev.* — *Howe v. Coldren*, 4 Nev. 171. *N. D.* — *Wheeler v. Castor*, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746. *Wis.* — *Butler v. Mitchell*, 17 Wis. 52. *Eng.* — *Warrington v. Leake*, 11 Ex. 304, 25 L. J. Ex. 27.

But a copy of the proposed answer setting forth the facts of the defense is usually required where a simple affidavit is permitted. See *infra*, IV, F, 1, b, (II).

But if the facts when stated show that no meritorious defense exists the affidavit is insufficient. *Tuttle v. Scott*, 119 Cal. 586, 51 Pac. 849. See *infra*, IV, F, 1, e.



law in New York<sup>83</sup> unless suspicious circumstances appear tending to show that the claimed defense is not a meritorious one.<sup>84</sup>

(II.) **Effect of Proposed Answer** — In many jurisdictions a copy of the proposed answer is required to accompany the application for relief,<sup>85</sup> and when verified either dispenses with the necessity for any affidavit or merits whatever,<sup>86</sup> or renders unnecessary a statement therein of the facts of the defense.<sup>87</sup> And such an answer may be referred to for the purpose of supplying deficiencies in the affidavit.<sup>88</sup>

83. *Merchants' Bank v. Mills*, 3 E. D. Smith (N. Y.) 210; *Ellis v. Jones*, 6 How. Pr. (N. Y.) 296. But see *Cogswell v. Vanderbergh*, 1 Caines (N. Y.) 155.

84. *Van Horne v. Montgomery*, 5 How. Pr. (N. Y.) 238; *Dix v. Palmer*, 5 How. Pr. (N. Y.) 233.

In *Pink v. Bryden*, 3 Johns. (N. Y.) 245, the court required more than a simple affidavit of merits to set aside an inquest taken by default. But see *Roosevelt v. Kemper*, 2 Caines (N. Y.) 30; *Duche v. Voisin*, 18 Abb. N. C. (N. Y.) 358.

Where the plaintiff's affidavit shows a clear case as to his claim the affidavit of merits by defendant should disclose the defense which is proposed to be made. *Merchants' Bank v. Mills*, 3 E. D. Smith (N. Y.) 210.

85. See *Milwaukee M. Bldg. & L. Soc. v. Jagodzinski*, 84 Wis. 35, 54 N. W. 102; *Howey v. Clifford*, 42 Wis. 561; and more fully the titles "Judgment;" "Default."

86. See *supra*, II, B, 10, g, (I).

87. *Minn.* — *Hildebrandt v. Robbecke*, 29 Minn. 100. *Mont.* — *Schaeffer v. Gold Cord Min. Co.*, 36 Mont. 410, 93 Pac. 344. And see *Jones v. Jones*, 37 Mont. 155, 94 Pac. 1056; *Bowen v. Webb*, 34 Mont. 61, 85 Pac. 739; *Donnelly v. Clark*, 6 Mont. 135, 9 Pac. 887. *N. D.* — *Minnesota Mfg. Co. v. Holz*, 10 N. D. 16, 25, 84 N. W. 581.

While the proper practice is to incorporate the proposed defense in a verified answer served and filed with the motion, the court in its discretion may accept in lieu thereof an affidavit of merits which sets out a valid defense to the merits. *Wheeler v. Castor*, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746. The court in this case after discussing earlier decisions settles the practice in motions to vacate default judgments under § 5298, Rev. Code 1899, as follows: "First, a sufficient affidavit of merits is indispensable in all cases; second, it is the proper practice to serve and sub-

mit a proposed verified answer with the moving papers, setting up a defense which is valid on its face; third, where a verified answer is not submitted, the trial court may, at its discretion, accept in lieu of such answer an affidavit setting out a valid defense to plaintiff's cause of action. Such an affidavit, in our opinion, would serve the purpose of an answer, and constitute a substantial compliance with the strict rule which requires the submission of a proposed verified answer, embracing a defense."

An affidavit which incorporates a copy of an answer setting up a good defense, and which states that the allegations of the answer are true, is sufficient (*Ellis v. Butler*, 78 Iowa 632, 43 N. W. 459); as is also one which incorporates by reference a copy of the proposed answer stating at least a partial defense (*Braseth v. Bottineau County*, 13 N. D. 344, 100 N. W. 1082). But see *Kirschner v. Kirschner*, 7 N. D. 291, 75 N. W. 252.

But an affidavit filed with an unverified answer, which merely states that defendant believes she has a good defense to the action, is insufficient since it does not show that it refers to the answer tendered. *McPherson v. Kingsbaker*, 22 Kan. 646.

**Answer Already Filed.** — Where an affidavit of merits in support of a motion to set aside a default states that defendant has a good defense to the action it will be deemed to refer to an answer already on file in the case and will be sufficient if such answer shows a meritorious defense. *Reidy v. Scott*, 53 Cal. 69. But where after answer filed the complaint is amended, the original verified answer cannot be considered an affidavit of merits. *Parrott v. Den*, 34 Cal. 79.

88. *Cal.* — *Melde v. Reynolds*, 129 Cal. 308, 61 Pac. 932. *Minn.* — *Fitzpatrick v. Campbell*, 58 Minn. 20, 59 N. W. 629. *Mo.* — *Adams v. Hickman*, 43 Mo. 168. *Mont.* — *Whiteside v. Logan*, 7 Mont. 373, 17 Pac. 34. *Neb.* —

(III.) In Equity.—A court of equity will not set aside a decree *pro confesso* unless the affidavit of merits alone, or in connection with the verified answer, discloses facts showing a meritorious defense, even in those jurisdictions where a simple affidavit of merits is sufficient in proceedings at law.<sup>89</sup>

c. *Accompanying Plea*.—The statutes requiring pleas to be accompanied by an affidavit of merits do not ordinarily require the affidavit to state the facts constituting the defense.<sup>90</sup> But if a statement of the facts is attempted it must be sufficient to show a meritorious defense<sup>91</sup> and one which is consistent with the plea which it accompanies.<sup>92</sup> And if the affidavit claims a defense only as to a part of the claim it is not sufficient to prevent judgment as to the remainder.<sup>93</sup> So on a request for leave to file an affidavit after default,<sup>94</sup> or to amend a defective affidavit,<sup>95</sup> the court may require a showing of facts constituting a meritorious defense. And the rule is the same after the overruling of a demurrer.<sup>96</sup>

Reference to Plea.—Even where the affidavit is required to disclose the nature of the defense it may properly refer to the plea for a statement of the facts.<sup>97</sup>

d. *To Prevent Summary Judgment*.—Statutes or rules of court requiring an affidavit of defense to prevent the taking of summary judgment in certain classes of cases, ordinarily require the nature and character of the defense to be set forth in the affidavit rather

Haggerty v. Walker, 21 Neb. 596, 33 N. W. 244; Hale v. Bender, 13 Neb. 66, 12 N. W. 929. N. Y.—Clews v. Peper, 112 App. Div. 430, 98 N. Y. Supp. 404.

89. U. S.—Scott v. Young America, Newb. 107, 21 Fed. Cas. No. 12,550. Cal.—Bailey v. Taaffe, 29 Cal. 422. Ill.—Grubb v. Crane, 5 Ill. 153. Mich.—Stockton v. Williams, Harr. Ch. 241. See also Thayer v. Swift, Walk. Ch. 384. N. Y.—The Sea Ins. Co. v. Stebbins, 8 Paige 565; Meach v. Chappell, 8 Paige 135; Goodhue v. Churchman, 1 Barb. Ch. 596; Winship v. Jewett, 1 Barb. Ch. 173. Wis.—Mowry v. Hill, 11 Wis. 146.

In equity a default judgment will not be set aside upon a simple affidavit of merits although an excuse is given for the default. Powers v. Trenor, 3 Hun (N. Y.) 3; Hunt v. Wallace, 6 Paige (N. Y.) 371. See also Wells v. Cruger, 5 Paige (N. Y.) 164; Lansing v. McPherson, 3 Johns. Ch. (N. Y.) 424.

90. Colo.—Martin v. Skehan, 2 Colo. 614. Ill.—McKichan v. Follett, 87 Ill. 103; Beardsley v. Gosling, 86 Ill. 58; Smith v. Bateman, 79 Ill. 531. Md.—Codd Co. v. Parker, 97 Md. 319, 55 Atl. 623; Baltimore Pub. Co. v. Hooper, 76 Md. 115, 24 Atl. 452. Va.—Spencer's Admr. v. Field, 97 Va. 38,

33 S. E. 380. W. Va.—See Miller v. Fewsmith Lumb. Co., 42 W. Va. 323, 26 S. E. 175.

An affidavit in the language of the statute is sufficient. It need not set out in detail the facts showing a meritorious defense. McCormick v. Wells, 83 Ill. 239. See Hurd v. Burr, 22 Ill. 29. But see Rich v. Hathaway, 18 Ill. 548.

91. McCord v. Crooker, 83 Ill. 556; Stuber v. Schack, 83 Ill. 191. See *infra*, IV, F, 1, e.

92. Frank v. Morris, 57 Ill. 138, 11 Am. Rep. 4.

93. Mayberry v. Van Horn, 83 Ill. 289.

94. Wilder v. Arwedson, 80 Ill. 435.

Where a plea has been stricken out for failure to file an affidavit of merits, on motion for leave to file an additional plea and affidavit the court may require defendant to show a meritorious defense setting forth its nature. New York Exch. Bank v. Reed, 232 Ill. 123, 85 N. E. 548.

95. McKichan v. Follett, 87 Ill. 103.

96. McCord v. Crooker, 83 Ill. 556.

97. National Met. Bank v. Hitz, McArthur & M. (D. C.) 198. Compare *supra*, IV, F, 1, b, (II).

than the mere conclusion of the affiant as to the existence of a defense.<sup>98</sup>

*e. Effect of Attempted Statement Where Not Required.*—Although a statement of the defense be not required, if an attempt be made to set forth the facts the affidavit will be deemed insufficient unless it discloses a meritorious defense.<sup>99</sup>

**2. Character and Sufficiency of Statement.**—*a. Generally.*—The fullness of the statement of the defense and the matters which must be included in it depend to some extent upon the purpose of the affidavit<sup>1</sup> and whether it is filed merely to prevent summary judgment or is to perform functions analogous to those of a pleading.<sup>2</sup>

*b. In Support of Motions.*—When the facts are required to be stated in an affidavit supporting a motion or other application for relief, a statement of the mere conclusions of the affiant is not sufficient;<sup>3</sup> and the affidavit should not be vague and uncertain in its averments,<sup>4</sup> nor leave material facts a matter of inference.<sup>5</sup>

**98. U. S.**—*Fidelity & Dep. Co. v. United States*, 187 U. S. 315, 23 Sup. Ct. 120, 47 L. ed. 194. **DeL.**—*Melvin & Son v. Conner*, 5 Penne. 476, 62 Atl. 264; *Flag v. Taylor*, 8 Houst. 165, 14 Atl. 26. **D. C.**—*Bryan v. Harr*, 21 App. Cas. 190; *Gordon v. Frazer*, 13 App. Cas. 382; *Durant v. Murdock*, 3 App. Cas. 114. **Mass.**—*Rogers v. Ladd*, 117 Mass. 334*n*. **Mich.**—*Brown v. Cowee*, 2 Dougl. 432. **Pa.**—*Gandy v. Weckerly*, 220 Pa. 285, 69 Atl. 558; *Bordentown Bkg. Co. v. Restein* (No. 1), 214 Pa. 331, 63 Atl. 751; *Andrews v. Blue Ridge Pack. Co.*, 206 Pa. 370, 55 Atl. 1059.

The act of 1887 relieved plaintiffs from certain formality, but not from any obligations of substance in the stated cause of action. *Bridgeman Bros. Co. v. Swing*, 205 Pa. 479, 55 Atl. 26.

Under the Replevin Act of 1901 the same statement of facts is necessary as is required under the general laws regulating affidavits of defense. *Miller v. Jackson*, 34 Pa. Super. 31. See also *Heisley v. Economy T. Mfg. Co.*, 33 Pa. Super. 218.

The rule of court may be such in some classes of actions as to require only a general affidavit of defense. *Barr & Son v. Duncan*, 76 Pa. 395; *Burkhart v. Parker*, 6 Watts & S. (Pa.) 480.

**99.** *Tuttle v. Scott*, 119 Cal. 586, 51 Pac. 849; *Stuber v. Schack*, 83 Ill. 191.

If defendant attempts to comply with an order of court requiring him to file a new affidavit setting forth the particulars of his defense he must set forth

facts showing a meritorious defense. *Hays v. Loomis*, 84 Ill. 18.

1. See *supra*, VIII.

2. See *American F. Ins. Co. v. Hazen*; 110 Pa. 530, 1 Atl. 605; and more fully *infra*, VIII, G.

3. Compare *infra*, IV, F, 2, d, (VIII.).

**On Motion for Continuance.**—*Pine v. Pro*, 6 Blackf. 426; *Bank of Ravenswood v. Hamilton*, 34 W. Va. 75, 27 S. E. 296. See also *Engleman v. National Bank*, 2 Bush (Ky.) 165.

**On a motion to set aside a default judgment**, an affidavit containing merely conclusions of law and not statements of fact is sufficient. *Bamberger v. Golden*, 93 Ill. App. 452; *Brewer & Hoffman Brew. Co. v. Lonergan*, 63 Ill. App. 28.

**Absence of Negligence.**—In an action against a city for personal injuries, an affidavit, in support of a motion to set aside a default, by the city attorney to the effect that he had examined into the facts and circumstances of the accident and believed that such accident was not caused by the negligence of defendant or its officers or agents but was due solely to the plaintiff's negligence was held sufficient. *Klepfer v. Keokuk*, 126 Iowa 592, 102 N. W. 515. Compare *Ross v. Philadelphia, W. & B. R. Co.*, 3 Pa. Dist. 791.

4. See *Tallman v. Sprague*, 60 N. Y. Super. 425, 18 N. Y. Supp. 207. But see *Klepfer v. Keokuk*, 126 Iowa 592, 102 N. W. 515.

5. *Gilmore v. German Sav. Bank*, 89 Ill. App. 442.

“The particular evidentiary facts



**To Set Aside Default.**—In a proceeding to set aside a default the defense disclosed by the affidavit must be a meritorious one,<sup>6</sup> even though the disclosure is not required to be made;<sup>7</sup> but need not be to the whole claim or cause of action.<sup>8</sup>

A statement on information and belief has been held insufficient to justify setting aside a default judgment.<sup>9</sup>

c. *Where the affidavit accompanies a plea* and attempts to set forth the character of the defense, it must disclose a good defense and one which may be proved under the plea.<sup>10</sup> And if a set-off is attempted to be set out it must conform in matters of substance to the same rules as would apply to a plea.<sup>11</sup>

d. *To Prevent Summary Judgment.*—(I.) **Generally.**—An affidavit sufficient when filed is not affected by any subsequent action of the court.<sup>12</sup> But where the statement of claim has been amended the court may require the filing of a new or supplemental affidavit if necessary to meet such amendment.<sup>13</sup>

The affidavit of defense is sufficient if it merely points out the insufficiency of the plaintiff's statement of claim<sup>14</sup> or a non-compliance with the law governing the latter,<sup>15</sup> where such matters are not waived by the filing of the affidavit.<sup>16</sup> The defendant may set up any legal defense which he has.<sup>17</sup> But to prevent summary judgment the

must be shown, substantially as they should be proven on trial." Duddleston v. Eckhart, 134 Ill. App. 656 citing Crossman v. Wholleben, 90 Ill. 537.

6. Colo.—Donald v. Bradt, 15 Colo. App. 414, 62 Pac. 580. Ia.—District Twp. of Newton v. White, 42 Iowa 608. Minn.—St. Paul & D. R. Co. v. Blackmar, 44 Minn. 514, 47 N. W. 172. Mo.—Carr v. Dawes, 46 Mo. App. 351. Neb.—Fritz v. Grosnicklaus, 20 Neb. 413, 30 N. W. 411; Hale v. Bender, 13 Neb. 66, 12 N. W. 920; Mulhollan v. Scoggin, 8 Neb. 202. Nev.—Ewing v. Jennings, 15 Nev. 379; Jones v. S. F. Sulphur Co., 14 Nev. 172. N. Y.—Cook v. Empire Furn. Co., 103 N. Y. Supp. 581. See fully the titles "Judgment;" "Default;" and *supra*, II, B, 10, a.

A *prima facie* showing on the merits is sufficient. Griswold L. Oil Co. v. Lee, 1 S. D. 531, 47 N. W. 955, 36 Am. St. Rep. 761.

Where the trial court strikes out a plea and renders judgment for failure of the defendant to appear and defend, a motion to set aside the judgment must show a meritorious defense, and the statute of limitations is not of this character. Carr v. Dawes, 46 Mo. App. 351.

The defense of former adjudication is sufficiently set forth by an affidavit

stating that all the matters alleged in the petition as grounds of action were involved and litigated in a former action between the same parties. Jean v. Hennessy, 74 Iowa 348, 37 N. W. 771.

7. Tuttle v. Scott, 119 Cal. 586, 51 Pac. 849. See *infra*, IV, F, 1, e.

8. Bowman v. Powell, 127 Ill. App. 114. See *supra*, IV, E, 2, b, (III.).

An affidavit which shows a *prima facie* defense to a part of the cause of action is a sufficient showing of merits. Frazier v. Williams, 18 Ind. 416.

9. Hitchcock v. Herzer, 90 Ill. 543; Columbus M. L. Assn. v. Plummer, 86 Ill. App. 446. See *supra*, III, 6, B.

10. See *supra*, IV, F, 1, e.

11. McCord v. Crooker, 83 Ill. 556.

12. Smyth v. Miller, 174 Pa. 639, 34 Atl. 210.

13. See *supra*, II, F, 12.

14. See *infra*, VIII, D, and also Bank v. Enos, 7 Pa. Dist. 397.

15. Kyler v. Christman, 25 Pa. Super. 74; White v. Sperling, 24 Pa. Super. 120.

16. See *infra*, VIII, F.

17. American Alkali Co. v. Huhn, 209 Pa. 238, 58 Atl. 283; Smyth v. Miller, 174 P. A. 639, 34 Atl. 210; Rees v. Jutte, 153 Pa. 56, 25 Atl. 998.

An affidavit which sets up the pendency of another suit for the same cause of action is sufficient. Bank v. Teese, 6 Pa. Co. Ct. 178. But not

matter averred must be such as constitutes, *prima facie*, a defense,<sup>18</sup> and one which is provable<sup>19</sup> under the rules of evidence. The affidavit must distinctly aver every fact essential to the legal sufficiency of the defense attempted to be stated.<sup>20</sup> The court will not supply by inference any essential fact since the party is presumed to have stated his case as strongly as the facts will permit.<sup>21</sup> A mere pre-

where the alleged prior action is in another jurisdiction. *Smith v. Lathrop*, 44 Pa. 326.

**Plea in Abatement.**—*National Bank v. American Ship-Bldg. Co. (Pa.)*, 2 Atl. 511.

The apparent unreasonableness of the defense set up is not alone enough to make the affidavit insufficient. *Gleason v. Hoeke*, 5 App. Cas. (D. C.) 1.

Inconsistent defenses cannot be set up in the affidavit. *Hibberd v. Mullen*, 14 Pa. Dist. 419. *Compare Hummel v. Lilly*, 188 Pa. 463, 41 Atl. 613.

18. **U. S.**—*Earle v. Miller*, 102 Fed. 600. **D. C.**—*Meyers v. Davis*, 13 App. Cas. 361. **Pa.**—*Burns v. Armstrong*, 223 Pa. 66, 72 Atl. 255; *Cunningham v. Standard S. M. Co.*, 219 Pa. 477, 68 Atl. 1027; *Meyers v. Catawissa Coal Co.*, 219 Pa. 1, 67 Atl. 904; *Bordentown Bkg. Co. v. Restein (No. 1)*, 214 Pa. 331, 63 Atl. 751; *Hess v. Gerstlauer*, 214 Pa. 10, 63 Atl. 366.

"A brief and comprehensive statement of facts or what the defendant supposes to be facts and honestly expects to prove at the trial, which would be sufficient in law if adequately supported by testimony to constitute a valid defense to the suit, is what the rule contemplates and requires." *Cropley v. Vogler*, 2 App. Cas. (D. C.) 28.

**Actions on Foreign Judgment.**—*Hughes v. Schreiner*, 202 Pa. 488, 52 Atl. 30; *Marston v. State Hospital*, 18 Pa. Super. 547; *Comly v. Simpson*, 6 Pa. Super. 12; *Willett v. Kiefer*, 31 Pa. Co. Ct. 120.

**Affidavit by Married Woman.**—*Van Cott v. Webb-Miller*, 25 Pa. Super. 51; *Abeles v. Powell*, 6 Pa. Super. 123; *Hutton v. McLaughlin*, 1 Pa. Super. 642; *Harrar v. Croney*, 13 Pa. Co. Ct. 193.

**Action by municipality for license tax on electric wires and poles.** *Postal-Tel. Cable Co. v. Taylor*, 192 U. S. 64, 24 Sup. Ct. 208, 48 L. ed. 342; *Norwood Borough v. Western Union Tel. Co.*, 25 Pa. Super. 405.

**Action on Municipal Tax Claim.**—*Philadelphia v. Pennsylvania Co.*, 214

Pa. 138, 63 Atl. 420; *Oil City v. Lay*, 164 Pa. 370, 30 Atl. 289; *Scranton v. Jermyn*, 156 Pa. 107, 27 Atl. 66; *Philadelphia v. Coates*, 18 Pa. Super. 418; *Philadelphia v. P. & R. Co.*, 1 Pa. Super. 236.

19. **Superior Nat. Bank v. Stadelman**, 153 Pa. 634, 26 Atl. 201. See also IV, F, 2, d, (VIII.), (E.), (2.).

**Denial of Conclusive Presumption.** *Capital City Mut. F. Ins. Co. v. Boggs*, 172 Pa. 91, 33 Atl. 349; *Hiestand v. Williamson*, 128 Pa. 122, 18 Atl. 427.

**Impeachment of Judgment.**—*Camden Nat. Bank v. Fries-Breslin Co.*, 214 Pa. 395, 63 Atl. 1022.

20. **Consumers' Gas Co. v. American Elec. Const. Co.**, 50 Fed. 778; *Reed v. Raymond*, 37 Fed. 186; *Berlin Iron Bridge Co. v. Bonta*, 180 Pa. 448, 36 Atl. 867; *Class v. Kingsley*, 142 Pa. 636, 21 Atl. 902; *Peck v. Jones*, 70 Pa. 83.

In an action of assumpsit on a foreign judgment the affidavit of defense setting up that an appeal had been taken in a foreign court must allege that the appeal is a supersedeas. *Dryfoos v. Uhl*, 11 Pa. Dist. 688.

An affidavit setting up facts which merely amount to an accord without satisfaction, is insufficient. *Morrison v. Nevin*, 130 Pa. 344, 18 Atl. 636.

21. **U. S.**—*Northern Nat. Bank v. Hoopes*, 98 Fed. 935; *Reed v. Raymond*, 37 Fed. 186. **Pa.**—*Ryon v. Starr (No. 1)*, 214 Pa. 310, 63 Atl. 701; *Ogden v. Beatty*, 137 Pa. 197, 20 Atl. 620; *Bardsley v. Delp*, 88 Pa. 420.

"What is not directly and explicitly averred in an affidavit of defense will be taken as not existing." *Burgettstown Nat. Bank v. Nill*, 213 Pa. 456, 63 Atl. 186; *Lord v. Ocean Bank*, 20 Pa. 384, 59 Am. Dec. 728.

"It is true, an affidavit is sufficient which avers with reasonable precision and distinctness, and with certainty to a common intent, facts which will constitute a defense. A reasonable intendment should be given to the language used for the purpose of sustaining the affidavit. It is not, however,

sumption will not supply the failure to aver an essential fact.<sup>22</sup> It seems to be unnecessary, however, to aver that a contract relied on is in writing, even where such fact is essential to its validity.<sup>23</sup> And the words used are to be given their legitimate and necessary inferences.<sup>24</sup> Where the substantial averments of the affidavit if true would, *prima facie*, constitute a defense the affidavit is sufficient.<sup>25</sup>

Contradictory averments of material facts render the affidavit defective and insufficient.<sup>26</sup>

**Failure to File Supplemental Affidavit After Opportunity.** — Where an opportunity to file a supplemental affidavit has not been improved defendant cannot complain that his affidavit is scrutinized with greater strictness than if he had not been afforded such an opportunity.<sup>27</sup>

**(II.) Recitals in Participial Form.** — Statements in the participial form have been held sufficient in some cases.<sup>28</sup>

**(III.) Answering Plaintiff's Unnecessary or Immaterial Averments.** — The affidavit of defense need not deny or reply to unnecessary or immaterial averments in the plaintiff's statement of claim.<sup>29</sup> This rule applies to allegations by plaintiff of merely evidentiary facts<sup>30</sup> or matters in avoidance of an anticipated defense.<sup>31</sup>

**(IV.) Anticipation or Avoidance of Replicatory Matter.** — The affidavit of defense is not required to anticipate, by denial or otherwise, matter which the plaintiff may thereafter set up or show in rebuttal or avoidance of the defense alleged.<sup>32</sup> Nor can the plaintiff by inserting such matter in his statement compel the defendant to reply to or avoid it in his affidavit.<sup>33</sup>

sufficient to use designedly and unnecessarily language intended to create the presumption of a fact, which, if it actually existed, would readily and naturally have been expressly averred." *Markley v. Stevens*, 89 Pa. 279.

It is not sufficient to allege facts from which an essential fact may possibly be inferred. *Myers v. Kipp*, 20 Pa. Super. 311.

22. *Moore v. Somerset*, 6 Watts & S. (Pa.) 262.

23. See *infra*, IV, F, 2, d, (VIII.), (E.), (3).

24. *Brown v. Gourley*, 214 Pa. 154, 63 Atl. 607. See *infra*, VII, D.

**Necessary Inference.** — *Brown v. Gourley*, 214 Pa. 154, 63 Atl. 607; *Selden v. Neemes*, 43 Pa. 421.

25. *Vulcanite Pav. Co. v. McNichol*, 215 Pa. 100, 64 Atl. 325; *American A. Co. v. Huhn*, 209 Pa. 238, 58 Atl. 283.

**Prima Facie Showing Sufficient.** — *Noble v. Kreuzkamp*, 111 Pa. 68, 2 Atl. 419.

26. *Hibberd v. Mullen*, 14 Pa. Dist. 419; *Kelly v. Singer Mfg. Co.*, 4 Pa. Dist. 440.

27. *Close v. Hancock*, 3 Pa. Super. 207.

28. *Collins v. Hansen*, 2 Penne. (Del.) 155, 44 Atl. 624. See also *Gundersheimer v. Earnshaw*, 13 App. Cas. (D. C.) 178, applying this rule to the plaintiff's affidavit of claim.

A recital in the affidavit of payment in participial form "having paid" is sufficient in connection with the further statement that there is nothing due. *Collins v. Hanson*, 2 Penne. (Del.) 155, 44 Atl. 624.

29. See *Terry v. Wenderoth*, 147 Pa. 519, 23 Atl. 763.

30. *Anchor Sav. Bank v. Stoneham Tannery Co.*, 8 Pa. Co. Ct. 303.

31. See section following.

32. *Hunter v. Reilly*, 36 Pa. 509.

33. *Kimball v. Grant*, 19 Pa. Co. Ct. 96, s. c. 6 Pa. Dist. 15; *Henry v. Lynde*, 12 Pa. Co. Ct. 189; *Anchor Sav. Bank v. Stoneham Tannery Co.*, 8 Pa. Co. Ct. 303.

The plaintiff cannot anticipate a defense in his statement and then treat such matters as admitted because they are not positively denied. *Boomer v. Henry*, 13 Pa. Co. Ct. 104.



(V.) **Lack of Knowledge as Excuse.** — Mere lack of knowledge of the facts essential to his defense does not excuse the defendant from making a sufficient affidavit of defense.<sup>34</sup> And it is not enough for the defendant merely to aver his ignorance.<sup>35</sup> But where the affidavit sufficiently shows the inability of the defendant to fully inform himself of the facts,<sup>36</sup> a lack of particularity in its averments which might otherwise be fatal may be excused.<sup>37</sup> And where an inspection of plaintiff's books is necessary upon a showing of this fact in the affidavit the court will suspend the rule for judgment until such an opportunity has been afforded.<sup>38</sup>

(VI.) **Comparison With Plaintiff's Statement.** — In some states the affidavit of defense is not as strictly scrutinized or construed as the plaintiff's statement of claim.<sup>39</sup> In others apparently the same rules are applied to both.<sup>40</sup> But a defendant cannot be compelled to deny what plaintiff has failed to allege expressly<sup>41</sup> or by necessary inference,<sup>42</sup> nor can the latter demand greater certainty and precision in the affidavit of defense than is exhibited<sup>43</sup> or permitted<sup>44</sup> by the statement of claim. Denials which are as broad<sup>45</sup> and specific<sup>46</sup> as the statement are sufficient. But mere indefiniteness or lack of precision in the statement not objected to will not aid the insufficiency of the affidavit.<sup>47</sup>

(VII.) **Denials.** — (A.) **GENERALLY.** — The affidavit of defense should

34. *Lord v. Ocean Bank*, 20 Pa. 384, 59 Am. Dec. 728.

35. *Adams v. White*, 1 Fed. Cas. No. 68. See *Woods v. Watkins*, 40 Pa. 458; *Cochran v. Shields*, 2 Grant Cas. (Pa.) 437; *Comly v. Simpson*, 6 Pa. Super. 12; *Coburn v. Reynolds*, 3 Pa. Dist. 475.

36. *Pennsylvania R. Co. v. Midvale Steel Co.*, 203 Pa. 624, 51 Atl. 313, 88 Am. St. Rep. 836; *Moore v. Smith*, 81 Pa. 182.

37. *Langfeld v. Lyon*, 132 Pa. 441, 19 Atl. 343. See *Leiby v. Lutz*, 224 Pa. 377, 73 Atl. 345; *Com. v. Magee*, 224 Pa. 168, 73 Atl. 347; *Pennsylvania R. Co. v. Midvale Steel Co.*, 203 Pa. 624, 51 Atl. 313, 88 Am. St. Rep. 836; *Boomer v. Henry*, 13 Pa. Co. Ct. 104. Compare, *Bell v. Kelly*, 17 N. J. L. 270.

Failure to state the particulars with reference to alleged payment may be excused where the affidavit states facts showing that it was impossible for the defendant to get the necessary information. *Moore v. Smith*, 81 Pa. 182.

**Less Particularity Required of Surety.** *Com. v. Magee*, 224 Pa. 168, 73 Atl. 347.

38. *Wanner v. Emanuel's Church*, 174 Pa. 466, 34 Atl. 188. See also *Lord v. Ocean Bank*, 20 Pa. 384.

39. *Gordon v. Frazer*, 13 App. Cas. (D. C.) 382.

40. *Fritz v. Hathaway*, 135 Pa. 274, 19 Atl. 1011; *Hutton v. McLaughlin*, 1 Pa. Super. 642.

41. *Werner v. Gross*, 174 Pa. 622, 34 Atl. 327.

42. *Werner v. Gross*, 174 Pa. 622, 34 Atl. 327.

Where a copy of the instrument only is filed the affidavit of defense must negative the averments necessarily implied from the terms of the instrument. *Montour Iron Co. v. Coleman*, 31 Pa. 80.

43. *Kenworthy v. Hirst*, 124 Fed. 995; *Kinney v. Citizens' Bldg. & L. Assn.*, 37 Pa. Super. 425; *Markle v. Winston Co.*, 14 Pa. Dist. 31. See *Tallman v. Whitaker*, 2 Houst. (Del.) 72.

Where the statement of claim is itself indefinite the plaintiff cannot demand the same precision and certainty in the affidavit which he might require in ordinary cases. *Federal Nat. Bank v. Cross Creek & P. Coal Co.*, 220 Pa. 39, 68 Atl. 1018.

44. *Altoona Concrete C. & S. Co. v. Knickerbocker C. Co.*, 29 Pa. Super. 512.

45. *Deacon v. Smaltz*, 10 Pa. Super. 151.

46. *Markle v. Winston*, 31 Pa. Co. Ct. 33.

47. *Newbold v. Pennock*, 154 Pa. 591, 26 Atl. 606.

not be a mere general denial.<sup>48</sup> The denials of the affidavit should be clear and concise,<sup>49</sup> not indirect and vague.<sup>50</sup> Vagueness and uncertainty in the statement of claim may, however, justify a corresponding lack of precision in the denials.<sup>51</sup> And the denials are not required to be broader than the averments of the plaintiff's statement;<sup>52</sup> if they meet the case made therein they are sufficient.<sup>53</sup> A denial of non-essential or immaterial averments of the statement is unavailing.<sup>54</sup> But a denial need not be in the words of the statement of claim.<sup>55</sup> And if it is full, complete and unequivocal and goes to the whole of plaintiff's claim it is sufficient.<sup>56</sup> A clear and specific denial of any fact which is essential to the plaintiff's claim is sufficient.<sup>57</sup> But a mere denial of the legal conclusions to be drawn from the statements of claim rather than the facts therein set forth is insufficient.<sup>58</sup> And a denial must be more than literally true; it must be such as to constitute a defense.<sup>59</sup> Denial of the correctness of an itemized account should be accompanied by averment of facts tending to support such conclusion.<sup>60</sup>

48. *Ford v. Cornish*, 2 McArthur (D. C.) 57; *Superior Nat. Bank v. Stadelman*, 153 F. 2d 201, 20 Atl. 201.

On an application to compel a non-resident plaintiff to furnish security for costs, a statement that the defense is "not guilty" is insufficient. *Rauche v. Blumenthal*, 4 Penne. (Del.) 521, 57 Atl. 368. See also, *Reynolds v. Fabey*, 4 Penne. (Del.) 264, 55 Atl. 221; *Fidelity Mut. F. Ins. Co. v. Simmons*, 1 Penne. (Del.) 474, 42 Atl. 367.

49. *Ashman v. Weigley*, 148 Pa. 61, 23 Atl. 897. See *infra*, IV, F, 2, (VIII.), (B.).

50. *Coburn v. Reynolds*, 3 Pa. Dist. 475. See *Woods v. Watkins*, 40 Pa. 158.

Where a positive denial is necessary, a mere intimation or indirect statement which might be construed to be a denial will not be sufficient. *Whiting v. Davidge*, 23 App. Cas. (D. C.) 156.

51. See *supra*, IV, F, 2, d, (VI.).

52. See *supra*, IV, F, 2, d, (VI.).

53. *Strawbridge v. Himes*, 11 Pa. Dist. 14, in an action against husband and wife for necessities.

54. *Terry v. Wenderoth*, 147 Pa. 519, 23 Atl. 763.

55. *Kaiser v. Frederick*, 98 Pa. 528.

56. *Lengert v. Chaninell*, 205 Pa. 634, 54 Atl. 889; *Galey v. Fitzpatrick*, 171 Pa. 50, 32 Atl. 1093.

"It is manifest that a defense resting on a denial of the existence of the fact or facts upon which the plaintiff predicates his claim does not require or permit the amplification necessary where affirmative defenses are set up,

and in neither case is it necessary or proper to state the evidence in support of the defense so asserted." *Mutual L. Ins. Co. v. Keen*, 135 Fed. 677.

A denial of indebtedness in the specific sum named in plaintiff's affidavit is not an admission of some other or smaller sum when coupled with a general denial of indebtedness in any sum whatever. *Ceranto v. Trimboli*, 63 W. Va. 340, 60 S. E. 138.

In an action against a carrier for breach of its agreement to carry through negligence, an affidavit of defense denying negligence and setting up the facts causing the injury is sufficient. *Ross v. Philadelphia W. & B. R. Co.*, 3 Pa. Dist. 791. Compare *Klepfer v. City of Keokuk*, 126 Iowa 592, 102 N. W. 515.

57. *Connilleau v. Rogers*, 162 Fed. 998; *Davis v. Koenig*, 165 Pa. 347, 30 Atl. 976; *Third Ref. D. Church v. Jones*, 132 Pa. 462, 19 Atl. 279.

58. *Catasauqua Mfg. Co. v. Roberts*, 2 Pa. Dist. 392.

Denial of liability on the note sued upon and an averment that there was no consideration for the endorsement are mere conclusions and insufficient. *Bryan v. Harr*, 21 App. Cas. (D. C.) 190. See *infra*, IV, F, 2, d, (VIII.), (C.).

59. *Holt v. Holt Elec. S. Co.*, 79 Fed. 597.

60. Where the plaintiff specifies the items of account, an affidavit by the defendant "that the account is not correct" is sufficient to put the plaintiff to proof of the indebtedness of the

(B.) NOTICE. — Where notice is alleged generally in the plaintiff's statement, a specific though general denial in the affidavit is sufficient.<sup>61</sup> But where alleged with particulars of time, place or manner, it must be denied with equal particularity and specifiveness.<sup>62</sup>

(VIII.) **Definiteness and Particularity Required.**—(A.) **GENERALLY.**—While no particular form is essential,<sup>63</sup> the facts must be so distinctly stated that the nature and character of the defense will clearly appear.<sup>64</sup> They should be stated with sufficient detail to enable the court to determine whether they amount to a defense,<sup>65</sup> to inform the plaintiff of the character of the defense which he will be called upon to meet at the trial,<sup>66</sup> and to enable him to take judgment for any portion of

defendant. *Tichenor v. Woodburn Sarven Wheel Co.*, 54 Miss. 589.

**Copies of Book Entries.**—An affidavit of defense merely denying their existence or correctness is insufficient. *March's Sons v. Carman*, 16 Pa. Dist. 877.

61. *McPherson v. Allegheny Nat. Bank*, 96 Pa. 135; *Historical Pub. Co. v. Hartranft*, 3 Pa. Super. 59.

62. See *McPherson v. Allegheny Nat. Bank*, 96 Pa. 135; *Caven-Williamson A. Co. v. Ice Mfg. Co.*, 27 Pa. Super. 381.

**Notice of Dishonor and Protest.** *McConeghy v. Kirk*, 68 Pa. 200; *Cook v. Forker*, 193 Pa. 461, 44 Atl. 560.

So where a mere circumstance is alleged from which notice may be inferred, it is sufficient to deny the giving or receipt of notice. *Deacon v. Smaltz*, 10 Pa. Super. 151.

63. *Kennedy v. Barker, McArthur & M.* (D. C.) 340; *Kilpatrick v. Home Bldg. & L. Assn.*, 119 Pa. 30, 12 Atl. 754.

The statute of limitations is sufficiently set out in an affidavit of defense which calls attention to the fact that the charges in the copy of the account filed with the statement of claim bear date more than six years prior to the bringing of the suit and avers that the defendant has made no new promise. *Fritz v. Hathaway*, 135 Pa. 274, 19 Atl. 1011.

**Form.**—Under a statute requiring defendant to make an affidavit "that in his opinion there is a good and valid defense, and in what said defense consists," the following affidavit was held sufficient: "That I have a good and valid defense to a part of the plaintiff's claim; that said defense consists in this, that the account rendered is incorrect and that prices charged for material furnished are higher than was agreed upon at the time of the pur-

chase. I make this affidavit from my best knowledge and belief and that such defense will prevail." *New England S. Brick Co. v. Dube*, 19 R. I. 397, 37 Atl. 14.

64. *Kilpatrick v. Home Bldg. & L. Assn.*, 119 Pa. 30, 12 Atl. 754; *DuBois v. Sturch*, 39 Pa. Super. 348.

But the brief and comprehensive language of the affidavit is not a fault "if it contain the necessary elements of a good defense." *Selden v. Neemes*, 43 Pa. 421.

65. *Del.*—*Flag v. Taylor*, 8 Houst. 165, 14 Atl. 26. *D. C.*—*Durant v. Murdock*, 3 App. Cas. 114. *Pa.*—*Shafer v. Keystone M. B. Assn.*, 22 Pa. Co. Ct. 51.

Every matter of defense presented in an affidavit must be set forth specifically with such detail as to show clearly and definitely its relation to the plaintiff's claim. *Caven-Williamson A. Co. v. Ice Mfg. Co.*, 27 Pa. Super. 381.

The purpose of an affidavit of defense is to test the defendant's conscience and to compel him to state the case with such particularity as will enable the court to reach a decision on the merits at a preliminary hearing without sending the parties before a jury. *Boomer v. Henry*, 13 Pa. Co. Ct. 104.

Hence an affidavit which consists merely of a series of short disjointed sentences setting forth no particulars or specific facts but constituting single and unconnected propositions involving conclusions of law as well as of fact is bad in form. *Superior Nat. Bank v. Stadelman*, 153 Pa. 634, 26 Atl. 201.

**Usury.**—*King v. Curtin*, 31 App. Cas. (D. C.) 23.

66. *Ralph v. Rathburn Co.*, 75 Fed. 971, 21 C. C. A. 584; *Connick v. Morrison*, 4 Mackey (D. C.) 497.



the claim not covered by the affidavit.<sup>67</sup> But the utmost fullness and particularity of statement is not essential.<sup>68</sup> And where the affidavit reasonably construed and giving to its words their legitimate and necessary inferences, shows that the plaintiff is not entitled to judgment, it is sufficient.<sup>69</sup>

The evidence by which the facts are established or the manner in which they are to be proved, need not be alleged.<sup>70</sup>

Technical accuracy of formal pleadings is not required in an affidavit of defense, but it is sufficient if it sets forth a substantial defense with reasonable certainty to a common intent.<sup>71</sup> This is especially true in cases appealed from a justice court.<sup>72</sup>

(B.) VAGUE AND EVASIVE AVERMENTS.—The averments of the affidavit must be direct; denials,<sup>73</sup> or averments of fact,<sup>74</sup> which are vague.

67. *Balsh v. Rathburn Co.*, 75 Fed. 971, 21 C. C. A. 584; *Holt v. Holt Elec. S. Co.*, 79 Fed. 597.

68. *Potomac Laundry Co. v. Miller*, 26 App. Cas. (D. C.) 230; *Tredway v. Kennedy*, 153 Pa. 438, 25 Atl. 644; *Reamer v. Bell*, 79 Pa. 292.

69. *Brown v. Gourley*, 214 Pa. 154, 63 Atl. 607; *Lengert v. Chaninel*, 205 Pa. 634, 54 Atl. 889.

Where the affidavit of defense distinctly states facts which if true would defeat a recovery it is sufficient. *Judge v. Pyle*, 224 Pa. 479, 73 Atl. 919.

70. *National Met. Bank v. Hitz, McArthur & M.* (D. C.) 198; *Durant v. Murdock*, 3 App. Cas. (D. C.) 114; *Moore v. Susquehanna Mut. F. Ins. Co.*, 196 Pa. 30, 46 Atl. 266; *Noble v. Kreuzkamp*, 111 Pa. 68, 2 Atl. 419; *Gandy v. Weckerly*, 220 Pa. 285, 69 Atl. 858.

71. *Hoopes v. Northern Nat. Bank*, 102 Fed. 448, 42 C. C. A. 436; *Kenworthy v. Hirst*, 124 Fed. 995; *White v. Safe Harbor M. Co.*, 106 Fed. 109; *Brown v. Gourley*, 214 Pa. 154; 63 Atl. 607; *Thompson v. Clark*, 56 Pa. 33.

The affidavit of defense is not a substitute for a special plea. *Brown v. Ohio Nat. Bank*, 18 App. Cas. (D. C.) 508; *Gleason v. Hoeke*, 5 App. Cas. (D. C.) 1.

72. *Hathoro Nat. Bank v. Stevenson*, 33 Pa. Super. 144.

73. *Columbus Land Co. v. McNally*, 172 Pa. 158, 33 Atl. 339; *State Bank v. Bolander*, 16 Pa. Dist. 987. See *supra*, IV, F, 2, d, (VI.).

74. *U. S.*—*Reed v. Raymond*, 37 Fed. 186. *D. C.*—*Bryan v. Harr*, 21 App. Cas. 190; *Chapman v. Natalie A. Coal Co.*, 11 App. Cas. 386. *Pa.*—*Lindsay v. Dutton*, 217 Pa. 148, 66 Atl. 250; *Moore v. Susquehanna Mut. F. Ins. Co.*, 196 Pa. 30, 46 Atl. 266.

**Sufficient Basis for Perjury Charge.**—Apparently the averments should be in such form that a charge of perjury could be predicated upon them if untrue. *Coulston v. Bertolet* (Pa.), 12 Atl. 255.

**Illustration of Evasive Averment.**—*Moore v. Phillips*, 154 Pa. 204, 25 Atl. 829, was an action on a foreign judgment where the record of a judgment showed an appearance for defendant. An averment in the affidavit of defense that "if an appearance was entered by Herbert F. Oddy for your deponent your deponent had no knowledge of it whatsoever was held evasive for the reason that defendant might have authorized the attorney to enter such an appearance and yet have had no actual knowledge that it had been done."

An averment in the affidavit that it does not appear from the plaintiff's statement of claim that the note sued upon was duly stamped is a mere argumentative denial amounting at most to a technical objection to the pleadings, and not constituting a statement that the note was not duly stamped. *Andrews v. Blue Ridge Pack. Co.*, 206 Pa. 379, 55 Atl. 1059.

An averment by the defendant that he expects to be able to prove a certain fact at the trial is not an assertion of the fact, but is a mere statement of his belief and expectation which, if literally proved, would constitute no defense, and is therefore insufficient. *Second Nat. Bank v. Morgan*, 165 Pa. 199, 30 Atl. 957, 44 Am. St. Rep. 652.

An averment which is argumentative only is insufficient. *Philadelphia v. Stewart*, 195 Pa. 309, 45 Atl. 1056.

**Uncertainty From Attempt at Unnecessary Particularity.**—*Lulley v. Morgan*, 21 D. C. 88.

uncertain and evasive in their nature, apparently designed to conceal rather than to exhibit the truth, are insufficient, especially where the facts are within the actual knowledge of the defendant.<sup>75</sup>

(C.) CONCLUSIONS.—(1.) **Generally.**—Where an affidavit is required to set forth the facts it must contain more than a statement of mere conclusions either of law or fact, or general averments of matters constituting mixed questions of law and fact.<sup>76</sup> But in determining whether any particular averment is of that character due regard must be had to all of the averments contained in the affidavit and to the further consideration that such affidavits are not required to be framed with the technical accuracy of formal pleadings, and should not therefore be subject to the same severe scrutiny.<sup>77</sup> So, too, the ultimate fact<sup>78</sup> rather than the evidence<sup>79</sup> by which it is established may be stated, although it partakes somewhat of the nature of a conclusion.

Where it is not clear whether an averment is intended as a statement of fact or as a conclusion of law from particular facts not set forth, it is bad for uncertainty.<sup>80</sup>

(2.) **Consideration.**—An averment of the lack<sup>81</sup> or failure<sup>82</sup> of consideration is the statement of a conclusion which should be supported by setting out the facts or circumstances.

(3.) **Fraud, duress and undue influence** should be averred in an affidavit by setting forth the facts and circumstances, a general averment

Under the Massachusetts statute vague or general allegations are not permitted. *Rogers v. Ladd*, 117 Mass. 334n.

75. *Gordon v. Frazer*, 13 App. Cas. (D. C.) 382.

76. **U. S.**—*Consumers' Gas Co. v. American Elec. Constr. Co.*, 50 Fed. 788, 1 C. C. A. 663; *Holt v. Holt Elec. S. Co.*, 79 Fed. 597. **Del.**—*Fidelity Mut. F. Ins. Co. v. Simmons*, 1 Penne. 474, 42 Atl. 367. **Pa.**—*Pennsylvania Tr. Co. v. Kline*, 192 Pa. 1, 43 Atl. 401, holding that an averment that a mortgage was not executed to secure payment of any debt lawfully contracted by the mortgagor was a mere legal conclusion.

**Mixed Questions of Law and Fact.** *Moore v. Susquehanna Mut. F. Ins. Co.*, 196 Pa. 30, 46 Atl. 266.

**Ownership.**—*Moore v. Susquehanna Mut. F. Ins. Co.*, 196 Pa. 30, 46 Atl. 266.

**Bona Fides of Purchase.**—*Stitt v. Garrett*, 3 Whart. (Pa.) 281.

**Usury.**—*King v. Curtin*, 31 App. Cas. (D. C.) 23.

**Protest and Notice.**—*Caven-Wilhamson A. Co. v. Ice Mfg. Co.*, 27 Pa. Super. 381. See *supra*, IV, F, 2, d, (VII.), (B.).

**Capacity of Foreign Corporation To**

**Sue.**—*Wile & B. Co. v. Onsel*, 10 Pa. Co. Ct. 659.

**General averments as to non-compliance with a contract** are insufficient. *City of Pittsburgh v. McConnell*, 130 Pa. 463, 18 Atl. 645. See *infra*, IV, F, 2, d, (IX.).

**"Material to the Risk."**—*McCaffrey v. Knights & Ladies of Columbia*, 213 Pa. 609, 63 Atl. 189, an action on an insurance policy.

77. *Warren Nat. Bank v. Seneca Oil Wks.*, 175 Pa. 580, 34 Atl. 859.

78. **Agency.**—*Steiner v. Bartlett*, 2 Pa. Super. 4.

**Authority of Agent.**—*May v. Forbes*, 2 Penne. (Del.) 194, 43 Atl. 839.

An allegation of eviction by title paramount is not a mere conclusion of law. *Friend v. Oil Well Supply Co.*, 165 Pa. 652, 30 Atl. 1134. See *The Richmond v. Cake*, 1 App. Cas. (D. C.) 447, 465.

79. See *supra*, IV, F, 2, d, (VIII.), (A.).

80. *Superior Nat. Bank v. Stadelman*, 153 Pa. 634, 26 Atl. 201.

81. *Bryan v. Harr*, 21 App. Cas. (D. C.) 190 (for endorsement); *Woods v. Watkins*, 40 Pa. 458.

82. *Brian v. Merrill*, 23 Pa. Super. 629.

being insufficient.<sup>83</sup> But on the other hand they should be clearly and explicitly alleged and not left as a mere matter of inference from averments of the affidavit.<sup>84</sup> And fraudulent representations may be of such an indefinite character as to make it impossible for the affiant to do more than characterize them as false.<sup>85</sup> Every essential element of such a defense must be set forth.<sup>86</sup>

(4.) **Payment** should be averred directly, not evasively.<sup>87</sup> But a mere allegation of payment is a conclusion;<sup>88</sup> all the particulars as to manner, time, amount, and persons by and to whom made, should be given.<sup>89</sup> Lack of particularity, however, may be excused where the affidavit shows that it was impossible for defendant to get the necessary information.<sup>90</sup>

(D.) **WRITINGS.**—Where a writing forms the basis or a material part of the defense, a copy of it should be attached to the affidavit,<sup>91</sup>

83. *Reed v. Raymond*, 37 Fed. 186; *Mathews v. Sharp*, 99 Pa. 560.

The facts constituting the alleged fraud should be as fully set forth as the circumstances of the case will admit. *Fredric v. Margwarth*, 200 Pa. 156, 49 Atl. 881; *Felleman v. Cassler*, 198 Pa. 407, 48 Atl. 275.

A general averment that the judgment sued upon was "fraudulently and collusively" obtained by the said plaintiff, unsupported by any statement of facts, is insufficient. *Ball v. Warrington*, 87 Fed. 695.

An allegation of duress should specify the act or acts constituting the duress. *Pennsylvania Tr. Co. v. Kline*, 192 Pa. 1, 43 Atl. 401; *Hamilton v. Lockhart*, 158 Pa. 452, 27 Atl. 1077.

84. *Burgettstown Nat. Bank v. Nill*, 213 Pa. 456, 63 Atl. 186.

85. *Land & Imp. Co. v. Mendinhal*, 4 Pa. Super. 398, where the representation was that certain named industries had agreed to locate at a particular place.

86. *Burgettstown Nat. Bank v. Nill*, 213 Pa. 456, 63 Atl. 186 (inducement); *Smith v. Smith*, 166 Pa. 563, 31 Atl. 343.

87. *Coulston v. Bertolet* (Pa.), 12 Atl. 255.

88. *McCracken v. First Ref. Church*, 111 Pa. 106, 2 Atl. 94 (in which the affidavit was in effect that defendant has accounted for and paid over the moneys claimed, and was not indebted to the plaintiff). See also *Snyder v. Powers*, 37 Leg. Int. (Pa.) 387.

*Contra.*—*Ridings v. McMenamin*, 1 Penne. (Del.) 15, 39 Atl. 463 (in which the affidavit was as follows: "The defendant verily believes that he has a defense to the whole of the cause of

action, the nature and character of which defense is payment"); *Collins v. Hansen*, 2 Penne. (Del.) 155, 44 Atl. 624 (in which the statement was in the participial form, "having paid").

89. *Coulston v. Bertolet* (Pa.), 12 Atl. 255; *Hiestand v. William*, 128 Pa. 122, 18 Atl. 427 (holding insufficient a statement in the affidavit that there is no balance due on the judgment which is sought to be revived by *scire facias*). *McCracken v. First Ref. Church*, 111 Pa. 106, 2 Atl. 94.

90. *Com. v. Magee*, 224 Pa. 168, 73 Atl. 347. See *supra*, IV, F, 2, d, (V.).

91. *Willard v. Reed*, 132 Pa. 5, 18 Atl. 921; *Lucas Coal Co. v. Hunt* (Pa.), 8 Atl. 860 (in which the affidavit was held insufficient for failure to set out an alleged written contract of novation substituting the liability of a third party for that of defendant).

In an action upon a policy of fire insurance where the sufficiency of the proofs of loss furnished is questioned the affidavit to be sufficient should specify the defects or annex copies of the proofs of loss. *Moore v. Susquehanna Mut. F. Ins. Co.*, 196 Pa. 30, 46 Atl. 266.

**Written consent of plaintiffs** to the cancellation of the contract sued on. *Harding v. York Knitting Mills*, 142 Fed. 228.

**The constitution or by-laws** of an association when relied upon by the defendant must be set forth in the affidavit. *Lepore v. Twin Cities Nat. B. & L. Assn.*, 5 Pa. Super. 276; *Shoemaker v. Whitehall Mut. F. Ins. Co.*, 9 Pa. Dist. 579.

**Decree of Court.**—*Kraft v. Gingrich*, 2 Pa. Dist. 398.



or an excuse given for the omission.<sup>92</sup> But this rule has no application to a mere incidental reference to a writing,<sup>93</sup> nor to documents to which the court is not required to give a construction.<sup>94</sup> Where it is contended that plaintiff's claim is based upon a writing of which he has failed to file a copy, the affidavit must be sufficient to show that the writing is the real basis of the claim.<sup>95</sup>

(E.) **CONTRACT RELIED UPON BY DEFENDANT.**—(1.) **Generally.**—Where the defendant relies upon an agreement different from that which forms the basis of the plaintiff's claim it must be fully set forth in the affidavit of defense,<sup>96</sup> or, if in writing, a copy annexed.<sup>97</sup> And if a breach of such contract is relied upon it must be specifically averred.<sup>98</sup>

(2.) **Parol Contemporaneous Agreement.**—In a suit upon a written contract, if a parol contemporaneous agreement is relied upon, the affidavit must aver such facts as would render evidence of the agreement admissible.<sup>99</sup> The parol agreement itself must be averred with clearness and certainty,<sup>1</sup> and where it is of such a character that evidence of it is not admissible the affidavit is insufficient.<sup>2</sup> But where in addition to the parol agreement facts which make evidence of it admissible are averred, the affidavit may be sufficient.<sup>3</sup>

(3.) **Contract Required To Be Written.**—Where the contract averred must be in writing to be legal the usual presumption in favor of its validity will be indulged, and the affidavit will be deemed sufficient although it fails to state that the contract was written.<sup>4</sup>

(IX.) **Set-Off, Recoupment, or Mitigation.**—(A.) **GENERALLY.**—Matters relied upon by the defendant by way of set-off, recoupment, or miti-

When the record of a suit in another jurisdiction is relied upon as a defense, a copy must be annexed to affidavit. *Dennis v. Coffin*, 16 Pa. Dist. 311.

**Foreign Statute.**—*Spellier Elec. Time Co. v. Geiger*, 147 Pa. 399, 23 Atl. 547.

92. *Lucas Coal Co. v. Hunt* (Pa.), 8 Atl. 860.

93. *Hebb v. Kittanning Ins. Co.*, 138 Pa. 174, 20 Atl. 837.

94. *Cannon v. Baker*, 14 Pa. Dist. 716. See also *Land & Imp. Co. v. Mendinhal*, 4 Pa. Super. 398.

95. *Kyler v. Christman*, 23 Pa. Super. 548.

96. *McBrier v. Marshall*, 12<sup>e</sup> Pa. 390, 17 Atl. 647.

97. See *supra*, IV, F, 2, d, (VIII.), (D.). But see *Smith v. Stevenson*, 190 Pa. 48, 42 Atl. 388.

98. *Close v. Hancock*, 3 Pa. Super. 207.

**As Set-Off Or Mitigation.**—See *infra*, IV, F, 2, d, (IX.).

99. **U. S.**—*Northern Nat. Bank v. Hoopes*, 98 Fed. 935; *Consumers' Gas*

*Co. v. American Elec. Constr. Co.*, 50 Fed. 778, 1 C. C. A. 663. **D. C.**—*Knight v. Walker B. Co.*, 23 App. Cas. 519. **Pa.**—*S. Morgan Smith Co. v. Monroe County W. P. Co.*, 221 Pa. 165, 70 Atl. 738; *Cochran v. Pew*, 159 Pa. 184, 28 Atl. 219.

1. *Myers v. Kipp*, 20 Pa. Super. 311.

A parol agreement inducing execution of contract sued upon when set up as a defense must be averred with clearness and precision. *Hand v. Russell*, 1 Pa. Super. 165.

2. **U. S.**—*Farnham Co. v. Southeastern Constr. Co.*, 144 Fed. 989; *Northern Nat. Bank v. Hoopes*, 98 Fed. 935. **D. C.**—*Knight v. Walker B. Co.*, 23 App. Cas. 519. **Pa.**—*Clarke v. Allen*, 132 Pa. 40, 18 Atl. 1071.

3. *Lee v. Taylor*, 154 Pa. 95, 26 Atl. 253; *Callan v. Lukens*, 89 Pa. 124; *Hardwick v. Pollock*, 3 Pa. Dist. 245.

4. *Smith v. Stevenson*, 190 Pa. 48, 42 Atl. 380. See *Fischer v. Dalmus*, 173 Pa. 296, 34 Atl. 435. *Contra*, *Consumers' Gas Co. v. American Elec. Constr. Co.*, 50 Fed. 778, 1 C. C. A. 663; *Kaufman v. Copper Iron Co.*, 105 Pa. 537.

gation of damages must be averred with the same definiteness and particularity as would be required were they being made the basis of an independent action.<sup>5</sup> The affidavit must be clear and specific as to all the essential elements of the defendant's claim,<sup>6</sup> and aver such facts as entitle him to set it up.<sup>7</sup> Allegations in general terms<sup>8</sup> or which are vague and evasive<sup>9</sup> are insufficient. The source, character and amount of the counter-claim or matter alleged in reduction of the claim must be specifically set forth,<sup>10</sup> not only because, *pro tanto*, the defendant occupies the position of a plaintiff, but also because his adversary is entitled to judgment for that portion of the original claim as to which no sufficient defense is made.<sup>11</sup>

(B.) DAMAGES.—Where it is possible the amount of damage suffered by plaintiff's breach of contract must be set forth specifically.<sup>12</sup> The items which go to make up the loss claimed should be stated.<sup>13</sup> And the damages claimed must be of a character allowed by law.<sup>14</sup> The facts which determine the amount of damage must be

5. *Sprissler v. McFetridge*, 37 Pa. Super. 607; *Appleby v. Barrett*, 28 Pa. Super. 349.

6. *U. S. — American Bridge Co. v. Foley*, 151 Fed. 960. *D. C. — Durant v. Murdock*, 3 App. Cas. 114. *Pa. — Asay v. Lieber*, 92 Pa. 377.

7. *Fleisher v. Blackburn*, 15 Pa. Super. 289 (its ownership by the defendant at the institution of the action).

8. *Consumers' Gas Co. v. American Elec. Constr. Co.*, 50 Fed. 778, 1 C. C. A. 663; *Penn Shovel Co. v. Phelps*, 24 Pa. Super. 595; *Carnahan S. & E. Co. v. Foley*, 23 Pa. Super. 643. But see *Spencer v. Keeler*, 11 Pa. Super. 614.

Items of credit claimed to have been omitted from plaintiff's statement must be specified. A general averment to that effect is insufficient. *Baker v. Reese*, 150 Pa. 44, 24 Atl. 634.

9. *Terriberry v. Broude*, 173 Pa. 48, 33 Atl. 699; *Markley v. Stevens*, 89 Pa. 279.

A general statement in an affidavit that the plaintiff's claim is in excess of the amount agreed upon, and is extortionate, and charges for labor and material which was not furnished, is too vague. *Griel v. Buckius*, 114 Pa. 187, 6 Atl. 153.

10. *Adams v. White*, 1 Fed. Cas. No. 68; *Berlin Iron Bridge Co. v. Bonta*, 180 Pa. 448, 36 Atl. 867; *Vollmer v. Mago-wan*, 180 Pa. 110, 36 Atl. 571.

11. *Sweigard v. Ice Co.*, 15 Pa.

Super. 285; *Loeser v. Erie City R. Ware-house*, 10 Pa. Super. 540.

12. *Sweigard v. Ice Co.*, 15 Pa. Super. 285; *Croxton v. Davies C. Mach. Co.*, 27 Pa. Co. Ct. 148; *Levering v. Gerhart*, 10 Pa. Co. Ct. 559.

Damages due to the inferior quality of goods furnished must be so stated as to show the amount of loss to the various items. *Rathbun v. Ralph*, 76 Fed. 939. See also *Spellman v. Kelly*, 27 Pa. Super. 39. But see *Rheinstrom v. Wolf*, 26 Pa. Super. 559.

13. *Terriberry v. Broude*, 173 Pa. 48, 33 Atl. 699; *Continental T. & T. Co. v. Harvey*, 11 Pa. Dist. 619.

14. Where the damages claimed are purely speculative, the affidavit is insufficient. *Sprague Elec. Co. v. Perley*, 32 Pa. Co. Ct. 577; *Keystone Drilling Co. v. Stahl*, 17 Pa. Co. Ct. 498; *Sofrancsy v. Fowler Waste Mfg. Co.*, 14 Pa. Dist. 336.

15. *Carnahan S. & E. Co. v. Foley*, 23 Pa. Super. 643. See *Rockwell Mfg. Co. v. Cambridge Springs Co.*, 191 Pa. 386, 43 Atl. 327.

**Breach of Covenant.**—In an action for rent, an allegation of a breach of covenant by the landlord is insufficient where it fails to state the facts by which the amount of damages must be ascertained as the difference in the rental value of the premises as they were and as they should have been had the covenant been performed. *Jackson v. Farrell*, 6 Pa. Super. 31.

averred,<sup>16</sup> and without them neither a general<sup>16</sup> nor a specific<sup>17</sup> averment of damages is sufficient. But the failure to claim damages in a certain liquidated amount is not fatal to the affidavit where the facts as stated are such that the damages can only be approximated.<sup>18</sup> Where the affidavit is otherwise sufficient, a positive though general averment of damages equal to,<sup>19</sup> or in excess<sup>20</sup> of the amount claimed by plaintiff is sufficient. But an averment of damage in excess of a given sum which is less than the amount claimed by plaintiff is insufficient.<sup>21</sup>

(C.) BREACH OF WARRANTY. — Where a breach of warranty is relied upon the alleged warranty must be specifically set forth<sup>22</sup> with the particulars as to its character and terms and the circumstances under which it was made.<sup>23</sup> The facts showing the breach<sup>24</sup> and the basis for determining the damages<sup>25</sup> and also the amount of the damage<sup>26</sup> must be specifically stated.

(X.) Partial Defense. — The affidavit is not insufficient merely because the facts averred disclose only a partial defense.<sup>27</sup> But the affidavit, in such case, to be effective, must be sufficiently specific to determine the exact extent of the defense.<sup>28</sup>

(XI.) Replevin. — Where the defendant in replevin claims title to the property he must set forth the facts supporting his claim<sup>29</sup> and not his mere conclusions.<sup>30</sup> The facts alleged must show *prima facie* a valid claim.<sup>31</sup>

V. SERVING AND FILING. — A. GENERALLY. — Service of the original<sup>32</sup> affidavit or a copy<sup>33</sup> thereof on the adverse party or his at-

16. Exeter Mach. Wks. v. Ritter, 4 Pa. Dist. 474.

17. Carnahan S. & E. Co. v. Foley, 23 Pa. Super. 643; Genesee P. Co. v. Bogart, 23 Pa. Super. 23.

18. Brown v. Gourley, 214 Pa. 154, 63 Atl. 607; Kaufman v. Cooper Iron Min. Co., 105 Pa. 537.

19. Newton Rubber Wks. v. Kahn, 186 Pa. 306, 40 Atl. 483.

20. Davis Coal & Coke Co. v. Price, 175 Pa. 155, 34 Atl. 444; Lane v. Penn Glass Sand Co., 172 Pa. 252, 33 Atl. 760.

21. McBrier v. Marshall, 126 Pa. 390, 17 Atl. 647.

22. Genesee P. Co. v. Bogart, 23 Pa. Super. 23; Exeter Mach. Wks. v. Ritter, 4 Pa. Dist. 474.

23. Reed v. Raymond, 37 Fed. 186; Kaufman v. Cooper Iron Co., 105 Pa. 537.

24. Northern Nat. Bank v. Hoopes, 98 Fed. 935; Fuhrman v. Stackman, 28 Pa. Super. 154.

25. Fuhrman v. Stackman, 28 Pa. Super. 154.

26. See *supra*, IV, F, 2, d, (IX.), (B.).

27. U. S. — Connilleau v. Rogers-Holloway & Co., 162 Fed. 998. III. —

Hurd v. Burr, 22 Ill. 29, modifying previous decisions to the contrary. Pa. — Lindsay v. Dutton, 217 Pa. 148, 66 Atl. 250.

As to the effect of a partial defense on the right to judgment for the balance of the claim, see *infra*, IX, C, 8.

28. Bordentown Bkg. Co. v. Restein (No. 1), 214 Pa. 331, 63 Atl. 451; Ettinger v. Miller, 153 Pa. 457, 25 Atl. 894; Griel v. Buckius, 114 Pa. 187, 6 Atl. 153. See *supra*, IV, F, 2, d, (IX.).

What averments are essential in case a partial defense is made, see *supra*, IV, E, 2, b, (III.).

29. Lehman v. Gill, 12 Pa. Dist. 89.

30. Miller v. Jackson, 34 Pa. Super. 31.

31. In an action of replevin an affidavit of defense alleging that the chattel was seized on a distress warrant for rent and sold by virtue of a warrant placed in defendant's hands is defective and insufficient for failure to set forth a compliance with the law regulating the sale of goods for rent. Ramsdell v. Seybert, 27 Pa. Super. 133.

32. Wirts v. Norton, 25 Wend. (N. Y.) 698.

33. Corning v. Roosevelt, 10 N. Y.



torney may be required by statute or rule of court, and non-compliance therewith justifies the taking of a default,<sup>34</sup> from which, however, the court may grant relief.<sup>35</sup> Where service of the proposed answer is not required its use as an affidavit of merits cannot be objected to because it was not served as such.<sup>36</sup>

The manner of making service and the persons on whom it may be made are matters dependent almost entirely upon rules which are general in their scope and are elsewhere discussed.<sup>37</sup> If the time allowed for service has elapsed, to cut off the right to enter default the affidavit must be served not only before the actual entry of default, but in such manner as is reasonably calculated to bring the fact of service to the knowledge of the adverse attorney before he enters the default.<sup>38</sup>

The filing of an affidavit of merits where required is essential to entitle it to consideration.<sup>39</sup>

**B. TIME FOR.** — 1. **Generally.** — The time for serving and filing an affidavit of merits or defense is regulated by statutes and rules of practice either of a general nature<sup>40</sup> or specially applicable to such affidavits.<sup>41</sup> The filing of such an affidavit cannot, of course, properly precede the filing or serving of the plaintiff's claim or complaint,<sup>42</sup> but must usually be within a fixed time thereafter.<sup>43</sup> The rule or statute may require that it accompany the plea,<sup>44</sup> pleading,<sup>45</sup> or

Supp. 937. See also *Beglin v. People's Tr. Co.*, 95 N. Y. Supp. 910.

34. See *infra*, V, B, 3.

35. *Fassett v. Tallmadge*, 15 Abb. Pr. (N. Y.) 205.

36. *San Diego Realty Co. v. McGin*, 7 Cal. App. 294, 94 P. 371.

37. See the title "Motions."

38. *Smith v. Aylesworth*, 24 How. Pr. (N. Y.) 33.

39. *Town of Omro v. Ward*, 19 Wis. 232.

40. See the title "Motions."

41. **Action Against Several Defendants.** — *Fisher v. Wannamacher*, 2 Penne. (Del.) 32, 43 Atl. 89.

**On Appeal to Common Pleas.** — *Heroy Co. v. Smith*, 5 Pa. Dist. 293.

**Scire Facias.** — The act of 1887 does not apply to action by *scire facias*. *Ruhland v. Alexander*, 19 Pa. Co. Ct. 577; *Johnson v. Scofield*, 8 Pa. Dist. 410.

42. *Geib v. Icard*, 11 Johns. (N. Y.) 82.

43. *Laufman v. Hope Mfg. Co.*, 54 N. J. L. 70, 23 Atl. 305 (within ten days); *Western Nat. Bank v. Cotton Oil, etc. Co.*, 35 Pa. Super. 47. See Del. Laws 1893, c. 161, § 4; R. I. Gen. Laws 1896, c. 239, § 14; *Price v. Marks*, 103 Va. 18, 48 S. E. 499; *Hurlburt v. Straub*, 54 W. Va. 306, 46 S. E. 163.

**Defendant has all of the last day specified in which to file his affidavit of defense.** *Porter v. Hower*, 9 Pa. Co. Ct. 283.

**Effect of Request for Leave To File.** Although the defendant's counsel makes the mistake of asking leave to file an affidavit of defense, his client's right to file it without leave is not thereby forfeited since the affidavit offered will be treated as having been filed for the purpose of preventing a default judgment. *Bordentown Bkg. Co. v. Restein*, 214 Pa. 30, 63 Atl. 451.

44. *Meyers v. Davis*, 13 App. Cas. (D. C.) 361; *Wilder v. Arwedson*, 80 Ill. 435; *Anthony v. Ward*, 22 Ill. 181; *General Elec. Co. v. Leahy*, 85 Ill. App. 526.

**On appeal from justice court, since the plea is oral and made at the trial, the affidavit may be filed at the trial.** *Barnes v. Sisson*, 44 Ill. App. 327; *Reid v. Cisler*, 35 Ill. App. 572; *Jensen v. Fricke*, 35 Ill. App. 23.

45. **Change of Place of Trial.** — The affidavit of merits and demand for change of place of trial must be filed when the defendant appears and answers or demurs — if filed before he answers or demurs they are ineffective. *Nicholl v. Nicholl*, 66 Cal. 36, 4 Pac. 882.

motion<sup>46</sup> which it supports. Such a requirement is imperative.

An affidavit in support of a motion to set aside a default judgment must be filed before the motion has been acted upon<sup>47</sup> and the judgment has passed out of the control of the court which rendered it, even though the motion itself was timely.<sup>48</sup>

**2. Suspension or Extension of Time.**—*a. Matters Operating as a Stay.*—Certain proceedings intervening before the expiration of the time allowed by law operate as a stay or as an extension of the time for filing the affidavit and prevent the taking of a default pending their determination.<sup>49</sup>

*b. Effect of Amendment of Plaintiff's Statement.*—Where an amendment of the plaintiff's statement of claim has been allowed the court may fix a reasonable time within which a new affidavit must be filed.<sup>50</sup> But if the amendment be one which does not affect the substance of the statement or affidavit, opportunity for filing a new affidavit need not be given.<sup>51</sup>

*c. By Court.*—Since the court has power in a proper case to set aside a default,<sup>52</sup> it may permit the filing of an affidavit of merits or defense by one who is in default for failure to file the affidavit at the prescribed time.<sup>53</sup> So it may extend the time for filing before it has expired.<sup>54</sup>

*d. By Stipulation.*—The time for filing an affidavit of merits or defense may be extended by stipulation,<sup>55</sup> which is binding upon the parties.

46. *Donovan v. Cunard S. S. Co.*, 85 N. Y. Supp. 1114; *Corning v. Roosevelt*, 10 N. Y. Supp. 937.

47. *Thompson v. Savage*, 43 Iowa 398.

48. *Ex parte Payne*, 130 Ala. 189, 29 So. 622.

49. *Demurrer.*—*Bradly v. Potts*, 155 Pa. 418, 26 Atl. 734. See *Robinson v. Montgomery*, 14 Pa. Co. Ct. 106.

After Suggestion of Insufficiency.—*Bordentown Bkg. Co. v. Renstein*, 214 Pa. 30, 63 Atl. 451.

While a motion to dismiss for want of jurisdiction is pending, the court cannot properly grant the plaintiff's motion for judgment for want of an affidavit of defense. *Kinney v. Mitchell*, 136 Fed. 773, 69 C. C. A. 493.

50. *Ball v. Warrington*, 87 Fed. 695; *Jones v. Gordon*, 124 Pa. 263, 16 Atl. 862. See also *Healy v. Charnley*, 79 Ill. 592.

51. Striking out parties joined by mistake does not entitle the real party, who has filed an insufficient affidavit, to an opportunity to file a new affidavit. *Kidney v. Beemer*, 27 Pa. Super. 558.

52. *Johnson v. Hoxsie*, 19 R. I. 703, 36 Atl. 720.

53. *Wilder v. Arwedson*, 80 Ill. 435;

*Johnson v. Hoxsie*, 19 R. I. 703, 36 Atl. 720. See also *Anthony v. Ward*, 22 Ill. 180; *Griffith v. Adams*, 95 Md. 170, 52 Atl. 66. But see *Woodruff v. McGaule*, 12 N. J. L. J. 384; *Bordentown Bkg. Co. v. Renstein*, 214 Pa. 30, 63 Atl. 451.

On a motion for an extension of time to answer or demur which is opposed on the ground that no affidavit of merits has been filed in accordance with the rule, the court in its discretion may grant leave to file an affidavit of merits at the hearing of the motion. *Donovan v. Cunard S. S. Co.*, 85 N. Y. Supp. 1114.

54. In *Bucker v. Carroll*, 1 Penne. (Del.) 112, 39 Atl. 784, an extension of time for filing an affidavit of defense was given in the absence of opposing counsel.

55. *Muir v. Preferred Acc. Ins. Co.* 203 Pa. 338, 53 Atl. 158. See *James' Sons Co. v. Gott*, 55 W. Va. 223, 47 S. E. 649.

Effect of stipulation on time for filing petition for removal of cause to federal court, see *Muir v. Preferred Acc. Ins. Co.*, 203 Pa. 338, 53 Atl. 158, and the title "Removal of Causes."

**3. Necessity and Effect of Entry of Default.** — Although the failure to file an affidavit within the time limited gives the adverse party a right to take a default or have judgment entered,<sup>56</sup> this right is defeated by the filing of the affidavit any time before the default or judgment is actually entered<sup>57</sup> or the inquest taken.<sup>58</sup> A mere rule or motion for judgment or inquest does not cut off the right to file an affidavit.<sup>59</sup> On a motion to strike from the files a plea because not accompanied by an affidavit the court may, in its discretion, permit an affidavit to be filed at the hearing.<sup>60</sup> In one state, however, if the affidavit is not filed within the prescribed time its subsequent filing is unavailing unless the court for good cause extends the time.<sup>61</sup>

Fractions of a day will be considered by the court in so far as necessary to determine the actual priority of the filing of the affidavit and the entry of the default where they occur on the same day.<sup>62</sup> If the filing actually follows the judgment it is too late.<sup>63</sup>

**VI. SUPPLEMENTING AND AMENDING.** — A. GENERALLY. — Affidavits of merits or defense may ordinarily be amended or supplemented by virtue of statutes or the practice of courts,<sup>64</sup> which leave

<sup>56</sup> *Meyers v. Davis*, 13 App. Cas. (D. C.) 361.

Failure to file the required affidavit of defense within the time allowed by law entitles the plaintiff to judgment. *Work, McCouch & Co. v. Tatman*, 2 Houst. (Del.) 304; *Geylin v. Villeroi*, 2 Houst. (Del.) 203.

<sup>57</sup> An affidavit of defense may be filed as a matter of right at any time before judgment: no leave of court is necessary. *Bordentown Bkg. Co. v. Restein*, 214 Pa. 30, 63 Atl. 451; *Wilkinson v. Brice*, 148 Pa. 153, 23 Atl. 282.

<sup>58</sup> *Miller v. Hooker*, 2 How. Pr. (N. Y.) 124.

The taking of an inquest may be prevented by serving and filing an affidavit of merits at any time before the inquest is actually taken. "In fact, it may be filed and handed to the attorney in court on the day of the application for inquest. And on an application for inquest it is not error for the court to allow defendant's attorney, who represents himself as uncertain as to the proper practice in the matter, to file and serve the affidavit of merits upon the hearing for inquest. *Beglin v. People's Tr. Co.*, 95 N. Y. Supp. 910.

<sup>59</sup> *Beglin v. People's Tr. Co.*, 95 N. Y. Supp. 910; *Bordentown Bkg. Co. v. Restein*, 214 Pa. 30, 63 Atl. 451. But see *Meyers v. Davis*, 13 App. Cas. (D. C.) 361.

If filed before motion for judgment,

the affidavit is in time. *Gillespie v. Smith*, 13 Pa. 65; *Miller v. Jackson*, 16 Pa. Dist. 122. See also *Meyers v. Davis*, 13 App. Cas. (D. C.) 361.

<sup>60</sup> *Wilder v. Arwedson*, 80 Ill. 435, holding that the court could require the affidavit allowed to be filed under such circumstances to set forth facts showing a meritorious defense.

<sup>61</sup> *Griffith v. Adams*, 95 Md. 170, 52 Atl. 66; *Gemmell v. Davis*, 71 Md. 458, 18 Atl. 955. See *Wilder v. Arwedson*, 80 Ill. 435.

<sup>62</sup> *Bordentown Bkg. Co. v. Restein*, 214 Pa. 30, 63 Atl. 451; *Gillespie v. Smith*, 13 Pa. 65. But see *Duncan v. Bell*, 28 Pa. 516.

<sup>63</sup> *Guernsey v. Hunt*, 4 Pa. Co. Ct. 480.

<sup>64</sup> Cal. — *Palmer v. Barclay*, 92 Cal. 199, 28 Pac. 226 (under § 473 C. C. P. authorizing amendment of pleadings generally). Ill. — *Blizzard v. Epkens*, 105 Ill. App. 117. Mich. — *Wells v. Booth*, 35 Mich. 424. Pa. — *Fleisher v. Blackburn*, 15 Pa. Super. 289; *Houghton, Mifflin & Co. v. DuBell*, 33 Pa. Co. Ct. 267; *Hallowell v. Hoey*, 16 Pa. Dist. 986.

Rules of court may determine the conditions under which amendments and supplemental affidavits will be allowed. *Sulzner v. Cappeau, Lemley & Miller Co.*, 223 Pa. 87, 72 Atl. 270.

A defective statement of a defense which is probably good may ordinarily be supplemented. But if the insufficiency of an affidavit is manifestly in



the matter to a considerable extent in the sound discretion of the court,<sup>65</sup> the exercise of which, in some jurisdictions, will not be reviewed on appeal.<sup>66</sup>

Additional supplemental affidavits may be allowed although one or more has previously been filed, where the insufficiency is in the statement of what appears to be a good defense.<sup>67</sup>

A new defense may be set up in the supplemental affidavit.<sup>68</sup>

B. AT WHAT TIME REQUESTED OR ALLOWED. — The time or stage of the proceedings at which such an amendment or supplemental affidavit may be allowed rests in the court's discretion,<sup>69</sup> the exercise of which may be regulated by rule of court.<sup>70</sup> Additional time may be

the substance of a defense, or if evasiveness is patent in the manner of statement, it is usual and proper to give judgment. *Andrews v. Blue Ridge Pack Co.*, 206 Pa. 370, 55 Atl. 1059.

A supplemental affidavit may be allowed for the purpose of setting out specifically the facts where only the legal conclusion deducible therefrom has been stated in the original. *Moore v. Susquehanna Mut. F. Ins. Co.*, 196 Pa. 30, 46 Atl. 266.

An amendment will not be allowed where the affidavit is general and evasive and discloses no substantial defense. *Sharpless Bros. v. Stirman*, 4 Pa. Dist. 569. But see *Rising v. Patterson*, 5 Whart. (Pa.) 316, where a supplemental affidavit was allowed to correct vagueness in the original.

65. Cal. — *Palmer v. Barclay*, 92 Cal. 199, 28 Pac. 226. Del. — *Valley Paper Co. v. Smalley*, 2 Marv. 289, 43 Atl. 176. D. C. — *Meyers v. Davis*, 13 App. Cas. 361. Pa. — *Andrews v. Blue Ridge Pack Co.*, 206 Pa. 370, 55 Atl. 1059.

Where the affidavit was defective in using the expression "his case" instead of "the case," the allowing of an inquest was held error on the ground that the court should have permitted an amendment to correct the defect. *Wells v. Booth*, 35 Mich. 424.

66. Discretion Not Subject to Review. — *Valley Paper Co. v. Smalley*, 2 Marv. (Del.) 289, 43 Atl. 176 (declining to interfere with the trial court's refusal to permit an amendment to supply a notary's seal and intimating that the allowance of an amendment was a very rare occurrence); *Meyers v. Davis*, 13 App. Cas. (D. C.) 361. And the fact that in entering judgment for an insufficient affidavit the court granted the defendant leave to move to vacate the judgment and for leave

to file an amended affidavit, does not authorize a review of the action of the court in refusing to vacate the judgment upon motion made within five days. *Magruder v. Schley*, 17 App. Cas. (D. C.) 227. Compare *Blizzard v. Epkens*, 105 Ill. App. 117; *Sulzner v. Cappeau, L. & M. Co.*, 223 Pa. 87, 72 Atl. 270; *Yaryan Co. v. Pennsylvania Glue Co.*, 180 Pa. 480, 36 Atl. 1080; *Flegal v. Hoover*, 156 Pa. 276, 27 Atl. 162.

67. *Andrews v. Blue Ridge Pack Co.*, 206 Pa. 370, 55 Atl. 1059.

68. *Callan v. Lukens*, 89 Pa. 134, 7 W. N. C. 28.

69. After the time for filing the original has expired, the court may in its discretion, under § 473, C. C. P., permit the amendment of an insufficient affidavit of merits which has been filed in due time upon a motion to change the place of trial. *Palmer v. Barclay*, 92 Cal. 199, 28 Pac. 226.

The granting or refusing of a motion to vacate a judgment rendered against the defendant for want of a sufficient affidavit of defense and for leave to amend his affidavit and plea, is a matter of discretion with the trial court. *St. Clair v. Conlon*, 12 App. Cas. (D. C.) 161.

Where pleas have been stricken from the files for an insufficient affidavit, an application for an extension of time in which to present an amended affidavit is addressed to the sound discretion of the court, which will not be disturbed unless abused. *Blizzard v. Epkens*, 105 Ill. App. 117.

After Verdict. — *Houghton, Mifflin & Co. v. DuBell*, 33 Pa. Co. Ct. 267.

After Appeal. — *Kyler v. Christman*, 25 Pa. Super. 74.

70. *Yaryan Co. v. Pennsylvania Glue Co.*, 180 Pa. 480, 36 Atl. 1080.

allowed for the purpose of amending an insufficient affidavit of defense.<sup>71</sup> A limit of time within which leave to amend must be asked may be provided by statute.

A reasonable time should be allowed for the filing of a supplemental affidavit where the right to file one has been granted.<sup>72</sup> If no time is fixed by the court the party must avail himself of his privilege within a reasonable time.<sup>73</sup>

C. CONSTRUCTION AND EFFECT OF SUPPLEMENTAL OR AMENDED AFFIDAVIT. — The filing of an amended affidavit supersedes the original which cannot thereafter be considered.<sup>74</sup> Asking and obtaining leave to amend is an acknowledgment of the insufficiency of the original which will amount to an estoppel where the privilege obtained is not exercised.<sup>75</sup> The manner in which a supplemental affidavit will be construed is treated elsewhere in this article.<sup>76</sup>

## VII. DETERMINATION OF NECESSITY AND SUFFICIENCY.

A. HOW AND WHEN QUESTIONED. — The necessity for or legal sufficiency of an affidavit of merits or defense to prevent summary judgment may be questioned by motion to strike the plea from the files,<sup>77</sup> or for judgment,<sup>78</sup> at any time before plaintiff has taken action constituting a waiver of the necessity for filing the affidavit.<sup>79</sup> Such a rule or motion is in the nature of a demurrer.<sup>80</sup>

A demurrer to a plea does not question the failure to accompany the plea with an affidavit.<sup>81</sup>

B. AVERMENTS TAKEN AS TRUE. — The material averments of a statement of claim are deemed to be admitted in those particulars in which there is no positive and specific averment to the contrary in the affidavit of defense.<sup>82</sup> But for the purpose of determining its suffi-

After Rule for Judgment Is Called for Argument. — *Salzner v. Cappeau*, *Lemley & Miller Co.*, 223 Pa. 87, 72 Atl. 270.

71. *McGuire v. Conway*, 10 Pa. Co. Ct. 298.

72. *Lash v. Von Neida*, 109 Pa. 207. See also *McPettridge v. Megargee*, 26 Pa. Super. 501.

73. *Close v. Hancock*, 3 Pa. Super. 207, in which failure to file such affidavit within a week was held to justify entry of judgment without further notice.

74. *Stuber v. Schack*, 83 Ill. 191; *Hunt v. Cape*, 19 Montg. (Pa.) 214.

75. *Culver v. Johnson*, 90 Ill. 91.

76. See *infra*, VII, E.

77. See *infra*, IX, B.

78. The proper way to raise the question whether an affidavit of defense is required under the law is for the plaintiff to enter a rule for judgment for want of such an affidavit. *Com. v. Payton*, 1 Pa. Dist. 609.

79. See *infra*, IX, D, 1.

Time for Questioning Sufficiency. —

*Haldy v. Deichler*, 16 Pa. Dist. 711 *Compare Starkweather v. Carswell*, 1 Wend. (N. Y.) 77.

Delay in asking for judgment may waive the right. *Standard Mut. Live Stock Co. v. Williamson*, 10 Kulp (Pa.) 266; *Boyle v. McCafferty*, 21 W. N. C. (Pa.) 95. But even a long delay may be explained. *Ball v. Warrington*, 87 Fed. 695; *Anthony v. Ward*, 22 Ill. 181.

80. *Brooks v. Keller*, 173 Pa. 615, 34 Atl. 284; *Third Ref. Dutch Church v. Jones*, 132 Pa. 462, 19 Atl. 279. See *infra*, VII, B.

81. *Lewis' Admr. v. Hicks*, 96 Va. 91, 30 S. E. 466.

82. *Bryan v. Harr*, 21 App. Cas. (D. C.) 190; *Industrial S. & L. Co. v. Hare*, 216 Pa. 389, 65 Atl. 1080; *Ashman v. Weigley*, 148 Pa. 61, 23 Atl. 897.

The material averments of the statement of claim are to be taken as admitted in those particulars in which they are not specifically denied by the affidavit. *Ryon v. Starr* (No. 1), 214 Pa. 310, 63 Atl. 701.

ciency the statements or denials of the affidavit of defense, if made with sufficient definiteness and particularity,<sup>83</sup> must be accepted as true<sup>84</sup> and cannot be affected by anything appearing in the statement of claim.<sup>85</sup> This rule, however, has no application to immaterial, irrelevant, obscure or evasive averments,<sup>86</sup> or on a proceeding to open a default regularly entered.<sup>87</sup>

C. CONSIDERATION OF EXTRANEOUS MATTERS. — 1. Generally. — No matters or facts extraneous to the statement of claim and affidavit or affidavits in reply thereto may be considered by the court in passing upon the sufficiency of such affidavits,<sup>88</sup> except upon agreement of the parties acquiesced in by the court.<sup>89</sup>

2. Contradiction and Counter-Affidavits. — An affidavit of merits or defense as such cannot be contradicted.<sup>90</sup> Counter-affidavits to the merits cannot legally be received,<sup>91</sup> nor can the court consider such affidavits previously filed in the case for other purposes.<sup>92</sup> In some cases, however, contrary to the rule above stated, such affidavits seem to have been considered by the court in determining the propriety of opening a default,<sup>93</sup> and if such action is not objected to below its

83. See *infra*, IV, F, 2, d, (VIII.).

84. *St. Clair v. Conlon*, 12 App. Cas. (D. C.) 161; *Strauss v. Hensey*, 7 App. Cas. (D. C.) 289, 36 L. R. A. 92; *Union S. D. Bank v. Niehter*, 224 Pa. 227, 73 Atl. 558; *Brown v. Goarley*, 214 Pa. 154, 63 Atl. 607; *Long v. Long*, 208 Pa. 368, 57 Atl. 759.

Where the affidavit makes a clear *prima facie* case its averments must be accepted as true, and the court cannot inquire into the merits and enter judgment for the plaintiff. *Morrison v. Warner*, 197 Pa. 59, 46 Atl. 1030.

85. *St. Clair v. Conlon*, 12 App. Cas. (D. C.) 161; *Strauss v. Hensey*, 7 App. Cas. (D. C.) 289, 36 L. R. A. 92.

86. *Odd Fellows' Sav. Bank v. Miller*, 179 Pa. 412, 36 Atl. 324.

87. *Andrews v. Blue Ridge Pack. Co.*, 206 Pa. 370, 55 Atl. 1059; *Hunter v. Forsyth*, 205 Pa. 466, 55 Atl. 26, holding that in the latter case if the proposed affidavit is vague and uncertain in its terms the court will refuse to open the judgment in the absence of depositions or other proof.

88. *Bernhardt v. Taylor*, 223 Pa. 307, 72 Atl. 620; *Philadelphia v. Pierson*, 211 Pa. 388, 60 Atl. 999; *Musser v. Stauffer*, 178 Pa. 99, 35 Atl. 709.

89. *Allegheny City v. McCaffrey*, 131 Pa. 137, 18 Atl. 1001.

90. *Ind.* — *Beatty v. O'Connor*, 106 Ind. 81, 5 N. E. 880. *Ia.* — *Joerns v. LaNicca*, 75 Iowa 705, 38 N. W. 129. *N. Y.* — *Gideon v. Dwyer*, 17 Misc. 233, 40 N. Y. Supp. 1053.

91. *Cal.* — *Douglas v. Todd*, 96 Cal. 655, 31 Pac. 623, 31 Am. St. Rep. 247; *Reclamation Dist. v. Coghill*, 56 Cal. 607; *Gracier v. Weir*, 45 Cal. 53; *Francis v. Cox*, 33 Cal. 323 (*explaining* *Bailey v. Taaffe*, 29 Cal. 422). *D. C.* — *The Richmond v. Cake*, 1 App. Cas. 447, 465. *Ill.* — *Gilchrist T. Co. v. Northern Grain Co.*, 204 Ill. 510, 68 N. E. 558; *Vennum v. Carr*, 130 Ill. App. 309. *Ind.* — *Masten v. Indiana Car & F. Co.*, 25 Ind. App. 175, 57 N. E. 148. *N. Y.* — *Gideon v. Dwyer*, 17 Misc. 233, 40 N. Y. Supp. 1053. *S. D.* — *Griswold L. Oil Co. v. Lee*, 1 S. D. 531, 47 N. W. 955, 36 Am. St. Rep. 761. *Eng.* — *Warrington v. Leake*, 11 Ex. 304; *Blewitt v. Gordon*, 6 Jur. 825.

On a Motion To Set Aside an Inquest. — *Roosevelt v. Kemper*, 2 Caines (N. Y.) 30; *Fake v. Edgerton*, 6 Duer (N. Y.) 653.

It is harmless error to receive counter-affidavits to the merits where the showing made by defendant does not of itself warrant the relief asked. *Gilchrist T. Co. v. Northern Grain Co.*, 204 Ill. 510, 68 N. E. 558.

92. *Smyth v. Miller*, 174 Pa. 639, 34 Atl. 124.

93. See *Ill.* — *Truby v. Case*, 41 Ill. App. 153. *N. Y.* — *Catlin v. Latson*, 4 Abb. Pr. 248. *Can.* — *Bank of Montreal v. Harrison*, 4 Ont. Pr. 331. But see *Wooster Coal Co. v. Nelson*, 4 Ont. Pr. 343, explaining the preceding case as applying only to explanatory affidavits in reply to a simple affidavit of



propriety cannot be questioned on appeal.<sup>94</sup> And this rule applies only to the affidavit in so far as it is a statement of merits and not to other matters appearing therein,<sup>95</sup> such as the reason for an attorney's making the affidavit<sup>96</sup> or the excuse for suffering a default.<sup>97</sup>

**D. RULES OF CONSTRUCTION. — 1. Generally.** — The affidavit of defense is to be construed in the light of the statement of claim to which it is a reply.<sup>98</sup> Its statements will be taken in the sense in which they will be effectual rather than meaningless and unavailing,<sup>99</sup> and its words given their reasonable and ordinary meaning<sup>1</sup> or the meaning which was manifestly intended.<sup>2</sup> The affidavit should be given a fair and liberal interpretation.<sup>3</sup> But inasmuch as a party is presumed to state his case as strongly as he can his affidavit of defense<sup>4</sup> or merits<sup>5</sup> will be construed most favorably to the plaintiff, and its statements will not be enlarged by implication.<sup>6</sup> But notwithstanding this rule, if there is doubt as to the sufficiency of the affidavit to prevent a default it will be resolved in favor of the defendant.<sup>7</sup> And it has

merits which stated no facts, and holding that when the facts as to the defense were set forth that counter-affidavits could not be considered. (*Compare Warrington v. Leake*, 11 Exch. (Eng.) 334, holding counter-affidavits inadmissible even where a simple affidavit of merits is filed.

94. *Finkelstein v. Schilling*, 135 Ill. App. 543.

95. *In Hart v. McGarry*, 1 How. Pr. (N. Y.) 74.

96. *Johnson v. Lynch*, 15 How. Pr. (N. Y.) 199.

97. **Excusing Default.** — As to the right to file counter-affidavits to the matters alleged in excuse for suffering a default, see the titles "Default;" "Judgment."

98. *Union Surety & G. Co. v. Stevenson*, 27 Pa. Super. 324.

99. *Pumphrey v. Bogan*, 8 App. Cas. (D. C.) 449, 452; *The Richmond v. Cake*, 1 App. Cas. (D. C.) 447.

1. *Hatboro Nat. Bank v. Stevenson*, 33 Pa. Super. 144; *Philadelphia W. Co. v. Colonial Biscuit Co.*, 33 Pa. Super. 134.

2. Where a word is misused in an affidavit but it is clear what was intended to be expressed thereby it will be taken to mean what was thus clearly intended. *Ceranto v. Trimboli*, 63 W. Va. 340, 60 S. E. 138.

3. *Potomac Laundry Co. v. Miller*, 26 App. Cas. (D. C.) 230; *Sinclair v. Conlon*, 12 App. Cas. (D. C.) 161. See *supra*, IV, 6, B, d, (I.); IV, F, 2, d, (VIII.), (A.).

"If the facts stated will, by any fair and reasonable construction, con-

stitute a defense to the action within the scope of the defensive pleas, it is the right of the defendant to have the case tried by the jury. All that is required is that the facts alleged shall be sufficient to indicate a substantial legal defense made in good faith." *Paterson v. Barrie*, 30 App. Cas. (D. C.) 531; *Dobbins v. Thomas*, 26 App. Cas. (D. C.) 157. See also *St. Clair v. Conlon*, 12 App. Cas. (D. C.) 161; *Philadelphia Warehouse Co. v. Colonial Biscuit Co.*, 33 Pa. Super. 134.

Where Good Faith of Defendant Appears. — *Lawrence v. Hammond*, 4 App. Cas. (D. C.) 467.

4. *Camden Nat. Bank v. Fries-Breslin Co.*, 214 Pa. 395, 63 Atl. 1022; *Selden v. Neemes*, 43 Pa. 421.

5. *Gilmore v. German Sav. Bank*, 89 Ill. App. 442.

In proceeding to vacate a judgment by confession, the affidavits filed in support of the motion are to be construed most strongly against the moving party, and are not sufficient if they merely show facts from which, if proved, a defense may be inferred. *Chicago Fire Proof Co. v. Park Nat. Bank*, 145 Ill. 481, 32 N. E. 534; *Crossman v. Wohlleben*, 90 Ill. 537.

6. *Marsh v. Marshall*, 53 Pa. 396; *Com. v. Snyder*, 1 Pa. Super. 236. See more fully, *supra*, IV, F, 2, d, (I.).

7. *Collins v. Hansen*, 2 Penne. (Del.) 155, 44 Atl. 624; *May v. Forbes*, 2 Penne. (Del.) 194, 43 Atl. 839; *Gale v. Myers*, 4 Houst. (Del.) 546; *Hatboro Nat. Bank v. Stevenson*, 33 Pa. Super. 144. But see *Boal v. Citizens' N. G. Co.*, 23 Pa. Super. 339.

been held the strict rule of construction does not apply to an affidavit on behalf of a public corporation.<sup>8</sup>

**2. Interpretation of Writings.**—Where the case turns solely upon the interpretation of writings set forth in the statement of claim, there being no dispute as to the facts, the court will give judgment in accordance with its interpretation.<sup>9</sup> But where the affidavit of defense sets up material matters *dehors* the writings the court will not attempt to construe them, but will permit the case to go to trial.<sup>10</sup>

**E. SUPPLEMENTAL AND AMENDED AFFIDAVITS.**—Where a supplemental affidavit has been allowed to correct deficiencies which have been pointed out in the original it will be subjected to an especially close scrutiny.<sup>11</sup> Supplemental and original affidavits should be construed and considered together<sup>12</sup> and should not be contradictory.<sup>13</sup> Apparent inconsistency, however, is not fatal where the supplemental affidavit is fuller and more specific than the original, or where they are not irreconcilable in their express averments or necessary inferences.<sup>14</sup>

An amended affidavit displaces the original entirely and must be sufficient in itself.<sup>15</sup>

**F. LOST AFFIDAVIT.**—Where an affidavit of defense has been lost from the files it will be deemed to have been sufficient.<sup>16</sup>

**VIII. PURPOSE, USE AND EFFECT.**—**A. GENERALLY.**—While the purpose, use and effect of an affidavit of merits or defense depends considerably upon the particular rules of practice or statute by which it is required, its function in a general way is to prevent unnecessary delay in the enforcement of just claims and to that end to inform the court whether the defendant has, or in good faith believes he has, a valid or meritorious defense to the action.<sup>17</sup> The purpose which the affidavit is to subserve has an important bearing upon its form and

8. *Braseth v. Bottineau County*, 13 N. D. 344, 100 N. W. 1082, holding sufficient an affidavit "that this defendant has a good and sufficient defense to said action, as shown by the copy of the answer herein attached to this affidavit." But see *Pettigrew v. Sioux Falls*, 5 S. D. 646, 60 N. W. 27.

9. *Ryon v. Starr* (No. 1), 214 Pa. 310, 63 Atl. 701; *Continental T. & Tr. Co. v. Devlin*, 209 Pa. 380, 58 Atl. 843.

10. *Kerr v. Culver*, 209 Pa. 14, 57 Atl. 1105.

11. *Weston v. Killeen*, 11 Pa. Co. Ct. 412.

12. *Noble v. Kreuzkamp*, 111 Pa. 8, 2 Atl. 419; *Penrose v. Caldwell*, 29 Pa. Super. 550.

13. *Penrose v. Caldwell*, 29 Pa. Super. 550; *Sykes v. Anderson*, 14 Pa. Co. Ct. 329 (two supplemental affidavits must not be contradictory).

14. *Penrose v. Caldwell*, 29 Pa.

Super. 550. See also *Loeper v. Haas*, 24 Pa. Super. 184.

15. See *supra*, VI, C.

16. *O'Brian's Admr. v. Wiggins*, 22 Pa. Co. Ct. 236.

17. **U. S.**—*Fidelity & Dep. Co. v. United States*, 187 U. S. 315, 23 Sup. Ct. 120, 47 L. ed. 194. **Colo.**—*Martin v. Skehan*, 2 Colo. 614. **D. C.**—*Lawrence v. Hammond*, 4 App. Cas. 467; *Johnson v. Wright*, 2 App. Cas. 216; *Cropley v. Vogeler*, 2 App. Cas. 28. **Md.**—*Adler v. Crook*, 68 Md. 494, 13 Atl. 153. **N. Y.**—*Morris v. Kahn*, 62 N. Y. Supp. 1040. **Pa.**—*Andrews v. Blue Ridge Pack. Co.*, 206 Pa. 370, 55 Atl. 1059; *Muir v. Preferred Acc. Ins. Co.*, 203 Pa. 338, 53 Atl. 158. **R. I.**—*Pawtucket S. & G. P. Co. v. Briggs*, 21 R. I. 457, 44 Atl. 595. **Va.**—*Jackson v. Dotson*, 65 S. E. 484; *Grigg v. Dalsheimer*, 88 Va. 508, 13 S. E. 993. **W. Va.**—*Bank of Princeton v. Johnston*, 41 W. Va. 550, 23 S. E. 517.

contents, the function of an affidavit and of a plea being wholly different.<sup>18</sup>

B. AS APPEARANCE. — The filing of an affidavit of defense may operate as an appearance by the party filing it.<sup>19</sup>

C. EFFECT ON NECESSITY FOR APPEARANCE. — Statutes providing for affidavits of defense do not abrogate previous statutes requiring an appearance<sup>20</sup> or the filing of a plea within a given time.<sup>21</sup>

D. AS DEMURRER. — An affidavit of defense may serve the purpose of a demurrer by incorporating a suggestion of the insufficiency of the statement of claim.<sup>22</sup>

E. AS PLEA IN ABATEMENT. — An affidavit of defense which avers facts constituting a good plea in abatement is sufficient.<sup>23</sup>

F. AS WAIVER. — 1. **Generally.** — The filing of an affidavit of defense to the merits is a waiver of the right to plead in abatement,<sup>24</sup> and of merely formal defects in the statement of claim.<sup>25</sup>

2. **Of Right To Demur.** — Whether it operates as a waiver of the right to demur and therefore as a waiver of a demurrer filed with or as a part of it, the cases are not agreed.<sup>26</sup> It seems, however, that a demurrer cannot be interposed after the affidavit of defense has been disposed of.<sup>27</sup> But where the same point is raised in the affidavit and

18. See *supra*, IV, and the following cases: D. C. — *Gleason v. Hooke*, 5 App. Cas. 1. Pa. — *Johnson v. Royal Ins. Co.*, 218 Pa. 423, 67 Atl. 749. Va. — *Jackson v. Dotson*, 65 S. E. 484. Wash. — *State v. Superior Court*, 9 Wash. 668, 38 Pac. 206.

19. *McCullough v. Railway Mail Assn.*, 225 Pa. 118, 73 Atl. 1007.

20. *Lessing Bldg. & L. Assn. v. Lentz*, 10 Pa. Dist. 257.

21. *Johnson v. Royal Ins. Co.*, 218 Pa. 423, 67 Atl. 749.

22. *Bordentown Bkg. Co. v. Restein*, 214 Pa. 30, 63 Atl. 451; *Robinson v. Montgomery*, 14 Pa. Co. Ct. 106 (holding that the question thus raised should be disposed of before defendant is required to plead).

But technical objections to the plaintiff's statement cannot be raised by affidavit since its office is to prevent such objections. *Andrews v. Blue Ridge Pack. Co.*, 206 Pa. 370, 55 Atl. 1059; *Hunter v. Forsyth*, 205 Pa. 466, 55 Atl. 26.

Filing as Waiver of Right To Demur. See *infra*, VIII, F, 2.

23. *National Bank v. American* See *infra*, VIII, F, 2.

24. *Cunningham v. Ocean Coal Co.*, 13 Pa. Dist. 158. See the title "Abatement, Pleas of."

25. *Newbold v. Pennock*, 154 Pa. 591, 26 Atl. 606.

26. That the affidavit may incorporate a demurrer and answer to the

merits, see *Hanover F. Ins. Co. v. Eason*, 17 Pa. Dist. 915; *Duffy v. Mell*, 13 Pa. Dist. 143 (citing *Heller v. Royal Ins. Co.*, 151 Pa. 101, 25 Atl. 83; *Robinson v. Montgomery*, 3 Pa. Dist. 661). But see *Pittsburg, C. C. & St. L. R. Co. v. Hayes*, 13 Pa. Dist. 671, refusing to follow the above case and placing a different interpretation upon the decision in *Heller v. Royal Ins. Co.*, *supra*. In the latter case a demurrer was interposed after the affidavit of defense had been filed but before pleading. In interpreting this decision the court in *Pittsburg, C. C. & St. L. R. Co. v. Hayes*, *supra*, says: "This we understand only to mean that a demurrer, if filed, must be heard and disposed of *in limine*. Not that it and an affidavit of defense can be interposed contemporaneously and the defendant permitted to rely upon either or both; otherwise we can see no reason for refusing (as the supreme court did in that case) to permit the defendant to file his demurrer and have the same disposed of before trial on the merits. . . . It seems to us that the defendant should be required to elect upon what he will rely for a defense to the action, and we think that the filing of an affidavit of defense on the merits is an abandonment of the demurrer." See *Schonaman v. Schambach*, 18 York (Pa.) 124.

27. *Heller v. Royal Ins. Co.*, 151 Pa. 101, 25 Atl. 83.



demurrer it is held that the right to demur is not lost by filing an affidavit of defense.<sup>28</sup>

**3. Of Insufficiency of Plaintiff's Statement.**—The filing of an affidavit of defense is not a waiver of the insufficiency of plaintiff's statement of claim to support a judgment.<sup>29</sup>

**G. AT TRIAL.**—**1. As Plea or Answer.**—Unless its functions are enlarged by statute or rule of court an affidavit of merits or defense is not regarded as a plea in any way limiting or defining the issues<sup>30</sup> or affecting the admission of evidence<sup>31</sup> except as any other written admission of a party. Thus it cannot take the place of the required plea although it states the facts of the defense,<sup>32</sup> nor can it even be regarded as a verification of the plea which it accompanies.<sup>33</sup> Statutes, however, may give it a wider scope analogous to that of an answer or plea;<sup>34</sup> and rules of court may provide that only matters set up in the affidavit shall be provable at the trial,<sup>35</sup> or that matters set forth in the statement of claim and not denied by the affidavit of defense must be deemed admitted,<sup>36</sup> or that a counter-claim set up in

28. *Paltrowitz v. Lucknow I. & S. Co.*, 15 Pa. Dist. 738. The defendant may be allowed to withdraw his affidavit of defense and file a demurrer which raises the same point made in the affidavit. *Ewald v. Coe*, 15 Pa. Dist. 102, *distinguishing* *Heller v. Royal Ins. Co.*, 151 Pa. 101, 25 Atl. 83, as holding that where an affidavit of defense has been filed to the merits and a rule for judgment taken and disposed of, the defendant will not be heard on a demurrer which raises a defense not set up in the affidavit.

29. See *infra*, IX, C, 7. But see *Newbold v. Pennoek*, 154 Pa. 591, 26 Atl. 606; *Loucheim v. Maguire*, 6 Pa. Super. 635.

30. *Martin v. Skehan*, 2 Colo. 614.

It is not a substitute for pleading or a special plea. *Gleason v. Hoeke*, 5 App. Cas. (D. C.) 1.

**Functions of Affidavit and Plea Different.**—*Johnson v. Royal Ins. Co.*, 218 Pa. 423, 67 Atl. 749; *Muir v. Preferred Acc. Ins. Co.*, 203 Pa. 338, 53 Atl. 158.

It does not constitute an admission of allegations in the statement which are not denied in the affidavit, nor is it an admission of matters which it does not set forth. *Taylor v. Beatty*, 202 Pa. 120, 51 Atl. 771.

The defense to be made at the trial is not in any way limited by the affidavit of defense. *Flegal v. Hoover*, 156 Pa. 276, 27 Atl. 162; *Forman v. Baltimore & O. R. Co.*, 17 Pa. Dist. 101; *White v. Iron City Mut. F. Ins. Co.*, 6 Pa. Dist. 655.

But a defense wholly inconsistent with the affidavit cannot be set up. *McKeesport Borough v. Wood*, 160 Pa. 113, 28 Atl. 574.

31. The relevancy of evidence at the trial is not controlled or affected by the affidavit of defense but is determined by its bearing upon the issue made up by the statement and the pleas. *Flegal v. Hoover*, 156 Pa. 276, 27 Atl. 162.

32. *City of Central v. Wilcoxon*, 3 Colo. 566; *Scammon v. McKey*, 21 Ill. 554.

33. *Hansen v. Hale*, 44 Ill. App. 474.

34. In *Pawtucket S. & G. P. Co. v. Briggs*, 21 R. I. 457, 44 Atl. 595.

35. **Scope of Evidence Limited by Affidavit.**—*Wall v. Royal Soc.*, 179 Pa. 355, 36 Atl. 748 (not limited to specific facts averred in affidavit); *Murphy v. Jones* (Pa.), 6 Atl. 726.

**Notice of filing of set-off is sometimes required by rule of court.** *Carl Barchhoff Church Organ Co. v. Ecker*, 184 Pa. 350, 39 Atl. 85.

36. *Kaiser v. Kendrick*, 98 Pa. 528. See *Whitehead v. North Huntington Sch. Dist.*, 145 Pa. 418, 22 Atl. 991.

An affidavit amounting to a plea of confession and avoidance does not prevent the plaintiff from resting upon the *prima facie* case made by his statement in connection with the failure of the affidavit to deny such statement. *Neely v. Bair*, 144 Pa. 250, 22 Atl. 673.

The statement of claim is admissible in proof of facts not denied in the affidavit of defense. *Neely v. Bair*, 144

the affidavit shall be deemed admitted unless the plaintiff denies it by a counter-affidavit.<sup>37</sup> Under such rules the affidavit is regarded as part of the pleadings for the purpose of determining the issues,<sup>38</sup> but only those portions of the plaintiff's statement which are not denied may be read in evidence.<sup>39</sup>

**2. As Evidence.**—In so far as it contains relevant admissions the affidavit is admissible to prove them.<sup>40</sup> By offering the whole affidavit the plaintiff is not bound by every statement therein contained.<sup>41</sup>

**3. Necessity of Offering in Evidence.**—Where required merely for the purpose of preventing a default judgment the affidavit cannot be considered or used as evidence at the trial unless it has been offered for that purpose.<sup>42</sup> Where, however, by virtue of the statute or rule of court it has assumed the character and functions of a pleading it is a part of the record which may be considered and used as such without being offered in evidence.<sup>43</sup>

Pa. 250, 22 Atl. 673; *Wickersham v. Russell*, 51 Pa. 71.

**Recitals in instruments or records forming part of statement of claim** admitted if not denied. *South Bethlehem Borough v. Laufé*, 11 Pa. Co. Ct. 65.

Such a rule of court must be distinguished from the rule of law that on a rule for judgment for an insufficient affidavit of defense, the uncontradicted averments of the statement of claim must be taken as true. See *Industrial & L. Co. v. Hare*, 216 Pa. 389, 65 Atl. 1080; and *supra*, VII, B.

By stipulation a waiver of rights secured by such a rule is permissible. *O'Connor v. American Iron Mt. Co.*, 56 Pa. 234.

37. *Bair v. Hubartt*, 139 Pa. 96, 21 Atl. 210.

38. *Whitehead v. North H. School Dist.*, 145 Pa. 418, 22 Atl. 991.

39. *Kaiser v. Fendrick*, 98 Pa. 528; *Blair v. Ford China Co.*, 26 Pa. Super. 374.

Where all averments of the statement are denied it is not admissible in evidence. *Kaiser v. Fendrick*, 98 Pa. 528; *Hultz v. Gibbs*, 66 Pa. 260.

40. *Jacoby v. North British & Merc. Ins. Co.*, 10 Pa. Super. 366; *Forman v. Baltimore & O. R. Co.*, 17 Pa. Dist. 101. See *Boomer v. Henry*, 13 Pa. Co. Ct. 104.

It is not error to admit in evidence the whole record for the purpose of getting the affidavit of defense before the jury, although the affidavit may be offered alone. *Stockwell v. Loecher*, 9 Pa. Super. 241.

**Defendant cannot offer in evidence his affidavit of defense as evidence of the facts therein alleged, nor can the same be considered on appeal.** *Kittanning Borough v. Kittanning Consol. N. Gas Co.*, 26 Pa. Super. 355; *Jacoby v. North British Merc. Ins. Co.*, 10 Pa. Super. 366.

**The affidavit of one co-defendant who is not acting as the agent of the others is not admissible in evidence against them as an admission.** *Sunday v. Dietrich*, 16 Pa. Super. 640.

**Collateral issues in no way raised by or contained in the offer are not opened by such action.** *Farmers' & M. Nat. Bank v. Elizabethtown Nat. Bank*, 30 Pa. Super. 271.

**Implied Admission of Part of Claim.** *Williams v. Reynolds*, 86 Ill. 263.

**Admission by Failure To Deny.**—See *supra*, VIII, G, 1.

41. *McAvoy & McMichael v. Commonwealth T. Ins. & Tr. Co.*, 27 Pa. Super. 271.

42. *Flegal v. Hoover*, 156 Pa. 276, 27 Atl. 162; *Maynard v. Sixth Nat. Bank*, 98 Pa. 250.

**It is reversible error to permit counsel for plaintiff to read in his argument to the jury an affidavit which neither party has offered in evidence.** *Mullen v. Union Cent. L. Ins. Co.*, 182 Pa. 150, 37 Atl. 988.

43. *Whitehead v. North H. School Dist.*, 145 Pa. 418, 22 Atl. 991.

**An affidavit of merits filed with the plea need not be offered in evidence to be considered by the court, since it is a part of the record.** *Williams v. Rey-*

## IX. EFFECT OF FAILURE TO FILE AND INSUFFICIENCY.

A. GENERALLY.—The effect of failing to file an affidavit, or of the insufficiency of the one filed, depends upon the character of the proceeding and the particular statute or rule of court by which it is required.<sup>44</sup> It may entitle the plaintiff to an inquest,<sup>45</sup> or render his statement *prima facie* evidence of his claim.<sup>46</sup>

B. FAILURE TO ACCOMPANY A PLEA with the required affidavit of merits justifies the striking of the plea from the files and a judgment as upon default,<sup>47</sup> or judgment may be entered in such case without the formality of striking out the plea.<sup>48</sup> But such failure does not deprive the defendant of his right to have an unlawful attachment dissolved.<sup>49</sup>

C. SUMMARY JUDGMENT.—1. Generally.—Where the statutes or rules of court<sup>50</sup> so provide, the failure<sup>51</sup> to file an affidavit of merits or defense, or the filing of an insufficient<sup>52</sup> affidavit, entitles the plaintiff to a summary judgment, subject, of course, to the right of the court to allow an amended or supplemental affidavit to be filed,<sup>53</sup> or to extend the time for filing an affidavit.<sup>54</sup> Plaintiff must have complied with the law or rules of court entitling him to judgment,<sup>55</sup> and the record<sup>56</sup> and proceedings<sup>57</sup> in the case must be in such condition as to render the entry of judgment proper.

molds, 86 Ill. 263. See *Whiting v. Fuller*, 22 Ill. 33.

44. See *supra*, II.

On Motion To Set Aside Default. See *supra*, II, B, 10.

Supplementing and Amending Insufficient Affidavit.—See *supra*, VI.

45. See *supra*, II, E.

46. *Morrill v. Bissell*, 99 Mich. 409, 58 N. W. 324.

Plaintiff's Affidavit Must Be Offered in Evidence.—*Gordon v. Sibley*, 59 Mich. 250, 26 N. W. 485.

47. *New York Nat. Exch. Bank v. Reed*, 232 Ill. 123, 85 N. E. 548; *Braidwood v. Weiller*, 89 Ill. 606; *Horn v. Noble*, 95 Ill. App. 101. See *Price v. Marks*, 103 Va. 18, 48 S. E. 499; *Lewis' Admr. v. Hicks*, 96 Va. 91, 30 S. E. 466; *Grigg v. Dalsheimer*, 88 Va. 508, 13 S. E. 993; *Flat Top Groc. Co. v. McClaugherty*, 46 W. Va. 419, 33 S. E. 252.

48. *Snow v. Merriam*, 133 Ill. App. 641.

49. *Miller v. Fewsmith Lumb. Co.*, 42 W. Va. 323, 26 S. E. 175.

50. *Johnson v. Wright*, 2 App. Cas. (D. C.) 216.

51. Md.—*Griffith v. Adams*, 95 Md. 170, 52 Atl. 66. Tenn.—*Brien v. Peterman*, 3 Head 498. Va.—*Gregg v. Dalsheimer*, 88 Va. 508, 13 S. E. 993.

Action on Municipal Claim.—*Meadville School Dist. v. Rieman*, 31 Pa. Co. Ct. 50.

52. *Melvin & Son v. Conner*, 5 Penne. (Del.) 476, 62 Atl. 264; *Watson v. Southwick*, 2 Marv. (Del.) 254, 43 Atl. 93; *Brown v. Ohio Nat. Bank*, 18 App. Cas. (D. C.) 598.

For Insufficient Affidavit—Basis of Practice.—The practice of granting judgments for want of a *sufficient* affidavit rested for half a century on "the uncontrovertible judicial deduction, that an insufficient affidavit was legally no affidavit at all." The act of 1887 gave express legislative sanction to this rule. *Andrews v. Blue Ridge Pack. Co.*, 206 Pa. 370, 55 Atl. 1059.

A justice court has no authority to enter judgment for an insufficient affidavit. *Moore v. Bundy*, 22 Pa. Co. Ct. 583; *Spangler v. Rush*, 6 Pa. Dist. 28.

Default.—A judgment for the insufficiency of the affidavit of defense is not a default judgment. *Abeles v. Powell*, 6 Pa. Super. 123.

53. See *supra*, VI.

54. See *supra*, V.

55. See *supra*, II, G; *infra*, IX, C, 7; IX, 3, I; and also *Traders Nat. Bank v. Wood*, 6 Kulp (Pa.) 428; *Marstillier v. Ward*, 52 W. Va. 74, 43 S. E. 178.

56. *Wilkinson v. Brice*, 148 Pa. 153, 23 Atl. 982, 30 W. N. C. 30, holding that a supplemental affidavit showing a defense, if improperly filed as claimed, must first be stricken from the files.

57. Proceedings which operate as a



**2. Against Married Woman.**—In an action on a claim for which she or her separate estate is liable, judgment may be entered against a married woman for want of a sufficient affidavit of defense.<sup>58</sup>

**3. Against Joint Defendant.**—Where one of several joint defendants fails to comply with the law as to the filing of an affidavit the plaintiff may take judgment against him,<sup>59</sup> or such other relief as he is entitled to,<sup>60</sup> and proceed with the case as to the other defendants.<sup>61</sup> If an affidavit by one co-defendant protects the others against a default judgment,<sup>62</sup> the plaintiff may be permitted to amend by striking out such party and proceeding against the others.<sup>63</sup> But after an amendment of the statement to correct a defect of parties pointed out by the affidavit of defense, if proper steps are not taken to actually bring such new parties into the case judgment cannot be entered against any of the parties for insufficiency of the affidavit.<sup>64</sup>

**4. Where Counter-Claim or Set-Off Filed.**—If a counter-claim has been filed and no reply made thereto, judgment can be taken only by allowing the amount of the counter-claim.<sup>65</sup> And by rule of court it is sometimes provided that a counter-claim set up in the affidavit of defense is deemed admitted unless a sufficient counter-affidavit is filed by the plaintiff.<sup>66</sup>

A set-off filed with a plea may be established at the trial notwithstanding the failure to file an affidavit of defense where the necessity for such an affidavit is held not to apply to a set-off.<sup>67</sup>

**5. After Demurrer Overruled.**—Where a demurrer is interposed to the sufficiency of the statement of claim and the court finds the statement sufficient, judgment may be entered against defendant without giving him leave to file an affidavit of defense.<sup>68</sup>

**6. Effect of Amendment of Plaintiff's Statement.**—If the amendment of the plaintiff's statement of claim is not as to a matter of sub-

stay or as an extension of the time for filing an affidavit prevent the entry of judgment during their pendency. See *supra*, V, B, 2.

58. *Harrar v. Croney*, 13 Pa. Co. Ct. 193, quoting from *Steinman & Co. v. Henderson*, 94 Pa. 313. See also *Brooks v. Merchants' Nat. Bank*, 125 Pa. 394, 17 Atl. 418.

59. *Anthony v. Ward*, 22 Ill. 181. **Right To File Affidavit for Co-Defendant.**—See *supra*, III, D.

60. *Anthony v. Ward*, 22 Ill. 181.

61. See *infra*, IX, C, 8, b, and also *Com. v. McCleary*, 92 Pa. 188; *Sharp v. Murray*, 48 P. L. J. 301.

Judgment must be entered against defaulting defendants in an action on a joint debt, if plaintiff proceeds to judgment against the others for the insufficiency of their affidavit. *Murland v. Floyd*, 153 Pa. 99, 25 Atl. 1038; *American Bank's Appeal*, 153 Pa. 98,

25 Atl. 1040. But see *Campbell v. Floyd*, 153 Pa. 84, 25 Atl. 1033.

Judgment cannot be entered against one only of two defaulting partners. *Carson v. Carson*, 25 W. N. C. (Pa.) 358.

62. See *supra*, III, D.

63. *Miller v. Billingfelt*, 11 Pa. Dist. 57. Compare *Kidney v. Beemer*, 27 Pa. Super. 558.

64. *Dusenberry v. Bradley*, 88 Pa. 444.

65. *Potter v. Smith*, 9 How. Pr. (N. Y.) 262.

66. *Baer v. Hubartt*, 139 Pa. 96, 21 Atl. 210.

67. *West v. Darcy*, 20 R. I. 311, 38 Atl. 945.

68. *Bordentown Bkg. Co. v. Renstein*, 214 Pa. 30, 63 Atl. 451 (holding the practice in this respect to be unchanged by the act of 1887); *Bridge-man Bros. Co. v. Swing*, 205 Pa. 479, 55 Atl. 26.

stance,<sup>69</sup> as where it consists merely in striking out parties joined by mistake, judgment may be entered upon an insufficient affidavit previously filed.<sup>70</sup>

**7. Where Affidavit Not Required.** — Where an affidavit of merits or defense is not required,<sup>71</sup> as where plaintiff has failed to file the affidavit required of him or a sufficient statement of his claim,<sup>72</sup> or otherwise failed to comply with the statute or rules of court,<sup>73</sup> the absence of any affidavit or the filing of an insufficient one by the defendant will not justify a judgment against him.<sup>74</sup> A judgment entered under such circumstances will, on motion, be stricken off,<sup>75</sup> and this action will be sustained on appeal though the question was not raised below.<sup>76</sup>

In the federal courts the foregoing rule seems to apply only where the action itself is of a class in which an affidavit of defense cannot be required.<sup>77</sup> The filing of an affidavit in a proper case is a waiver of defects in the statement unless the averments of the affidavit amount to a special demurrer.<sup>78</sup>

**8. Where Partial Defense Is Made.** — *a. Generally.* — The statute<sup>79</sup> or rules<sup>80</sup> of the court may authorize the plaintiff to take judgment

**69. Necessity for Filing New Affidavit.** — See *supra*, II, F, 12.

**Extension of Time for Filing New Affidavit.** — See *supra*, V, B, 2.

**70. Kidney v. Beemer, 27 Pa. Super. 558.**

**71. See *supra*, II.**

**Actions Against Administrators.** — *Wright's Exrs. v. Cheney's Admsrs.*, 10 Phila. (Pa.) 469, 30 Leg. Int. 77.

**72. See *supra*, II, G, 2, and also *Emig v. Spatz*, 155 Pa. 642, 26 Atl. 765; *Barr v. McGary*, 131 Pa. 401, 19 Atl. 45; *Gould v. Gage*, 118 Pa. 559, 12 Atl. 476.**

**73. See *supra*, II, G, also *Hutchinson v. Woodwell*, 107 Pa. 509; *Gottman v. Shoemaker*, 86 Pa. 31.**

**Plaintiff's Failure To Serve Copy or Notice.** — *Marlin v. Waters*, 127 Pa. 177, 17 Atl. 890. See also *Tobyhanna & L. Lumb. Co. v. Home Ins. Co.*, 167 Pa. 231, 31 Atl. 564; *Zimmerman v. Drake*, 17 Pa. Dist. 754; *Blake v. Pennsylvania R. Co.*, 12 Pa. Dist. 661.

**74. *Foertsch v. Germuiller*, 2 App. Cas. (D. C.) 340; *Bartoe v. Guckert*, 158 Pa. 124, 27 Atl. 845; *Hutchinson v. Woodwell*, 107 Pa. 509.**

The discharge of a rule for a more specific statement is not an adjudication of the question of the sufficiency of the statement to support a judgment for want of a sufficient affidavit of defense. *Caruthers v. Pierie*, 13 Pa. Dist. 780.

**75. *Marlin v. Waters*, 127 Pa. 177, 17 Atl. 890.**

**76. *Hutchinson v. Woodwell*, 107 Pa. 509; *Gottman v. Shoemaker*, 86 Pa. 31.**

"A judgment for want of a sufficient affidavit of defense is in effect a judgment on demurrer, and like all such judgments must be self-sustaining on the face of the record." *Fritz v. Hathaway*, 135 Pa. 274, 19 Atl. 1011.

**77. *Felty v. National Acc. Soc.*, 139 Fed. 57; *Brady v. Osborn Eng. Co.*, 132 Fed. 412.**

**78. *American A. Co. v. Campbell*, 113 Fed. 389, 11 Pa. Dist. 260. And see *supra*, II, G, 2, a.**

**79. The Pennsylvania statute of July 15, 1897, P. L. 276, expressly authorizes judgment for that portion of the claim as to which the affidavit is sufficient (*Brown v. Gourley*, 214 Pa. 154, 63 Atl. 607; *Pierson v. Krause*, 208 Pa. 115, 57 Atl. 348). But the act of 1893 was constructed to apply only when part of the claim was admitted to be due and not where the affidavit was merely insufficient as to part of the claim (*Reilly v. Daly*, 159 Pa. 605, 28 Atl. 493; *Myers v. Cochran*, 3 Pa. Dist. 135; *Heckman v. Schmeck*, 35 Pa. Super. 39). As to the act of 1887 and the practice prior thereto, see *Stedman v. Poterie*, 139 Pa. 100, 21 Atl. 219; *United Oil Cloth Co. v. Dash*, 32 Pa. Super. 155; *Coburn v. Reynolds*, 3 Pa. Dist. 475; *Myers v. Cochran*, 3 Pa. Dist. 135.**

**80. A rule authorizing the entry of**

for that portion of his claim admitted to be due, or as to which the affidavit of defense is insufficient. The judgment may be entered for any portion of the claim whether constituting a separate item or only a part of such an item,<sup>81</sup> but it must be confined to the amount which is clearly and fairly admitted to be due.<sup>82</sup>

b. *Effect of Entry and Satisfaction on Subsequent Proceedings.*—Neither the entry of a judgment for part of the claim<sup>83</sup> and the satisfaction thereof,<sup>84</sup> nor the entry of judgment against one of several co-defendants<sup>85</sup> and the partial satisfaction thereof<sup>86</sup> deprive the plaintiff of the right to proceed to trial and judgment for the unpaid portion of his claim.

c. *Effect of Admission of Partial Defense.*—Where the defense made applies only to a part of the claim, and the plaintiff stipulates for a reduction to that extent, he is entitled to a judgment for the balance,<sup>87</sup> unless defendant has filed a new affidavit.<sup>88</sup>

9. When and How Taken. — a. *Generally.* — A judgment for failure to file an affidavit may be taken at any time after the right to file one has terminated.<sup>89</sup> The procedure governing the method of taking judgment for want of an affidavit of defense depends upon

judgment for part of the claim admitted or not denied in the affidavit of defense is applicable in case the affidavit is not legally sufficient as to part of the claim. *Stedman v. Poterie*, 139 Pa. 100, 21 Atl. 219.

81. *Roberts v. Sharp*, 161 Pa. 185, 8 Atl. 1023, *affirming* 14 Pa. Co. Ct. 86, 3 Pa. Dist. 136.

82. *Newcastle v. Newcastle Elec. Co.*, 2 Pa. Super. 228; *Maylin v. Root*, 3 W. N. C. (Pa.) 76.

Interest cannot be allowed unless the statement avers facts showing how much, if any interest, is due. *United Oil Cloth Co. v. Dash*, 32 Pa. Super. 155.

Where payment on account is averred without specifying that it was applied to any particular items of the claim, an admission in the affidavit that certain items are due does not authorize judgment. *Philadelphia v. Second & Third Sts. P. R. Co.*, 13 Pa. Co. Ct. 580, *s. c.*, 2 Pa. Dist. 705. But see *Jordan v. Kleinsmith*, 5 Pa. Dist. 674.

83. *Harding, Whitman & Co. v. York Knitting Mills*, 142 Fed. 228; *Pierson v. Krause*, 208 Pa. 115, 57 Atl. 348.

*Second Judgment for Insufficiency.*—*Lindenmeyer v. Hertgen*, 14 Pa. Dist. 394. See also *Taber v. Olmsted*, 158 Pa. 351, 27 Atl. 971; *Drake v. Irvine*, 10 Pa. Co. Ct. 486; *Philadelphia v. Second and Third Sts. P. R. Co.*, 2 Pa. Dist. 705.

84. *Stedman v. Poterie*, 139 Pa. 100,

21 Atl. 219; *Coleman v. Nantz*, 63 Pa. 178; *McKinney v. Mitchell*, 4 Watts & S. (Pa.) 25. And the same is true where judgment is entered for part of the claim and execution is issued thereon. *Russell v. Archer*, 76 Pa. 473.

But where there is neither statute nor rule of court authorizing a judgment for part and further proceedings for the rest of the claim, the rule would seem to be otherwise; although where the order of the court gives the plaintiff leave to proceed to trial for the balance of his claim this constitutes a special rule sufficient for the case. *Stedman v. Poterie*, 139 Pa. 100, 21 Atl. 219, *distinguishing* *Brazier v. Banning*, 20 Pa. 345, and similar cases on the ground that in such cases there was no rule of court authorizing a judgment for part and further proceedings for the rest of the claim. See *Blydenstein v. Haseltine*, 140 Pa. 120, 21 Atl. 306; *McKinney v. Mitchell*, 4 Watts & S. (Pa.) 25.

85. See *supra*, IX, C, 3.

86. *Com. v. McCleary*, 92 Pa. 188, an action against two defendants on a joint and several bond.

87. *Mayberry v. Van Horn*, 83 Ill. 289; *Allen v. Watt*, 69 Ill. 655.

88. *Haggard v. Smith*, 71 Ill. 226; *Hurd v. Burr*, 22 Ill. 29.

89. *Slocum v. Slocum*, 8 Watts (Pa.) 367. See *Grigg v. Dalsheimer*, 88 Va. 506, 13 S. E. 993; and *supra*, V.



the statute governing the particular class of cases in question.<sup>90</sup>

b. *Motion for Judgment.*—(I.) *Necessity For.*—It seems that in the absence of a rule of court providing otherwise,<sup>91</sup> a judgment for the absence or insufficiency of the required affidavit can be entered only upon a motion therefor.<sup>92</sup>

(II.) *Nature Of.*—Plaintiff should confine his request for judgment to that portion of his claim as to which he is entitled to judgment or his request may be denied.<sup>93</sup> It would seem to be proper, however, for the court to enter a judgment for part of the claim even though the motion or rule is general in terms.<sup>94</sup> Specific exceptions to the affidavit are sometimes required by rule of court.<sup>95</sup>

c. *Entry of Judgment.*—Where the affidavit is held to be insufficient as to part of the claim the court must adjudicate and indicate by its judgment what portions of the affidavit are insufficient.<sup>96</sup> The amount of the judgment must not exceed the amount claimed in the plaintiff's statement,<sup>97</sup> less any valid set-off sufficiently averred in the affidavit of defense.<sup>98</sup>

The filing of an opinion while desirable in such cases is not always essential,<sup>99</sup> as where the rule for judgment specifies the particular items as to which the affidavit is insufficient.<sup>1</sup>

90. The Pennsylvania Act of 1887 supersedes all previous statutes and all rules of court in so far as they prescribe a different method for taking judgment in the class of cases covered by it. *Marlin v. Waters*, 127 Pa. 177, 17 Atl. 890. See *Com. v. McCutcheon*, 4 Pa. Co. Ct. 309; *Zimmerman v. Drake*, 17 Pa. Dist. 754. But this act does not apply to proceedings by *scire facias*. *Lessing Bldg. Assn. v. Lentz*, 10 Pa. Dist. 257; *Johnson v. Scofield*, 8 Pa. Dist. 410.

91. *Oswego R. Pulp Co. v. Delaware Water G. Pulp. Co.*, 10 Pa. Co. Ct. 312.

Where no affidavit of defense has been filed within the time prescribed, judgment may be entered by the prothonotary out of term time. It is not necessary for the plaintiff to wait until the next term of court to make his motion for judgment. *Tobyhanna & Lehigh L. Co. v. Home Ins. Co.*, 167 Pa. 231, 31 Atl. 564, based apparently upon a rule of court.

92. *Doud v. Citizens' Ins. Co.*, 6 Pa. Co. Ct. 329. See *Bordentown Bkg. Co. v. Restein*, 214 Pa. 30, 63 Atl. 451. But see *Grigg v. Dalsheimer*, 88 Va. 508, 13 S. E. 993.

Judgment entered for want of an affidavit of defense, under the act of 1887, without a motion in court, will be set aside. *Blair v. Warden*, 4 Pa. Co. Ct. 464, holding that such act merely provides that a judgment may be moved for want of an affidavit of defense.

Where a supplemental affidavit has been filed pending a rule for judgment for insufficiency of the original affidavit, a new rule need not be taken, but the court may properly determine the sufficiency of both affidavits upon the original rule. *Bloomer v. Reed*, 22 Pa. 51.

93. *Faux v. Fitler*, 223 Pa. 568, 72 Atl. 891; *Gross v. Ricchezza*, 37 Pa. Super. 441.

94. *Drane v. Watson Coal Min. Co.*, 15 Pa. Dist. 591. See also *Moore v. Eyre*, 32 Pa. Super. 259.

But on a rule for judgment for the portion of the claim admitted to be due the court will not render judgment for the insufficiency of the affidavit. *Goodell v. Hall*, 9 Pa. Dist. 178. But see *Pure Oil Co. v. Terry*, 16 Pa. Super. 337.

95. *Traders' Nat. Bank v. Wood*, 6 Kulp (Pa.) 482.

96. *Pierson v. Krause*, 208 Pa. 115, 57 Atl. 348.

97. *Philadelphia v. Pierson*, 211 Pa. 388, 60 Atl. 999.

98. See *supra*, IX, C, 4.

99. *Sulzner v. Cappeau*, 223 Pa. 87, 72 Atl. 270.

1. *Moore v. Eyre*, 32 Pa. Super. 259; *Smucker v. Grinberg*, 27 Pa. Super. 531 (citing *Pierson v. Krause*, 208 Pa. 115, 57 Atl. 348).

**10. Opening and Setting Aside.**—While a default judgment entered for failure to file the required affidavit of merits or defense may be opened and set aside,<sup>2</sup> this can only be done in accordance with the rules applicable to default judgment generally<sup>3</sup> and therefore requires a showing of merits.<sup>4</sup>

**D. WAIVER.—1. By Plaintiff.**—*a. Of Right to Judgment.*—**(1.) Generally.**—The plaintiff by his conduct may waive the necessity for the filing of an affidavit and thereby forfeit his right to judgment for the failure to file an affidavit or a legally sufficient one.<sup>5</sup> Thus it has been held that any action in the case taken by the plaintiff before moving for judgment, which is calculated to mislead the defendant, is a waiver.<sup>6</sup> Giving notice or entering a rule to plead<sup>7</sup> unless such

**2. N. J.**—*Shawger v. Granard*, 64 N. J. L. 219, 45 Atl. 979. **Pa.**—*Trescott v. Co-Operative Bldg. Bank*, 215 Pa. 438, 64 Atl. 630; *Kelber v. Pittsburgh Nat. Plow Co.*, 146 Pa. 485, 23 Atl. 335. **R. I.**—*O'Connell v. King & Son*, 26 R. I. 544, 59 Atl. 926, following *Johnson v. Hoxsie*, 19 R. I. 703, 36 Atl. 720.

But see *Hurlburt & Sons v. Straub*, 54 W. Va. 303, 46 S. E. 163; *Marstiller v. Ward*, 52 W. Va. 74, 43 S. E. 178.

A judgment entered through inadvertence of defendant's counsel for want of an affidavit of defense will be opened to let in a *prima facie* defense. *Bright v. McLaughlin*, 1 Pa. Co. Ct. 296; *Gerz v. American Relief Assn.*, 15 Pa. Dist. 992.

**Actions for Municipal Claims.**—See *Olyphant Borough v. Egreski*, 29 Pa. Super. 116; *Philadelphia v. Merz*, 16 Pa. Super. 332.

**3. Bradshaw Elec. San. Odor Co. v. Bradshaw**, 27 Pa. Super. 196.

Delay may be such as to defeat the application for relief. *Lytle v. Forrest*, 175 Pa. 408, 34 Atl. 734.

**4. Wilder v. Arwedson**, 80 Ill. 435 (facts of defense must be set out); *Swartz v. Morgan & Co.*, 163 Pa. 195, 29 Atl. 974, 975; *Gorman v. Hibernian Bldg. & L. Assn.*, 154 Pa. 133, 25 Atl. 827.

An inquest and a judgment thereon will not be set aside except upon a showing of a meritorious case. *Zeigler v. Smith*, 115 N. Y. S. 99; *Clews v. Peper*, 112 App. Div. 430, 98 N. Y. Supp. 404.

A mere technical defense is insufficient. *Caldwell v. Carter*, 153 Pa. 310, 25 Atl. 831. See *Woelfel v. Hammer*, 159 Pa. 446, 28 Atl. 146.

Where the affidavit accompanying the motion would have been insufficient to

prevent judgment had it been filed in time, the judgment will not be opened. *Hipple v. Laird*, 189 Pa. 472, 42 Atl. 46.

**5.** See *Johnson v. Royal Ins. Co.*, 218 Pa. 423, 67 Atl. 749; *Spencer's Admr. v. Field*, 97 Va. 38, 33 S. E. 380; *Lewis' Admr. v. Hicks*, 96 Va. 91, 30 S. E. 466.

**Delay In Asking for Judgment.**—See *supra*, VII, A.

Waiting until the day of trial to which the case has been assigned by agreement of parties is a waiver, and a motion for a default judgment at such a time is properly denied. *O'Connell v. King & Son*, 26 R. I. 544, 59 Atl. 926; *Pawtucket S. & G. P. Co. v. Briggs*, 21 R. I. 457, 44 Atl. 595.

The question of waiver may be presented on appeal although not raised in the court below. *O'Neal v. Rupp*, 22 Pa. 395.

**6.** *Superior Nat. Bank v. Stadelman*, 153 Pa. 634, 26 Atl. 201; *O'Neal v. Rupp*, 22 Pa. 395. See also *Pawtucket S. & G. P. Co. v. Briggs*, 21 R. I. 457, 44 Atl. 595; *Jackson v. Dotson (Va.)*, 65 S. E. 484 (failure to object to the plea or to an order for a continuance until the next term).

The mere taking of depositions before the defendant's time to file the affidavit has expired does not waive the requirement of such affidavit. *Price v. Marks*, 103 Va. 18, 48 S. E. 499.

**7.** *Edison Gen. Elec. Co. v. Johnstown Elec. L. Co.*, 56 Fed. 456; *Superior Nat. Bank v. Stadelman*, 153 Pa. 634, 26 Atl. 201.

The withdrawal of a rule to plead preserves the plaintiff's right to take judgment for want of an affidavit of defense. *Joynes v. Kohler*, 12 Phila. (Pa.) 337.

action is involuntary,<sup>8</sup> renders the filing or sufficiency of an affidavit of defense or merits immaterial, especially where a plea has been filed pursuant thereto.<sup>9</sup> The same is true where plaintiff replies to a plea.<sup>10</sup>

Bringing the case to issue waives all questions as to the necessity or sufficiency of the affidavit of merits or defense.<sup>11</sup>

(II.) **Reference to Arbitrators.** — After a case has been referred to arbitrators at the plaintiff's instance,<sup>12</sup> or after a hearing before arbitrators and an award in favor of the defendant,<sup>13</sup> it has been held too late to ask for judgment for failure to file the required affidavit of defense. But the entry of a rule for reference by the defendant will not deprive the plaintiff of his right to judgment for want of a sufficient affidavit.<sup>14</sup>

(III.) **Effect of Voluntary Dismissal of Motion.** — Although the plaintiff has dismissed his rule or motion for judgment, for the purpose of expediting the progress of the case, the court in its discretion may allow him to take a second rule for judgment where defendant endeavors to delay a trial.<sup>15</sup>

b. *Of Right To Appeal.* — The right to appeal from an order denying a motion for judgment for want of a sufficient affidavit may be waived.<sup>16</sup> But the filing of a replication after the overruling of an objection to pleas filed without the required affidavit is not a waiver.<sup>17</sup>

2. **By Defendant.** — The defendant by his conduct may waive irregularities in the judgment taken against him.<sup>18</sup> But the filing of an

8. **Plaintiff's Action Must Be Voluntary.** — A notice to plead is not a waiver of the right to enter judgment for failure to file an affidavit where required by the same rule of court as makes it necessary for the defendant to file the affidavit. *Horner v Horner*, 145 Pa. 258, 23 Atl. 441, *distinguishing* *Duncan v. Bell*, 28 Pa. 516; *O'Neal v. Rupp*, 22 Pa. 395.

9. *Edison Gen. Elec. Co. v. Johnstown Elec Co.*, 56 Fed. 456.

10. See *Durant v. Murdock*, 3 App. Cas. (D. C.) 114, 122.

11. *Hutton & Co. v. Marx*, 69 Md. 252, 14 Atl. 684; *Flegal v. Hoover*, 156 Pa. 276, 27 Atl. 162. See also *McWilliams v. Richland*, 16 Ill. App. 333, in which the objection was not raised until the appeal.

**Issue of Law or Fact.** — A requirement that a plea be accompanied with an affidavit, being for the plaintiff's benefit, his action in taking issue, either of law or fact, on a plea filed without the affidavit is a waiver of its necessity. *Lewis' Admr. v. Hicks*, 96 Va. 91, 30 S. E. 466.

12. *Duncan v. Bell*, 28 Pa. 516; *O'Neal v. Rupp*, 22 Pa. 395. But see *Horner v. Horner*, 145 Pa. 258, 23 Atl. 441, where the court says that the re-

port of *Duncan v. Bell*, *supra*, is misleading on this point.

13. *Lusk v. Garrett*, 6 Watts & S. (Pa.) 89; *Gregg v. Meeker*, 4 Binn. (Pa.) 428.

14. *Pence v. Poet*, 221 Pa. 434, 70 Atl. 832; *Taggart v. Fox*, 1 Grant Cas. (Pa.) 190.

15. **Second Rule for Judgment.** — *Pence v. Poet*, 221 Pa. 434, 70 Atl. 832.

16. *Levinson v. Blumenthal*, 14 Pa. Dist. 628.

17. *Spencer's Admr. v. Field*, 97 Va. 38, 33 S. E. 380.

18. *Com. v. Snyder*, 1 Pa. Super. 286.

The premature entry of judgment by default is an irregularity which the defendant may waive by applying for and securing a stay of execution. *Harres v. Com.*, 35 Pa. 416.

A judgment entered for the want of an affidavit of defense where one has in fact been filed, is irregular, although the affidavit filed is insufficient. Such irregularity, however, is cured where on a *scire facias* to revive such judgment another judgment is entered for want of an affidavit of defense. *Campbell's Appeal*, 118 Pa. 128, 12 Atl. 299.



insufficient affidavit where none is required is not a waiver of his rights.<sup>19</sup> He may also waive his right to take advantage of the plaintiff's waiver.<sup>20</sup>

**X. APPEALS.**—A. GENERALLY.—Questions with respect to the practice relating to affidavits of merits and defense which have been properly raised below<sup>21</sup> will, of course, be considered on an appeal subject to the general rules governing appellate procedure.<sup>22</sup> Errors which are not harmless<sup>23</sup> and which have not been waived,<sup>24</sup> will be ground for reversal, as where the court has acted without the required affidavit of merits.<sup>25</sup>

Only those matters properly in the record and which the court below could properly have taken into consideration will be considered on appeal,<sup>26</sup> and the usual presumptions in favor of the lower court's action will be indulged.<sup>27</sup> The exercise of discretion will not be reviewed, at least where the discretion is absolute<sup>28</sup> or where it has not been abused.<sup>29</sup>

An order discharging a rule for judgment for want of a sufficient affidavit of defense will not be reversed in doubtful and uncertain cases, especially where a broad inquiry into the facts is necessary,<sup>30</sup> but only where the case is very clear and free from doubt.<sup>31</sup>

19. See *supra*, IX, C, 7. But see *Burns v. Armstrong*, 223 Pa. 66, 72 Atl. 255.

20. *Superior Nat. Bank v. Stadelman*, 153 Pa. 634, 26 Atl. 201.

Although plaintiff has waived his right to object to the failure to accompany a particular plea with an affidavit, if defendant withdraw such plea and file another plaintiff may take judgment for failure to accompany the latter with an affidavit. *Spencer's Admr. v. Field*, 97 Va. 38, 33 S. E. 380.

21. Ill.—*McKichan v. Follett*, 87 Ill. 103; *Finkelstein v. Schilling*, 135 Ill. App. 543 (erroneous allowance of counter-affidavits to the merits not questioned below). Ia.—*D. M. V. Livestock Ins. Co. v. Henderson*, 38 Iowa 446, holding that only those objections to the affidavit urged below will be considered on appeal. Pa.—*Chambers v. McLean*, 23 Pa. Super. 551 (holding that exception to order discharging rule for judgment is essential); *Com. v. Cavett*, 23 Pa. Super. 57.

Objections to alleged defects in an affidavit of merits on a motion to vacate a default judgment cannot be raised for the first time on appeal from an order granting the motion. *Headings v. Gavette*, 86 App. Div. 592, 83 N. Y. Supp. 1017.

The insufficiency of plaintiff's state-

ment is not waived by failure to question it below. See *supra*, IX, C, 7.

22. See the title "Appeal," and *Wells v. Booth*, 35 Mich. 424.

23. *Gilchrist T. Co. v. Northern Grain Co.*, 204 Ill. 510, 68 N. E. 558; *Flegal v. Hoover*, 156 Pa. 276, 27 Atl. 162.

24. *Culver v. Johnson*, 90 Ill. 91, waiver by amending affidavit.

25. Setting aside default without required affidavits of merits—reversed on appeal. See *supra*, II, B, 12.

26. See *supra*, VII; and *Town of Omro v. Ward*, 19 Wis. 232.

27. See *Garrity v. Lozano*, 83 Ill. 597; *Bowen v. Webb*, 34 Mont. 61, 85 Pac. 739.

28. See *supra*, VI, A; *Magruder v. Schley*, 17 App. Cas. (D. C.) 227; *Meyers v. Davis*, 13 App. Cas. (D. C.) 361.

29. *Fleisher v. Blackburn*, 15 Pa. Super. 289.

30. *Marquis v. McKay*, 216 Pa. 307, 65 Atl. 678; *Philadelphia Typewriter Co. v. Smith, etc. Co.*, 37 Pa. Super. 149; *Schlitz Brew. Co. v. Rosenbluth*, 33 Pa. Super. 303.

31. *Leiby v. Lutz*, 224 Pa. 377, 73 Atl. 345; *Kidder Elev. I. Co. v. Muckle*, 198 Pa. 388, 48 Atl. 272; *Thomas v. O'Donnell*, 183 Pa. 145, 38 Atl. 597; *Ensign v. Kindred*, 163 Pa. 638, 30 Atl. 274; *Aetna Ins. Co. v. Confer*, 158 Pa. 598, 604, 28 Atl. 153.

B. INTERPRETATION OF RULES OF COURT. — An appellate court is not disposed to overturn the construction by an inferior court of its own rules regulating affidavits of merits and defense.<sup>32</sup>

32. *Fidelity & Dep. Co. v. United States*, 187 U. S. 315, 23 Sup. Ct. 120, 47 L. ed. 194 (as to cases in which affidavit of defense is necessary); *Stedman v. Poterie*, 139 Pa. 100, 21 Atl. 219; *Morrison v. Nevin*, 130 Pa. 344, 18 Atl. 636; *Wickersham v. Russell*, 51 Pa. 71; *Livingston v. Ker-* baugh, 30 Pa. Super. 534; *Shenk v. Hacker*, 3 Pa. Super. 439 (necessity of stating facts of defense). Whether the affidavit of merits complies with the rules of court is a question for the trial court to determine. *Rhodes v. Walsh*, 58 Minn. 196, 59 N. W. 100.

Vol. I.

# AFFRAY

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### CROSS-REFERENCES:

Assault;

Riot.



**I. DEFINITION.**—Originally an affray meant no more than riding or going about armed with dangerous or unusual weapons, to the terror of the people.<sup>1</sup> Later the term came to mean the fighting of two or more persons in some public place, to the terror of citizens.<sup>2</sup>

1. *State v. Huntly*, 25 N. C. 418, 40 Am. Dec. 416, *citing* 4 Black. Com. 149; *Hawkins P. C.*, b. 1, c. 28, § 1; *Sir John Knight's Case*, 3 Mod. 117, 87 Eng. Reprint, 75; 3 Co. Inst. 158, 160, declaring that the English statute, 2 Edw. III., c. 3, prohibiting this form of the offence, was merely a declaration of the common law. But see *contra*, *Simpson v. State*, 5 Yerg. (Tenn.) 356.

See also *State v. Washington*, 19 Tex. 128, 70 Am. Dec. 323, where the indictment was held unquestionably good and sufficient, though it did not allege fighting.

2. *Ala.*—*Thompson v. State*, 70 Ala. 26. *Ark.*—*State v. Brewer*, 33 Ark. 176. *Ill.*—*Thomas v. Riley*, 114 Ill. App. 520, an indictment for assault where an instruction improperly assumed that there had been an affray. *Ind.*—*Supreme Council v. Garrigus*, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298. *Ky.*—*Com. v. Simmons*, 6 J. J. Marsh. 614, an indictment for assault. *N. Y.*—*People v. Judson*, 11 Daly 1, 83. *N. C.*—*State v. Perry*, 50 N. C. 9, 69 Am. Dec. 768. *S. C.*—*State v. Parish*, 8 Rich. L. 322, an indictment for assault. *Tenn.*—*Simpson v. State*, 5 Yerg. 356. *Va.*—*Wilkes v. Jackson*, 2 Hen. & M. 355, 360. *Can.*—*Hickey v. Fitzgerald*, 41 U. C. Q. B. 303, 308.

There may be an affray without actual violence. *Hickey v. Fitzgerald*, 41 U. C. Q. B. 303, 308, *citing* 1 Hawk. P. C. 487, § 2. Thus in *State v. Perry*, 50 N. C. 9, 69 Am. Dec. 768, a conviction for an affray was upheld where the defendant by using abusive language provoked an assault but was prevented by bystanders from returning the blow.

**Distinguished From Assault.**—It is the circumstance of publicity which distinguishes an affray from an assault, for there may be an assault which may not amount to an affray, as where it happens in a private place out of the hearing or seeing of any one except the parties concerned, in which case it cannot be to the terror of the people. *State v. Heflin*, 8 Humph. (Tenn.) 84, *citing* one Hawk. P. C. 487. See also *Ga.*—*Gamble v. State*, 113 Ga. 701, 39

*S. E.* 301, where a house "near" a public road was held not to be such a public place. *Tenn.*—*Cash v. State*, 2 Overt. 198. *Tex.*—*Saddler v. Republic*, Dall. 610. *Eng.*—*Queen v. Hunt*, 1 Cox C. C. 177.

An affray includes an assault, and a conviction for the latter may be had under an indictment for the former offense. *Thomas v. State*, 70 Ala. 26; *McClellan v. State*, 53 Ala. 640.

Where the affray charged is the fighting of two or more on a public highway or street, or simply in a public place, the indictment is in fact merely for the several assaults and batteries, one bill being used simply to avoid several trials for the same offence. *State v. Griffin*, 125 N. C. 692, 34 S. E. 513.

So an indictment on a conviction for an affray may be legally described as for an assault and battery. *State v. Brown*, 82 N. C. 585.

**Former Jeopardy.**—It is no bar to an indictment for an assault that there has been previously a conviction for an affray. *State v. Parish*, 8 Rich. L. (S. C.) 322, where the court said: "In the former indictment there was no allegation of an assault and battery on this prosecutrix, the fact being proved would not have been pertinent to any issue then involved, and would not have supported, or in any way induced the conviction." But in *Fritz v. State*, 40 Ind. 18, the court held squarely that a conviction for an affray barred a prosecution for an assault based on the same transaction.

**Affray is distinguished from a riot** in not being premeditated (*Rosc. Cr. Ev.* 270), and in the fact that while two may commit an affray, the presence of three is necessary to a riot (*State v. Allen*, 11 N. C. 356); and in that a riot involves also some sort of resistance to lawful authority. *Queen v. Hunt*, 1 Cox C. C. (Eng.) 177.

"An affray is when persons come together without a premeditated design to disturb the peace, and suddenly break out into a quarrel among themselves; and it is contradistinguished from a riot, by being more of a private nature." *Peo-*

Some modern statutes have injected into the offense the additional element of agreement or joint action.<sup>3</sup>

**II. INDICTMENT OR INFORMATION.**<sup>4</sup>—A. GENERALLY.—An indictment<sup>5</sup> or information<sup>6</sup> for engaging in an affray must allege with certainty all of the essential elements of the offense.

In general an indictment is sufficient if it avers those facts which the statute makes essential,<sup>7</sup> or if it follows a form provided by statute.

*ple v. Judson*, 11 Daly (N. Y.) 1, 83.

Dueling is an aggravated form of affray. *State v. Fritz*, 133 N. C. 725, 45 S. E. 957, citing 4 Bl. Com. 145.

3. *Hawkins v. State*, 13 Ga. 322, 58 Am. Dec. 517; *State v. Fritz*, 133 N. C. 725, 45 S. E. 957 (which held that the presence of seven others made the place public).

A friendly scuffle cannot be an affray. *State v. Freeman*, 127 N. C. 544, 37 S. E. 206.

More than angry words and boisterous conduct are required to constitute an affray. *Blackwell v. State*, 119 Ga. 314, 46 S. E. 432; *Hawkins v. State*, 13 Ga. 322, 58 Am. Dec. 517.

4. See generally the title "Indictment and Information."

5. *State v. Woody*, 47 N. C. 335; *State v. Heflin*, 8 Humph. (Tenn.) 84; *State v. Priddy*, 4 Humph. (Tenn.) 429; *Simpson v. State*, 5 Yerg. (Tenn.) 356.

"This is a common law offence, and must be charged in the indictment with that degree of certainty and precision required by the common law rules of criminal pleading; one of those rules, almost without an exception, is, that every fact and circumstance necessary to constitute the offence, must be specifically set forth in the indictment, with precision and certainty; that it may appear on the face of the indictment, whether or not they constitute an indictable offence—that the defendant may know how to make his defence; and that he may be enabled to plead a conviction or acquittal on such indictment, in bar of another prosecution for the same offence—and that the court may know what judgment should be given if the defendant be convicted. And if any material fact, or circumstance which is a necessary ingredient in the offence be omitted, it will vitiate the indictment, and the defendant may avail himself of it by demurrer, arrest of judgment, or writ of error. Arch. C. L., 41, 42." *State v. Heflin*, 8 Humph. (Tenn.) 84.

Use of a deadly weapon need not be averred. *State v. Hooper*, 82 N. C. 663; *State v. Moore*, 82 N. C. 659.

6. An information must contain all the substantial requisites of an indictment at common law. *State v. Vanloan*, 8 Ind. 182, holding insufficient an information alleging that defendants fought in a public place, but failing to state whom or what they fought.

7. Ark.—*State v. Brewer*, 33 Ark. 176. Mo.—*State v. Dunn*, 73 Mo. 586. Tex.—*State v. Billingsley*, 43 Tex. 93, which sustained an indictment alleging that the defendants, in J. county, on a given date, "at the gin-house of William Billingsley, in said Johnson County, the said gin-house being then and there a public place, did then and there unlawfully and willfully fight together, contrary," etc.

In *State v. Brewer*, 33 Ark. 176, a count in the indictment charging affray was as follows: "The Grand Jury of Baxter County, etc., etc., accuse A. J. B. and G. C. A. of the crime of an affray, committed as follows, to-wit: The said A. J. B. and the said G. C. A. on the 10th day of July, A. D. 1877, in the county, etc., aforesaid, mutually, by agreement, and unlawfully did fight to, with and against each other to the terror of citizens of the state of Arkansas then and there being, against the peace, etc.," as to necessity of alleging public place. See *infra*, II, B, 3, b.

In *State v. Warner*, 4 Ind. 604, an indictment was held sufficient which charged that the named defendants "in Washington township, in said county of Morgan, with force and arms, being then and there unlawfully assembled and gathered together in a warlike manner, then and there at a public place in said township in said county, did then and there unlawfully, by agreement, fight and make an affray with each other," etc.

In *State v. Priddy*, 4 Humph. (Tenn.) 429, the indictment charged that the defendants "'with force and arms,

ute.<sup>8</sup> The words of the statute need not be followed, however, if substantial equivalents are used.<sup>9</sup> The indictment, however, must be for an affray and not for an assault and battery.<sup>10</sup>

**B. SPECIFIC AVERMENTS.**—1. **Generally.**—While certain elements of the crime are common to all jurisdictions, differences in the statutes make essential particular averments in some states which are not necessary in others.<sup>11</sup>

2. **Jurisdictional Facts.**—Where under certain circumstances a superior court has concurrent jurisdiction with an inferior court, it is not necessary to allege the existence of the facts giving the former

being unlawfully assembled together, and arrayed in warlike manner, then and there, in a public place, unlawfully to the great terror and disturbance of all the good citizens of said state, then and there assembled, *did make an affray* in contempt of the laws," etc.

An indictment charging that defendant and one E on a certain date "at the said county of Harrison, in a certain public road and highway, there situate, did then and there voluntarily and unlawfully engage in a fight with each other, and did then and there use blows and violence towards each other, in an angry manner, to the terror and disturbance of the people then and there being, against the peace and dignity of the state," was held sufficient. *State v. Warren*, 57 Mo. App. 502.

For other forms approved see the following cases: Ark.—*Childs v. State*, 15 Ark. 204. Mo.—*State v. Dunn*, 73 Mo. 586. S. C.—*State v. Sumner*, 5 Strobb. L. 53. Tenn.—*Wilson v. State*, 3 Heisk. 278; *State v. Benthal*, 5 Humph. 519; *Curlin v. State*, 4 Yerg. 143. Tex.—*State v. Washington*, 19 Tex. 128, 70 Am. Dec. 323; *Saddler v. Republic*, Dall. 610. Eng.—10 Cox C. C. Appendix, p. xlix, 1.

**Riding or Going Armed With Dangerous or Unusual Weapons.**—The following indictment charging an affray committed in this manner was held sufficient: "The jurors for the State upon their oath present, that R. S. H., late of the county aforesaid, laborer, on the first day of September, in the present year, with force and arms, at and in the county aforesaid, did arm himself with pistols, guns, knives and other dangerous and unusual weapons, and, being so armed, did go forth and exhibit himself openly, both in the day time and in the night, to the good citi-

zens of Anson aforesaid, and in the said highway and before the citizens aforesaid, did openly and publicly declare a purpose and intent, one J. H. R. and other good citizens of the State, then and there being in the peace of God and of the State, to beat, wound, kill, and murder, which said purpose and intent, the said R. S. H., so openly armed and exposed and declaring, then and there had and entertained, by which said arming, exposure, exhibition and declarations of the said R. S. H., divers good citizens of the State were terrified, and the peace of the State endangered, to the evil example of all others in like cases, offering, to the terror of the people, and against the peace and dignity of the State." *State v. Huntly*, 25 N. C. 418, 40 Am. Dec. 416. See also *State v. Washington*, 19 Tex. 128, 70 Am. Dec. 323.

8. **Code Form.**—"State of Alabama, ——— County. Circuit Court, ——— term, 18—. The Grand Jury of said county charge that, before the finding of this indictment A. B. and C. D. did fight together in a public place, against the peace and dignity of the State of Alabama." Alabama Criminal Code, § 4923. See *Thompson v. State*, 70 Ala. 26; *McClellan v. State*, 53 Ala. 640.

9. *Williams v. State*, 64 Ind. 553, 31 Am. Rep. 135.

10. *Champer v. State*, 14 Ohio St. 437, as explained in *Barbolt v. Wright*, 45 Ohio St. 177, 12 N. E. 185, 4 Am. St. Rep. 535.

11. Where the statute is of such a nature as to create a new offense, the indictment must be framed in reference thereto and conform either to the letter or substance of the statute. *Skains v. State*, 21 Ala. 218, where the statute penalized fighting in a public place with firearms.



jurisdiction, the absence of such facts being matter of defense.<sup>12</sup>

**3. Place of Offense.**—*a. Generally.*—The venue of the offense must be alleged.<sup>13</sup>

*b. Public Place.*—The essence of the offense is that it occurred in a public place, and this fact must be alleged.<sup>14</sup> This may be done by simply averring that the affray was committed "in a public place," without further particulars,<sup>15</sup> or by stating facts showing that the place was a public one.<sup>16</sup>

**Public Highway or Street.**—Some courts judicially notice that a public highway or street is a public place, and therefore hold sufficient an averment that the affray occurred in a public highway.<sup>17</sup> Others have regarded such an averment as insufficient.<sup>18</sup>

**4. Nature of Affray.**—*a. Generally.*—While the common law precedents seem to sanction a simple averment of the making of an affray, without further particulars as to the manner in which the offense was committed,<sup>19</sup> some courts regard such an averment as the

**12. Jurisdictional Facts.**—Although the jurisdiction of a superior court is dependent upon the fact that a justice has not within six months after the commission of the offense proceeded to take official cognizance of the same, the indictment need not allege these facts, but they are matters of defense to be taken advantage of under a plea of not guilty. *State v. Hooper*, 82 N. C. 663; *State v. Moore*, 82 N. C. 659.

**13. Venue.**—It is sufficient to allege the offense to have been committed in a certain named county without specifying the township or otherwise particularizing the place. *State v. Warner*, 4 Ind. 604. See *Saddler v. Republic*, Dall. (Tex.) 610.

**14. Mo.**—*State v. Warren*, 57 Mo. App. 502. **S. C.**—*State v. Sumner*, 5 Strobb. L. 53. **Tenn.**—*State v. Priddy*, 4 Humph. 429; *Simpson v. State*, 5 Yerg. 356.

But see *State v. Brewer*, 33 Ark. 176. An averment that the act was committed in the presence of two named persons is not sufficient to supply the failure to allege that it was committed in a public place, even in connection with the averment that it was committed on a public highway. *Williams v. State*, 64 Ind. 553, 31 Am. Rep. 135.

**15. N. C.**—*State v. Griffin*, 125 N. C. 692, 34 S. E. 513; *State v. Baker*, 83 N. C. 649. **Tenn.**—*Wilson v. State*, 3 Heisk. 278. **Tex.**—*Shelton v. State*, 30 Tex. 432.

**16. State v. Warren, 57 Mo. App. 502.**

In *State v. Heflin*, 8 Humph. (Tenn.) 84, an averment that the fighting oc-

curred "in the town of Clarksville," was held insufficient since the averment might be true although the fighting occurred in a private place.

**17. State v. Warren, 57 Mo. App. 502. See *State v. Griffin*, 125 N. C. 692, 34 S. E. 513; *State v. Baker*, 83 N. C. 649.**

**City Street.**—*Carwile v. State*, 35 Ala. 392.

An indictment alleging the making of an affray "in a certain public street or highway in the town of New Salem," was approved in *State v. Washington*, 19 Tex. 128, 70 Am. Dec. 323. See also *Saddler v. Republic*, Dall. (Tex.) 610.

**Averment Required.**—*Queen v. O'Neill, Ir. R.*, 6 C. L. 1, apparently holds that the indictment must allege that the offense was committed "in a public street or highway."

**18.** The court judicially knows that public highways are frequently abandoned and cease to be public places long before they cease to be public highways, and furthermore public highways are frequently laid out in sections of the country which have not yet become public places within the meaning of the statute. *Williams v. State*, 64 Ind. 553, 31 Am. Rep. 135, following *State v. Weakly*, 29 Ind. 206, in which case the affray was alleged to have taken place "on a certain highway."

**19.** See *Queen v. O'Neill, Ir. R.*, 6 C. L. 1, and also 10 Cox C. C. Appendix, p. xlix.

An indictment charging the making of an affray is sufficient without stat-

statement of a conclusion<sup>20</sup> and require some further statement of facts.<sup>21</sup>

b. *Fighting* by two or more persons is essential and must be alleged<sup>22</sup> except, of course, where that form of affray is charged which consists in going about armed with dangerous and unusual weapons, or being arrayed in warlike manner.<sup>23</sup> But it is not necessary to aver that they fought against each other.<sup>24</sup>

c. *Agreement To Fight*.—Where agreement to fight is an essential element of the offense, it must be averred that the fighting was by agreement.<sup>25</sup>

d. *Terror of People*.—The fact that the fighting or affray was to the terror of the people is a distinctive element of the offense and must apparently be averred,<sup>26</sup> although it is not required to be proved.<sup>27</sup>

C. JOINDER OF COUNTS FOR AFFRAY AND ASSAULT.—Although at common law it seems that an indictment may join counts for affray and assault and battery,<sup>28</sup> such joinder is not permissible under a statute requiring an indictment to charge but one offense though permitting the indictment to allege in the alternative the different modes and means by which the crime may have been committed.<sup>29</sup>

ing the manner in which the affray occurred, or that there was fighting. *State v. Washington*, 19 Tex. 128, 70 Am. Dec. 323; *Saddler v. Republic*, Dall. (Tex.) 610 (treating additional averments as surplusage).

20. *Ind.*—Supreme Council *v. Garrigus*, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298. *N. C.*—*State v. Woody*, 47 N. C. 335, in which the indictment charged defendants with unlawfully assembling and making an affray. *Tenn.* *State v. Priddy*, 4 Humph. 429. See also *Simpson v. State*, 5 Yerg. 356.

21. See following section.

22. *State v. Priddy*, 4 Humph. (Tenn.) 429; *Simpson v. State*, 5 Yerg. (Tenn.) 356. *Contra*, *State v. Washington*, 19 Tex. 128, 70 Am. Dec. 323.

The indictment must charge a fighting or a being arrayed in a warlike manner in some public place. *State v. Woody*, 47 N. C. 335. See also *State v. Griffin*, 125 N. C. 692, 34 S. E. 513.

23. *State v. Griffin*, 125 N. C. 692, 34 S. E. 513; *State v. Huntly*, 25 N. C. 418, 40 Am. Dec. 416; *State v. Washington*, 19 Tex. 128, 70 Am. Dec. 323.

24. *Fighting Against Each Other*.—An indictment in the usual form charging that defendants "did make an affray by fighting" is sufficiently definite to show that defendants fought against each other and not on the same side of the combat. *State v. Benthal*, 5 Humph. (Tenn.) 519. See

also *State v. Brewer*, 33 Ark. 176. But see *State v. Vanloan*, 8 Ind. 182.

Although the indictment alleges that the defendants fought together, it is not necessary to show that they fought with each other; but evidence that they fought on the same side against another person who was not indicted is not at variance with the indictment. *Thompson v. State*, 70 Ala. 26.

25. See *Williams v. State*, 64 Ind. 553, 31 Am. Rep. 135. See Supreme Council *v. Garrigus*, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298.

An affidavit forming the basis of a prosecution for an affray does not sufficiently allege a fighting by agreement where it merely charges that one F. (defendant) did fight one L. P. by agreement in a public place, etc. *Fritz v. State*, 40 Ind. 18.

26. See *supra*, note 8. But see *State v. Sumner*, 5 Strobb. L. (S. C.) 53.

27. *State v. Sumner*, 5 Strobb. L. (S. C.) 53.

28. See *Ark.*—*Childs v. State*, 15 Ark. 204. *N. C.*—*State v. Baker*, 83 N. C. 649. *Tex.*—*Coyle v. State* (Tex. Crim.), 72 S. W. 847.

But see *Com. v. Perdue*, 2 Va. Cas. 227.

29. *State v. Brewer*, 33 Ark. 176, holding, however, that assault and battery may be proved under the count charging an affray if its averments are sufficient to cover the offense proved.

**III. TRIAL.**—A. GENERALLY.—The rules governing criminal trials generally<sup>30</sup> are applied to a prosecution for an affray.<sup>31</sup>

B. INSTRUCTIONS are governed by the principles applied in all criminal trials<sup>32</sup> and must accord with the law defining the essential ingredients of the offense,<sup>33</sup> the rights of the parties involved,<sup>34</sup> and the punishment to be inflicted.<sup>35</sup>

Instructions on self-defense must be given on request if there is evidence tending to show self-defense.<sup>36</sup>

30. See the title "Trial."

31. Where defendants jointly indicted are tried together, since the defense of one inures to the benefit of the other they have the rights of one defendant only as to challenges, and one of them is not entitled to the concluding argument merely because he refuses to introduce evidence, where his co-defendant has offered evidence. *Hawkins v. State*, 13 Ga. 322, 58 Am. Dec. 517.

**Impeachment of Co-Defendant.**—Where a co-defendant takes the stand in his own behalf to exculpate himself at the expense of his co-defendants, his position being adverse to them, they are entitled to cross-examine and impeach him. *State v. Goff*, 117 N. C. 755, 23 S. E. 355.

Wife of co-defendant. *State v. Harbison*, 94 N. C. 885.

32. See the title "Instructions."

An instruction upon an abstract question not presented by the evidence held non-prejudicial though perhaps erroneous. *Emerson Wilson v. State*, 3 Heisk. (Tenn.) 278.

A contested fact cannot be assumed by the court in its instructions, since this would be an invasion of the province of the jury. *Skains v. State*, 21 Ala. 218.

The instructions should not unduly emphasize the testimony of a single witness where the evidence is conflicting; but where the conflicting statements are put side by side and the jury directed to convict in one case and acquit in the other in accordance with their finding as to the facts, and such instruction is accompanied by another to examine and weigh all the testimony and to acquit the defendant unless satisfied that he wilfully entered into the fight, there is no error. *State v. Weathers*, 98 N. C. 685, 4 S. E. 512.

33. An instruction which omits an essential element of the crime, for instance, that the act must have been done to the terror and disturbance of

others, is erroneous. *State v. Warren*, 57 Mo. App. 502, holding, however, that there need be no instructions as to matters not charged in the indictment.

In *Hawkins v. State*, 13 Ga. 322, 58 Am. Dec. 517, the refusal to charge that not only must the fighting have been in a public place but that it must be proven that it was to the terror of the citizens, was held not error where the court instructed the jury in the language of the Code in relation to the offense.

An instruction as to aiding and abetting approved, that "the mere presence of a man at a difficulty is not sufficient evidence of aiding and encouraging, but, being present, they must do or say something tending to aid or encourage the parties fighting." *State v. Harrell*, 107 N. C. 944, 12 S. E. 439.

Where an indictment charges mutual assaults the court may charge the law as to mutual assaults and batteries without charging the specific law as to affrays, "for the very sufficient reason that when the affray is charged to have been by fighting of two or more, there is no distinction between the law of affray, and that of assault and battery, by which it is committed." *State v. Griffin*, 125 N. C. 692, 34 S. E. 513.

34. Instruction approved as to right of abutting owner to forcibly prevent defendant from brandishing firearms and using vulgar language on the public highway. *State v. Davis*, 80 N. C. 351, 30 Am. Dec. 86.

35. See *Skains v. State*, 21 Ala. 218.

36. *Coyle v. State* (Tex. Crim.), 72 S. W. 847 (explaining and distinguishing *Pollock v. State*, 32 Tex. Crim. 29, 22 S. W. 19). See *State v. Weathers*, 98 N. C. 685, 4 S. E. 512.

But although a defendant claims that he acted in self-defense, the court is not required to instruct in detail as to the law relating to assaults with felonious intent and the necessity for



C. VERDICT.—The verdict must be sufficient in form to constitute a finding of the guilt of the accused,<sup>37</sup> and must be supported by the evidence.<sup>38</sup>

IV. CONVICTION.—A. OF ASSAULT AND BATTERY.—In some jurisdictions it is held that since an affray necessarily includes an assault and battery, an indictment for the former will justify a conviction for the latter.<sup>39</sup> In others, whether an assault and battery may be proved under an indictment for an affray depends upon whether it contains the allegations necessary to warrant proof of an assault.<sup>40</sup>

B. UNDER INDICTMENT FOR ASSAULT AND BATTERY.—It has been held that an affray cannot be proved under an indictment for assault and battery.<sup>41</sup>

C. NECESSITY OF INDICTMENT OR CONVICTION OF BOTH PARTIES.—Where the grand jury refuses to indict one party to an alleged af-

retreating. *State v. Harrell*, 107 N. C. 944, 12 S. E. 439.

37. Form of Verdict.—“We find that an affray was committed by Chambers and Stanley, in the fighting of Connor, in Weakley county, as charged in the indictment, that the defendant Curlin aided and abetted in the commission of said affray.” This verdict though informal was a sufficient finding of Curlin’s guilt, since all participants are principals. *Curlin v. State*, 4 Yerg. (Tenn.) 143.

38. Where there is evidence of all the essential elements of an affray, a verdict of guilty will not be disturbed on appeal. *Hawkins v. State*, 13 Ga. 322, 58 Am. Dec. 517.

Whether the conduct of the accused was justifiable is a question for the jury, and where there is evidence to sustain their finding that he was not justified, which finding has been approved by the trial judge by refusing to grant a new trial, the appellate court will not say that such refusal was erroneous. *Blackwell v. State*, 119 Ga. 314, 46 S. E. 432.

39. *Thompson v. State*, 70 Ala. 26; *McClellan v. State*, 53, Ala. 640.

40. *Childs v. State*, 15 Ark. 204, holding that a conviction for an assault could not be sustained under the indictment charging that the defendants at a certain time and place, in a public highway, did make an affray by fighting, to the terror of the people. “There can be no doubt that, if counts for the assault be added in an indictment for an affray, one or all may be convicted of the assault, if the evidence falls short of proving an affray. But . . . although the offences are

of the same generic class, and the commission of the higher may involve the commission of the lower offence, yet the indictment in this case does not contain all the substantive allegations necessary to let in proof of the assault and battery. The court distinguishes *State v. Allen*, 11 N. C. (4 Hawks) 356, on the ground that there the indictment substantially charged an assault and battery.” See also *Com. v. Perdue*, 2 Va. Cas. 227; *State v. Brewer*, 33 Ark. 176.

Where fighting together is charged, an assault and battery may be proved. *State v. Brewer*, 33 Ark. 176; *State v. Griffin*, 125 N. C. 692, 34 S. E. 513; *State v. Brown*, 82 N. C. 585; *State v. Wilson*, 61 N. C. 237.

Since an indictment for affray charges a mutual assault, defendant may be convicted of assault under it. *State v. Harbison*, 94 N. C. 885; *State v. Allen*, 11 N. C. 356.

Although defective as an indictment for an affray it may be sufficient as a charge of assault and battery. *State v. Woody*, 47 N. C. 335.

41. An indictment against A for an assault upon B is not sustained by proof of a fight between them by agreement at fisticuffs. *Champer v. State*, 14 Ohio St. 437, distinguished and explained in *Barholt v. Wright*, 45 Ohio St. 177, 12 N. E. 185, 4 Am. St. Rep. 535. “By the statutes of this state a distinct offense is made of an affray or agreement to fight; and the effect of the holding is that where such an offense is committed, the indictment must be for an affray, and not for an assault and battery.”

fray.<sup>42</sup> or if one is acquitted by the trial jury, the other may nevertheless be convicted of an assault<sup>43</sup> or of an affray,<sup>44</sup> although as to the latter the contrary has been held on the ground that an affray is a fighting by agreement.<sup>45</sup>

42. Under an indictment charging that defendant and another committed an affray by fighting together by mutual and common consent, defendant may be convicted of an assault, although as to the other the grand jury endorsed not a true bill. *State v. Brown*, 82 N. C. 585; *State v. Wilson*, 61 N. C. 237.

43. *State v. Brewer*, 33 Ark. 176; *Childs v. State*, 15 Ark. 204.

"An affray is a mutual fighting, and an indictment therefor is a charge against each person. One may be acquitted and the other convicted of an assault, or one may be found guilty of an assault with a deadly weapon and the other of a simple assault." *State*

*v. Albertson*, 118 N. C. 633, 18 S. E. 321.

44. Ala.—*McClellan v. State*, 53 Ala. 640. N. C.—*State v. Allen*, 11 N. C. 356. Tenn.—*Cash v. State*, 2 Overt. 198, since consent or agreement is unnecessary.

See also *State v. Griffin*, 125 N. C. 692, 34 S. E. 513; *State v. Goff*, 117 N. C. 755, 23 S. E. 355; *State v. Harrell*, 107 N. C. 944, 12 S. E. 439. But see *State v. Wilson*, 61 N. C. 237.

45. Where two defendants are jointly indicted for an affray both must be convicted or both acquitted. "The successful defense of one will operate as an acquittal of both." *Hawkins v. State*, 13 Ga. 322, 58 Am. Dec. 517.

# AGREED CASE

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#### CROSS-REFERENCES:

Amicable Actions;  
Appeal.

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**I. DEFINITION.**—An agreed case is a proceeding provided by statute whereby, without action, parties may submit to a competent

court for determination a *bona fide* controversy existing between them.<sup>1</sup>

**II. NATURE AND PURPOSE.**—A. CHARACTER OF THE PROCEDURE.—The agreed case is of statutory origin.<sup>2</sup> The purpose and effect of the statutes is to subject the parties who submit a case to the judgment of the court as if one of them had been brought before it by due process properly served, in the name and at the instance of the other.<sup>3</sup> These statutes dispense with the ordinary procedure and have no application to any other than such statutory proceedings, and do not authorize beginning actions in other cases without an issuance of summons.<sup>4</sup>

The case in this procedure stands for complaint or petition, answer, evidence, and a verdict returned into court.<sup>5</sup> If pleadings are filed

1. More fully an agreed case may be described as a proceeding by which competent, real and interested parties to a real controversy which might be the subject of a present civil action between them, upon which an enforceable judgment which would be a bar to a future action might be rendered in favor of one party and against the other, agree upon all the ultimate as distinguished from the evidentiary facts upon which the controversy is based, and without action submit a written or oral statement thereof, according as the statute may provide, to a court of competent jurisdiction for adjudication.

2. Ky.—Jones *v. Hoffman*, 18 B. Mon. 656. N. Y.—Marx *v. Brogan*, 188 N. Y. 431, 81 N. E. 231. N. C.—Grandy *v. Gulley*, 120 N. C. 176, 26 S. E. 779; Grant *v. Newsom*, 81 N. C. 36. S. C.—Reeder *v. Workman*, 37 S. C. 413, 16 S. E. 187; South Carolina Soc. *v. Gurney*, 3 S. C. 51.

Statutory provisions may be found as follows: Ariz.—Rev. St., 1901, § 1391. Ark.—Sand. & Hill's Dig. of the St., 1894, §§ 5903-5905. Cal.—Code Civ. Proc., §§ 1138-1140. Colo.—Mill's Ann. Code, c. 24, §§ 278-280. Idaho.—Rev. Codes, Vol. 2, §§ 5068-5070. Ill.—Hurd's Rev. St., 1905, §§ 100-101. Ind.—Burn's Ann. St., 1896, Vol. 1, §§ 562-564. Ia.—McClain's Ann. St., 1880, §§ 3408-3415. Kan.—Dassler's Gen. St., 1905, §§ 5450-5452. Ky.—Civ. Code, § 705, cited in Canada *v. Hopkins*, 7 Bush 108. Minn.—Rev. Laws, 1907, p. 1060, c. 39, §§ 3218-3220. Mo.—Rev. St., 1899, Vol. 1, §§ 793-794; Ann. St., 1906, §§ 793, 795. Mont.—Rev. Codes, 1907, Vol. 2, § 7255. Neb.—Cobbey's Ann. St., 1903, Vol.

1, p. 497; Civ. Code, title XV, c. II, §§ 1572-1574. N. Y.—Code Civ. Proc., Vol. 2, §§ 1279-1281. N. C.—Rev. of 1905, Vol. 1, §§ 803-805. Ohio.—Bates' Ann. St. (Everett's 5th ed.), Vol. 2, §§ 5207-5209. Okla.—Wilson's Rev. & Ann. St., 1903, Vol. 2, §§ 4717-4719. Ore.—Bellinger & Cotton's Ann. Codes & St., Vol. 1, §§ 193-195. S. C.—Code of Laws, 1902, Vol. 2, §§ 374-376. S. D.—Rev. Codes (Hipple's ed.), 1904, p. 992, §§ 787-789; Grantham's Ann. St., 1899, Vol. 2, §§ 6788-6790. Tenn.—Shannon's Code, Vol. 2, §§ 5206-5210, 5189, 6330. Tex.—Sayles' Civ. Stat., Vol. 1, § 1293. Utah.—Comp. Laws, 1907, §§ 3218-3220. Wash.—Ballinger's Ann. Codes & St., Vol. 2, §§ 5044-5046. Wis.—Sanborn & Berryman's Ann. St., 1898, § 2788, and Sup. 1906, p. 1180, § 2788. This procedure originated in New York, as is said in Marx *v. Brogan*, 188 N. Y. 431, 432, 81 N. E. 231, in the report of the commissioners appointed to revise the New York practice and procedure under the constitution of 1846. That report contained a section which the legislature adopted as part of the Code of Procedure of 1848.

3. South Carolina Soc. *v. Gurney*, 3 S. C. 51.

4. State *ex rel. Webb v. McCune* 129 Mo. App. 511, 107 S. W. 1030; Ramsdell *v. Duxberry*, 14 S. D. 222, 228, 85 N. W. 221.

5. Peake *v. Webb*, 132 Mo. App. 601, 112 S. W. 13.

So in a case where there is a complaint and a stipulation which is treated by the court and parties as amending the complaint and raising an issue, this is not an agreed case. Bickford *v. Kirwin*, 30 Mont. 1, 75 Pac. 518.

they should be disregarded;<sup>6</sup> nor can any question be made upon them in the appellate court.<sup>7</sup>

A pending action cannot be submitted by this procedure; it is a substitute for a civil action,<sup>8</sup> and its effect upon the rights of the parties is the same as that of an action. It is a short and convenient mode of adjudicating legal rights<sup>9</sup> without the trouble and expense of procuring testimony or the delay involved in pleadings, evidence, and a trial of issues of fact.<sup>10</sup>

B. DISTINGUISHED FROM ARBITRATION. — An agreed case is not an arbitration, but is a recognized judicial proceeding.<sup>11</sup>

C. DISTINGUISHED FROM CASE STATED. — The fundamental principle of a statute authorizing an agreed case is that it should be a substitute for an action.<sup>12</sup> But if there is no statute authorizing an agreed case, a case stated to the court independent of any pending action does not

6. *The Warrick Bldg. & L. Assn. v. Houghland*, 90 Ind. 115; *Thaison v. Sanchez*, 13 Tex. Civ. App. 73, 35 S. W. 478.

7. *The Warrick Bldg. & L. Assn. v. Houghland*, 90 Ind. 115.

8. *Blake v. Commissioners*, 18 Kan. 266; *Van Sickle v. Van Sickle*, 8 How. Pr. (N. Y.) 265.

9. *Williams v. Rochester*, 2 Lans. (N. Y.) 169; *Newark, etc. R. Co. v. Perry County*, 30 Ohio St. 120, 123.

10. *Mo.—Peake v. Webb*, 132 Mo. App. 601, 112 S. W. 13. N. Y.—*Van Sickle v. Van Sickle*, 8 How. Pr. 265. N. C.—*McKethan v. Ray*, 71 N. C. 165.

The New York court of appeals has recently said that the statute "seems thus far to have afforded to parties an inexpensive and expeditious method of securing the judgments of the courts without the delay and circumstance inseparable from regular actions, and has amply vindicated the wisdom of the commissioners upon whose report it was inaugurated." *Marx v. Brogan*, 188 N. Y. 431, 436, 81 N. E. 231.

It is well settled that the agreed statement of facts in the statutory agreed case eliminates and takes the place of pleadings. *Colo.* — *Central City Water Co. v. Kimber*, 1 Colo. 475. *Ill.* — *Hurd's Rev. St.*, 1891, § 100. *Ind.* — *Geisen v. Reder*, 151 Ind. 529, 532, 51 N. E. 353; *Day v. Day*, 100 Ind. 460; *Warrick Bldg. & L. Assn. v. Houghland*, 90 Ind. 115; *Manchester v. Dodge*, 57 Ind. 584; *Sharpe v. Sharpe's Admr.*, 27 Ind. 507. *Ia.* — *Donald v. St. Louis, etc. R. Co.*, 52 Iowa 411, 3 N. W. 462.

11. *In Farwell v. Sturges*, 165 Ill. 252, 46 N. E. 189, it was contended

that the proceeding was an arbitration. Mr. Justice Carter, speaking for the court, said: "The proceeding is not an arbitration, but is a proceeding in a court of general jurisdiction, before a judge thereof selected by the parties. By the ancient common law all pleadings were oral, and we see no reason why the parties may not, under the statute in question, without converting the trial judge into a mere arbitrator, waive the issuing of process and the formalities of written pleadings and trial by jury, and by agreement appear in a circuit court, before a judge thereof selected by them, and under an agreement to be entered of record, as provided, make an oral submission of their controversies to such judge and be bound by the judgment or decree which shall be entered, releasing all errors and waiving the right of appeal. The statute requires the proceedings to be had in the circuit court or in the superior court of Cook county, and a judgment or decree to be entered which 'may be enforced in like manner as other judgments or decrees of such court.' The statute evidently contemplates that the proceeding shall be a proceeding in court, and one at law or in chancery, according to its nature."

12. *Van Sickle v. Van Sickle*, 8 How. Pr. (N. Y.) 265, 268, where it was said that no authority was contained in the code provision for the submission of actions; that it related solely to the submission of questions of difference without action. An action had been commenced which the court said must be deemed to be abandoned, or at least suspended, and the



present a case in which a judgment can be rendered that will bind anybody.<sup>13</sup>

Again, a case stated may be signed by the attorneys for the parties, but this is not true of an agreed case. The requirement that the parties themselves shall sign the case is not technical, but goes to the jurisdiction of the court.<sup>14</sup>

In an agreed case there must be submitted an affidavit that the controversy is real; but in a case stated no such affidavit is required.<sup>15</sup>

**D. DISTINGUISHED FROM AGREED STATEMENT OF FACTS.**—An agreed case submitted by the parties without action differs in essential features from an agreed statement of facts filed by the parties in an action brought in the ordinary way. "In the latter case, the agreed facts are regarded in the same light as facts settled by the verdict of a jury. . . . But where the controversy is submitted by agreement without action, . . . the jurisdiction of the court over parties and subject-matter attaches only to the precise state of facts contained in the stipulation."<sup>16</sup> A stipulation as to what the evidence is, commonly called an agreed statement of facts, does not constitute an "agreed case" under the statutes.<sup>17</sup> And the fact that an agreed

case considered and determined entirely independent of it.

13. *Smith v. Eline*, 4 Pa. Dist. 490.

14. *Bradford v. Buchanan*, 39 S. C. 237, 240, 17 S. E. 501, where at the trial the attorneys attempted to turn the case into a controversy without action under the code by agreeing upon a statement of facts which enlarged the scope of the action. In *Reeder v. Workman*, 37 S. C. 413, 416, 16 S. E. 187, the court said: "It should certainly appear in some way that the parties have bound themselves by the agreement, and are to be bound by the decision, and not, as in this case, come afterwards and repudiate the whole proceedings. Other considerations recommend the construction which we have given to the section under consideration, which is nothing more nor less than to allow the plain terms of the statute to have their legitimate effect; among others, that a different rule would put it in the power of attorneys, without the knowledge of their clients, to submit questions involving all the parties might be worth, for the decision of the courts, and the first intimation that a citizen would have of his ruin would be the arrival of the sheriff with the execution."

15. *Canaday v. Hopkins*, 7 Bush (Ky.) 108, 111; *Reeder v. Workman*, 37 S. C. 413, 416, 16 S. E. 187.

16. *State ex rel. Webb v. McCune*, 129 Mo. App. 511, 107 S. W. 1030, cit-

*ing Hinkle v. Kerr*, 148 Mo. 43, 49 S. W. 864; *State to Use of Kenrick v. Hudson*, 86 Mo. App. 501; *Jackson v. Railroad*, 66 Mo. App. 506.

17. *Colo.*—*Truesdale v. Montrose County*, 44 *Colo.* 416, 99 *Pac.* 63. *Kan.*—*Blake v. Commissioners*, 18 *Kan.* 266, opinion by Burr, J. *Ky.*—*Canaday v. Hopkins*, 7 *Bush* 108, 111. *Mo.*—*State ex rel. Malin v. Merriam*, 159 *Mo.* 655, 60 *S. W.* 1112; *Munford v. Wilson*, 15 *Mo.* 540; *State ex rel. Webb v. McCune*, 129 *Mo. App.* 511, 107 *S. W.* 1030. *Mont.*—*Bickford v. Kirwin*, 30 *Mont.* 1, 5, 75 *Pac.* 518.

In *State ex rel. Malin v. Merriam*, 159 *Mo.* 655, 60 *S. W.* 1112, the court said: "It is manifest that this is not an agreed case, within the meaning of section 793, *Rev. St.* 1899, which authorizes parties to a question of difference, without action, to agree upon a case containing the facts upon which the controversy depends, and submit the same to a court of competent jurisdiction for decision; for such an agreed case is 'without action,' which means without filing a suit, having summons issued, and the defendant brought into court against his will, followed by the usual steps in a suit. It is clearly a suit regularly begun, issues made up, and, to save the trouble of introducing testimony to support all or any of the questions at issue, the parties stipulate as to the existence or non-existence of the facts in issue. Such a stipulation is

statement of facts occupies the footing of a special verdict does not make it an agreed case within the meaning of the statute.<sup>18</sup> So, also, where such agreement only substitutes a brief statement on the record for written pleadings, and does not dispense with proof of the facts upon which the judgment of the court is sought, it does not constitute an agreed case under the statute.<sup>19</sup>

When parties agree to certain facts involved in a case which they do not wish to controvert, the agreement, when signed, is used before the tribunal, which ties the question of fact, as evidence, concluding the parties. Where an agreed statement of facts is submitted, the judgment will be upon findings of fact; but in an agreed case the judgment is upon the agreed case to which the parties have assented *without findings*.<sup>20</sup>

The agreed case is a part of the judgment roll by direct force of the statute,<sup>21</sup> but the agreed statement is a mere substitute for evidence and must be brought into the record by bill of exceptions,<sup>22</sup> with

commonly called an 'agreed statement of facts,' and does not constitute an agreed case under the statute."

In *Blake v. Comrs. of Johnson County*, 18 Kan. 266, pleadings were filed and afterwards an agreed statement was made up and signed by the attorneys and an affidavit attached thereto in the form required for an agreed case. Judge Brewer said: "The claim is, that this agreed statement, fully satisfying all the requirements of said section, must be considered as having superseded the pleadings, and as proceeding under said section; and that therefore the only matters to be considered are the facts in the statement. We cannot assent to this view, and for several reasons. There was an action pending. There was no pretense of any dismissal. There was no determination of the issues raised by those pleadings, otherwise than by the judgment herein. The agreed statement does not purport on its face to supersede the pleadings, or to be a matter outside of the action then pending. The agreed statement is of facts embraced in the issues raised by the pleadings. The journal entry of the trial reads, that the parties, 'submitted their case to the court for trial and the determination of all the issues, as well of law as of fact, made by the said pleadings on file herein, upon the agreed statement of facts signed by the parties respectively.' A similar recital appears in the entry of the judgment. Now it seems to us a fair deduction, that court and par-

ties alike looked upon this agreed statement as made in the case already pending, and as simply dispensing with further or other evidence in the case, and that it must be so regarded in this court."

18. *State ex rel. Malin v. Merriam*, 159 Mo. 655, 60 S. W. 1112.

"A judgment upon an agreed case is a judgment upon the facts which the parties have assented to and signed, and which agreement stands in lieu of a special verdict. The agreement is not, in such case, used as evidence before the triers of fact, but is designed to form a part of the record, and upon it the court pronounces the conclusion of law, as would be done if the same facts were found by a jury, in the form of a special verdict." *Munford v. Wilson*, 15 Mo. 540.

19. *Canaday v. Hopkins*, 7 Bush (Ky.) 108, 111.

20. *Munford v. Wilson*, 15 Mo. 540; *Ford v. Cameron*, 19 Mo. App. 467.

21. See *infra*, IV, F, 2, "Record on Appeal."

22. *Ark.*—See *Boyd v. Carroll*, 30 Ark. 527; *Ashley v. Stoddard, Jr. & Co.*, 26 Ark. 653; *King v. City of Little Rock*, 26 Ark. 479; *Lawson v. Hayden*, 13 Ark. 316. *Cal.*—*Towle v. Sweeney*, 2 Cal. App. 29, 83 Pac. 74. *Colo.*—*Truesdale v. Montrose County*, 44 Colo. 416, 99 Pac. 63; *Wagner-Stockbridge Merc. Co. v. Goddard*, 33 Colo. 387, 80 Pac. 1038. *Ind.*—*Blackburn v. Wagner*, 83 Ind. 325; *Reddick v. Board of Comrs.*, 14 Ind. App. 598, 41 N. E. 834, 43 N. E. 238. *Mo.*—*State ex rel. Malin v. Merriam*, 159

which the parties cannot dispense even by agreement.<sup>23</sup> Where there is an agreed statement of facts a motion for a new trial is necessary in order to present such statement on appeal as the evidence, or part of the evidence, before the trial court;<sup>24</sup> but in an agreed case neither a motion for a new trial<sup>25</sup> nor a bill of exceptions<sup>26</sup> is necessary in order to present the agreed facts on appeal.

The affidavit that there is a real controversy which is essential to an agreed case is not necessary where the parties sign an agreed statement of facts,<sup>27</sup> and the addition of such an affidavit will not make it an agreed case.<sup>28</sup>

An agreed statement of facts may be signed by counsel; and when so signed and filed it is regarded as a special verdict. An agreed case, on the other hand, must be signed and executed with the formalities required by statute, and takes the place of evidence.<sup>29</sup>

**III. JURISDICTION.**—A. CONSTRUCTION OF STATUTES.—This mode of proceeding without summons or voluntary appearance and without issue made by the pleadings, being unknown to the common law, the statutes upon all questions affecting the jurisdiction of the court must be strictly construed. The court acquires jurisdiction and can render judgment only when the parties observe the necessary requirements and formalities of the statute.<sup>30</sup>

Mo. 655, 60 S. W. 1112. Ohio.—See *Goyert v. Eicher*, 70 Ohio St. 30, 33, 70 N. E. 508, *citing and distinguishing* *Brown v. Mott*, 22 Ohio St. 149. S. D.—*Sweet v. Myers*, 3 S. D. 324, 53 N. W. 187.

23. *Truesdale v. Montrose County*, 44 Colo. 416, 99 Pac. 63.

24. *Witz v. Dale*, 129 Ind. 120, 27 N. E. 498; *Western Union Tel. Co. v. Frank*, 85 Ind. 480; *Slessman v. Crozier*, 80 Ind. 487; *Martin v. Martin*, 74 Ind. 207.

25. *Witz v. Dale*, 129 Ind. 120, 27 N. E. 498; *Lofton v. Moore*, 83 Ind. 112; *Martin v. Martin*, 74 Ind. 207; *Manchester v. Dodge*, 57 Ind. 584; *Fisher v. Purdue*, 48 Ind. 323; *Lang v. Ropke*, 1 Duer (N. Y.) 701.

**Motion For New Trial Unnecessary.**—"Under this section it is not necessary to move for a new trial, because the facts agreed to will necessarily be the same in a second trial as they were upon the first, and thereby nothing will be gained." *Fisher v. Purdue*, 48 Ind. 323.

26. *Citizens' Ins. Co. v. Harris*, 108 Ind. 392, 9 N. E. 299; *Lofton v. Moore*, 83 Ind. 112; *Martin v. Martin*, 74 Ind. 207; *Sweet v. Myers*, 3 S. D. 324, 328, 53 N. W. 187.

27. *Witz v. Dale*, 129 Ind. 120, 27 N. E. 498; *Manchester v. Dodge*, 57 Ind. 584.

28. *Pennsylvania Co. v. Niblack*, 99 Ind. 149.

29. *Goyert v. Eicher*, 70 Ohio St. 30, 70 N. E. 508.

30. U. S.—*Goodrum v. Buffalo*, 162 Fed. 817, 89 C. C. A. 525, *affirming* 7 Ind. Ter. 711, 104 S. W. 742. Idaho.—*Potter v. Talkington*, 6 Idaho 649, 59 Pac. 362. Ill.—*Crull v. Keener*, 17 Ill. 246. Mo.—*Peake v. Webb*, 132 Mo. App. 601, 112 S. W. 13; *State ex rel. Webb v. McCune*, 129 Mo. App. 511, 107 S. W. 1030. Mont.—*Bickford v. Kirwin*, 30 Mont. 1, 15, 75 Pac. 518. N. Y.—*Woodruff v. People*, 193 N. Y. 560, 86 N. E. 562; *Marx v. Brogan*, 188 N. Y. 431, 436, 81 N. E. 231; *Wood v. Squires*, 60 N. Y. 191; *Hobart College v. Fitzhugh*, 27 N. Y. 130, 134; *Troy Waste Mfg. Co. v. Harrison*, 73 Hun 528, 26 N. Y. Supp. 109; *People v. Binghamton Tr. Co.*, 65 Hun 384, 20 N. Y. Supp. 179; *City of Buffalo v. Mackey*, 15 Hun 204; *Fisher v. Stilson*, 9 Abb. Pr. 33; *Lang v. Ropke*, 1 Duer 701; *Williams v. Rochester*, 2 Lans. 169. N. C.—*Grandy v. Guley*, 120 N. C. 176, 26 S. E. 779; *Jones v. Commissioners*, 88 N. C. 56; *Grant v. Newsom*, 81 N. C. 36; *McKethan v. Ray*, 71 N. C. 165. S. C.—*Reeder v. Workman*, 37 S. C. 413, 415, 16 S. E. 187. Tenn.—*Ward v. Alsup*, 100 Tenn. 619, 46 S. W. 573; *Aldrich v. Pickard*, 12 Lea 657; *Memphis*



If two distinct matters are presented to the court, in one only of which it has jurisdiction, judgment will be entered as to that one, and the other will be dismissed.<sup>31</sup>

The question of jurisdiction may be raised at any time during the trial of a case, or even for the first time in the supreme court on appeal; and if not raised by the parties the court *sua sponte* may raise it.<sup>32</sup>

B. THE COURT.—Some statutes designate the particular court or judge to whom an agreed case may be submitted for determination. And the court specified in the statute must be resorted to.<sup>33</sup> The usual provision is that the submission shall be made to any court which would have jurisdiction if an action were brought.<sup>34</sup> This provision

Freight Co. v. Memphis, 3 Coldw. 249.

The purpose of the parties to submit a controversy is not sufficient if they do not comply with the statutory requirements. Geisen v. Reder, 151 Ind. 529, 532, 51 N. E. 353.

The courts will encourage the efforts of disputants to submit their differences for decision without the expense and delay incident to litigation, and will not impair in the slightest degree the usefulness of this manner of settling disputes when real controversies contemplated by the statutes are presented to courts authorized to adjudicate them by competent, interested and real parties with the requisites and formalities which are prescribed by the statutes for the protection of courts and people. Marx v. Brogan, 188 N. Y. 431, 435, 81 N. E. 231; Ward v. Alsop, 100 Tenn. 619, 742, 46 S. W. 573.

31. People v. Binghamton Tr. Co., 65 Hun 384, 20 N. Y. Supp. 179.

32. Woodruff v. People, 193 N. Y. 560, 86 N. E. 562, 564; Dickinson v. Dickey, 76 N. Y. 602; Reeder v. Workman, 37 S. C. 413, 416, 16 S. E. 187.

Even where a statute required that the parties to a submission of a controversy without action waive all rights of appeal from a judgment or decree thereon and release all errors that may intervene in the hearing of the matters so submitted, and in the entering up of the judgment of decree therein, and agree that the release of errors may be pleaded in bar of any writ of errors that may be sued out as to such judgment or decree, it was held that a question of jurisdiction may be presented on appeal. Farwell v. Sturges, 165 Ill. 275, 276, 46 N. E. 197; Farwell v. Sturges, 165 Ill. 252, 42 N. E. 189; s. c., 58 Ill. App. 462, 493.

33. Thus, in Illinois, such a case must be presented to the circuit court (or, in Cook county, to the superior court); and not in the supreme court without a record from the lower court. Farwell v. Sturges, 165 Ill. 252, 46 N. E. 189.

In New York, if the action is in the supreme court, it must be tried and judgment rendered by the appellate division thereof, and if in the city court of the city of New York, it must be tried and judgment rendered at the general term thereof. N. Y. Code Civ. Proc., § 1281.

In Tennessee, the submission may be made to the circuit or chancery court of the county in which either of the parties resides, or in which a suit might have been brought to determine such controversy. Shannon's Code, Vol. 2, § 5206.

34. See the statutory provisions cited *supra*, note 2, and the following cases: Ind.—Gregory v. Perdue, 29 Ind. 66. Ia.—Keeline v. Council Bluffs, 62 Iowa 450, 17 N. W. 668. Ky. Jones v. Hoffman, 18 B. Mon. 656. N. Y.—Marx v. Brogan, 188 N. Y. 431, 81 N. E. 231, reversing judgment, 111 App. Div. 480, 98 N. Y. Supp. 88. N. C.—James v. Commissioners, 88 N. C. 56. Okla.—Johnson v. Cameron, 2 Okla. 266, 37 Pac. 1055; Territory *ex rel.* Sampson v. Clark, 2 Okla. 82, 35 Pac. 882. S. C.—Reeder v. Workman, 37 S. C. 413, 416, 16 S. E. 187; South Carolina Soc. v. Gurney, 3 S. C. 51.

Jurisdiction of Special Term in New York.—Under § 1281 of the Code of Civil Procedure, as under § 372 of the old code, a controversy submitted upon agreed facts is to be tried at the general term, and it is irregular to have it heard in the first instance at special

allows the filing of an agreed case in the supreme court in the first instance in all matters within its original jurisdiction, as for example, the issuance of writs of mandamus.<sup>35</sup> But there is some variation in the statutes, and as the authority of the court to hear such cases is given only by statute, the statutes of each state should be carefully examined.

Where the constitution provides that the jurisdiction of the supreme court shall be "appellate only," a statute which confers original jurisdiction upon the supreme court in agreed cases is unconstitutional.<sup>36</sup>

**Consent of Parties.**—Consent of the parties cannot confer upon a court jurisdiction of subject-matter.<sup>37</sup>

**C. THE CONTROVERSY.**—The controversy must be within the provisions of the statute. Parties have no right to submit to the court any question of controversy between them, but only those controversies authorized by the statute.<sup>38</sup> Thus the controversy must be one with which the courts of the state have authority to deal.<sup>39</sup>

**The Controversy Must Be Real.**—A contest in good faith in order to arrive at a correct decision of all questions of law and fact does not

term. *Waring v. O'Neill*, 15 Hun (N. Y.) 105.

But an application at special term, complying in form with §§ 1279-1281, may be regarded as a motion, so as to be heard at special term, when presented in the form of a motion to direct the resisting party, a receiver, who is an officer of said court, to do certain things. *O'Clair v. Hale*, 25 Misc. 31, 54 N. Y. Supp. 386.

As to municipal courts, see Municipal Court Act Laws, 1902, § 241; and also *Lax v. Fourteenth Street Store*, 49 Misc. 627, 97 N. Y. Supp. 396.

35. *Territory ex rel. Sampson v. Clark*, 2 Okla. 82, 35 Pac. 882; *Grocery Co. v. Burnet*, 61 S. C. 205, 39 S. E. 381, 58 L. R. A. 687.

**Specific Performance.**—A controversy involving the specific performance of a contract for the sale of land is not within the original jurisdiction of the supreme court, and therefore cannot be submitted to such court in the first instance. *Nicholson v. Cousar*, 49 S. C. 329, 29 S. E. 1035.

36. *Crull v. Keener*, 17 Ill. 246; *Aldrich v. Pickard*, 12 Lea (Tenn.) 657; *Memphis Freight Co. v. Memphis*, 3 Coldw. (Tenn.) 249.

An agreed case was filed in the circuit court, but afterwards, by consent of parties, ordered by that court, without any adjudication, to be adjourned to the supreme court under the code, § 4497, which provides that agreed cases may, by consent of the parties,

be adjourned to the supreme court for decision. The constitution, however, provides that the jurisdiction of the court shall be "appellate only," which words are emphatic, and the supreme court remanded the case to the circuit court to be proceeded with. *Aldrich v. Pickard*, 12 Lea (Tenn.) 657.

37. *Ramsdell v. Duxberry*, 14 S. D. 222, 85 N. W. 221.

38. *Ind.*—*Citizens Ins. Co. v. Harris*, 108 Ind. 392, 9 N. E. 299. *N. Y.*—*Woodruff v. People*, 193 N. Y. 560, 86 N. E. 563, 652; *Marx v. Brogan*, 188 N. Y. 431, 81 N. E. 231; *Troy Waste Mfg. Co. v. Harrison*, 73 Hun 528, 26 N. Y. Supp. 109; *City of Buffalo v. Mackey*, 15 Hun 204; *People v. Binghamton Trust Co.*, 20 N. Y. Supp. 179; *Williams v. Rochester*, 2 Lans. 169. *N. C.*—*McKethan v. Ray*, 71 N. C. 165. *S. D.*—*Ramsdell v. Duxberry*, 14 S. D. 222, 85 N. W. 221. *Tenn.*—*Ward v. Alsop*, 100 Tenn. 619, 741, 46 S. W. 573.

39. Whether one of the parties to such a submission would have the right to enter certain land as a homestead under § 2289 of the United States Revised Statutes, if the patent under which the other party claims is void, cannot be the subject of a civil action in the courts of California; and a case submitting such question was remanded to the superior court with directions to that court to enter an order dismissing the proceeding. *White v. Clarke*, 111 Cal. 425, 44 Pac. 164.

admit of the existence of any system of procedure by which decisions of courts can be obtained by parties whose interests are one way.<sup>40</sup> If it appear that it is not the object to settle a real controversy existing between the parties, the action will be regarded as fictitious and will be dismissed by the court,<sup>41</sup> and may be treated as a fraud and a contempt on the part of those implicated.<sup>42</sup>

Further, the controversy must be real at the time of the submission. These statutes do not contemplate a decision upon a moot question.<sup>43</sup> So a stipulation of the parties cannot move the court to consider an abstract question of law.<sup>44</sup> The decision must be on a

40. *Overman v. Sims*, 96 N. C. 451, 2 S. E. 372; *Newark, etc. R. Co. v. Perry County*, 30 Ohio St. 120.

41. *Ward v. Alsup*, 100 Tenn. 619, 740, 46 S. W. 573.

42. *Ward v. Alsup*, 100 Tenn. 619, 741, 46 S. W. 573; *State v. Wilson*, 2 Lea (Tenn.) 204, 210.

In *Wood v. Nesbitt*, 64 Hun 639, 19 N. Y. Supp. 423, where it appeared that the same attorney prepared the statement and also the briefs of both parties, the decision was set aside.

It is professional misconduct for an attorney to submit a fictitious case. In *re Attorney*, 10 App. Div. 491, 42 N. Y. Supp. 268, 278, the court said: "Such acts constitute professional misconduct, as it foists upon the court a fictitious controversy, and is to that extent a fraud and imposition upon it. Courts are constituted to decide actual questions existing between parties who are real, and who have a real controversy. And the law has carefully hedged about the submission of controversies between parties with such formalities and solemn requirements as will prevent anxious persons from resorting improperly to its aid, and at the same time furnish real litigants an easy mode of invoking its authority. Code Civ. Proc. §§ 1279, 1280. A proper regard for the dignity of the court, a just recognition of its relation to the public, and a proper conception of the office of a lawyer, require a due observance of these formalities, in order that the court may properly discharge its obligations and fulfill its public function; otherwise the source of its authority is corrupted, and the administration of justice brought into contumely and disrepute. The submission of anything but a real controversy has been denominated judicially as a fraud. *Judson v. Flushing*

*Jockey Club*, 14 Misc. 350, 36 N. Y. Supp. 126."

43. Cal.—In *re DeLucca*, 146 Cal. 110, 79 Pac. 853; *Johnson v. Malloy*, 74 Cal. 430, 16 Pac. 228. Ind.—*Witz v. Dale*, 129 Ind. 120, 27 N. E. 498. Ky.—*Jones v. Hoffman*, 18 B. Mon. 656. N. Y.—*Woodruff v. People*, 193 N. Y. 560, 86 N. E. 562; *People v. Mutual Endow. & Acc. Ins. Assn.*, 92 N. Y. 622; *Trustees of Hobart College v. Fitzhugh*, 27 N. Y. 130; *Kelley v. Hogan*, 69 App. Div. 251, 74 N. Y. Supp. 682; *Town of Salamanca v. Cattaraugus County*, 81 Hun 282, 30 N. Y. Supp. 790; *Williams v. Rochester*, 2 Lans. 169. N. C.—See opinion of *Clarke, C. J.*, dissenting in *Campbell v. Cronley*, 150 N. C. 457, 471, 24 S. E. 213.

**Agreed Case.—Contents Must Represent Present Action—Not Contingent Rights.**—An agreed case must represent a present controversy which might become the subject of a *present* civil action; not one which may mature in the future. Thus, if a legacy to a college is payable in two years, provided that within one year it performed certain conditions, the question whether the condition has been performed does not raise a controversy capable of being submitted without action until the expiration of the two years. So if, at the end of one year, the parties ask whether certain admitted facts amount to a performance of the condition the court must dismiss the case. *Trustees of Hobart College v. Fitzhugh*, 27 N. Y. 130.

44. *Plumleigh v. White*, 9 Ill. 388; *Woodruff v. People*, 193 N. Y. 560, 86 N. E. 562; *Troy Waste Mfg. Co. v. Harrison*, 73 Hun 528, 26 N. Y. Supp. 109.

Courts do not sit to render advice or to give counsel, and a judgment in such a case will bind no one. *Trustees*



concrete point of law, the facts being settled by the agreement.<sup>45</sup>

That a controversy is fictitious may appear by the record, or by matter outside of the record,<sup>46</sup> or by absence of contest.<sup>47</sup>

**Objections.**—**When Taken.**—An objection that the controversy is fictitious may be taken after the decision of the case on appeal,<sup>48</sup> or at any stage of the proceeding.<sup>49</sup> And if it appears, after the decision on appeal, that the action was fictitious, the court will withdraw and cancel its opinion.<sup>50</sup>

**How Taken.**—Such objection may be taken in any manner sufficient to inform the court.<sup>51</sup>

**By Whom Taken.**—And the objection may be taken by counsel on behalf of interests not apparent on the record but involved in the decision.<sup>52</sup>

Attorneys, as officers of the court, if they know, or have reason to believe that the time of the court is being taken up by the trial of a feigned issue, should inform the judge of the fact, whether of

of *Hobart College v. Fitzhugh*, 27 N. Y. 130.

**Agreed Case.—Abstract Question.**—**What Is Not Agreed Case.**—Mere abstract questions not involving any actual present difference or controversy between the parties may not be propounded to the court as an agreed case. *People v. Mutual Endow. & Acc. Ins. Assn.*, 92 N. Y. 622.

45. A point of law must arise upon the agreed statement of facts; questions of law cannot be propounded independent of such statement. *Newark, etc. R. Co. v. Perry County*, 30 Ohio St. 120.

46. *Ward v. Alsup*, 100 Tenn. 619, 46 S. W. 573, where it was held that a suit may be shown to be fictitious by the record, or by evidence *aliunde*, or both; or upon affidavit of third persons, or the case may be referred to the clerk for proof.

Where an objection has been raised that a pending action is fictitious, the court may order a reference to determine the question. *Judson v. Flushing Jockey Club*, 14 Misc. 562, 36 N. Y. Supp. 128.

47. A decision of the general term is a controversy submitted to an agreed statement under Code Civ. Proc. § 1279, which provides for such submission, in good faith, of a real controversy, for the purpose of determining the rights of the parties, will be set aside, as not of the independent character contemplated by the code, where it appears that the same attorney prepared the statement and also the briefs of both parties. *Wood v. Nesbitt*, 19 N. Y.

Supp. 423, decision in 16 N. Y. Supp. 918 vacated.

In *Heasty v. Lambert*, 98 App. Div. 177, 96 N. Y. Supp. 595, the court said: "We do not think that the provisions of the Code of Civil Procedure relating to the submission of a controversy upon admitted facts contemplate the entry of a judgment by default, or upon the failure of one of the litigants to appear upon the trial to urge his side of the alleged dispute. The requirement of an affidavit that the controversy is in fact real would seem to be inconsistent with such a possible result. At all events, the court prefers to be assured by the presence and argument of the parties that the controversy presented is, indeed, genuine."

48. *Judson v. Flushing Jockey Club*, 14 Misc. 562, 36 N. Y. Supp. 128; *Wood v. Nesbitt*, 19 N. Y. Supp. 423.

49. *Judson v. Flushing Jockey Club*, *supra*.

50. *Judson v. Flushing Jockey Club*, *supra*.

51. A case gotten up without any foundation would be a fraud upon the court, and a contempt upon the part of those implicated; and the court would take notice of the fact, no matter how brought before it, that an action between parties, or upon an agreed statement, was fictitious, for the province of a court is to decide, not advise, and to settle rights, not to give abstract opinions. *State v. Wilson*, 2 Lea (Tenn.) 204.

52. *Judson v. Flushing Jockey Club*, 14 Misc. 562, 36 N. Y. Supp. 128.

counsel in the case or not, it being their duty to protect the court.<sup>53</sup>

D. THE PARTIES. — 1. **Competent Parties.** — The parties must be competent under the statute.<sup>54</sup>

**Infants.** — In the absence of express statutory authority an infant cannot by himself or by his guardian be a competent party to an agreed case.<sup>55</sup>

An Indian is not competent to enter into a submission involving the power of alienation of lands held under patent from the United States.<sup>56</sup>

53. *Ward v. Alsup*, 100 Tenn. 619, 46 S. W. 573. In this connection the court, on page 738, said: "The first question presented is whether an attorney who is not employed in a cause pending in this Court has the right to appear in behalf of a client not a party to the suit, or in his own behalf, as *amicus curiae*, and to have the Court pass upon the *bona fides* of the suit. Attorneys are officers of the Court, and it is their function to see that justice is administered according to law. It has been held that it is not only the right but the duty of an attorney, if he knows, or has a reason to believe, that the time of the Court is being taken up by the trial of a feigned issue, to inform the Judge thereof, whether of counsel in the case or not."

54. New York Code Civ. Proc., § 1279; *Marx v. Brogan*, 188 N. Y. 431, 432, 81 N. E. 231.

55. In New York only adults may be parties to this proceeding. *Coughlin v. Fay*, 68 Hun 521, 22 N. Y. Supp. 1095; *Lathers v. Fish*, 4 Lans. (N. Y.) 213; *Fisher v. Stieson*, 9 Abb. Pr. (N. Y.) 33; *Baumgrass v. Brickell*, 7 N. Y. St. 685.

"It is a well known principle, that no guardian in an action is to be allowed to make admissions in behalf of infants. Whenever infants are parties to an action, the facts must be proved against them. But the making of a case under § 372 is an agreement as to the truth of the facts, upon which the court is to decide the law. Infants are not competent to make such an agreement; nor has their guardian any such power in their behalf. Otherwise he might, by such an agreement, sacrifice their rights. This is merely the application to new circumstances of a principle so elementary as to need the citation of no authority. *Fisher v. Stilson* (9 Abb. 33) is, however, directly in point." *Lath-*

*ers v. Fish*, 4 Lans. (N. Y.) 213.

In *Fisher v. Stilson*, 9 Abb. Pr. (N. Y.) 33, it was held that as an infant could appear in such a controversy only by guardian appointed for the purpose, and that as there was no statute authorizing the appointment of a guardian for an infant to appear in such a controversy, the infant could settle the controversy only by action.

In Oregon and Tennessee there is statutory authority permitting an infant to become a party to such a case. *Bellinger & Cotton's Ann. Code, Ore.*, Vol. 1, §§ 193-195; *Shannon's Tenn. Code*, §§ 5189, 5206.

56. "The Indian who consented to the stipulation for submission to the judgment of the court for such purpose was not a person *sui juris*. The submission required, as the very basis of its recognition, the acquiescence and consent of the Indian thereto. The effect of the act of Congress, under which the patent was granted, was to deny to the Indian the exercise of any consent whereby the restriction upon the power of alienation could be removed. If the Indian could create no estoppel against himself or herself by deed of conveyance, how could he or she create an estoppel, by consenting to a judgment as the basis of an estoppel, effectual to alienate the land, in direct contravention of the act of Congress? The allottees of these lands, during the probationary period of twenty-five years, were under as much disability to alienate them by contract, or deed, or voluntary submission to a court, as if they had been under the disability of coverture, or minority. The disability of the minor to do those things is imposed by the common law. The disability of these Indians is imposed by statute. It must, therefore, logically and necessarily follow that the record and judgment of a court, disclosing on their face that the disqualified Indian was entering into

In at least one jurisdiction the statute authorizes the state to be a party to an agreed case.<sup>57</sup> In other states the state has been a party to such cases, in which, however, the question of competency, apparently, was neither raised by counsel nor discussed by the court.<sup>58</sup> In New York the question was noticed recently, but was not decided.<sup>59</sup>

It has been held that where a municipal corporation is a party to such a proceeding,<sup>60</sup> the submission should be made by the mu-

an agreement for submission of the question of his right to dispose of these lands, was in no wise different from such a proceeding participated in by a minor infant. It is a wholesome rule of law that a party may not accomplish by indirection that which he could not do directly. That which Goodrum undertook to do by stipulation with this Indian could not become the subject of a controversy to be submitted to the jurisdiction of the United States Court, so as to build a foundation to support the plea of *res adjudicata*." *Goodrum v. Buffalo*, 162 Fed. 817, 826, 89 C. C. A. 525.

57. "Where either party to the controversy is the state, a county, or other public corporation therein, or a private corporation or minor, the statement of the case may be subscribed and verified by any person who at the time sustains the relation to such state, corporation, county, or minor as would authorize the service of summons upon him." *Bellinger & Cotton's Ann. Codes & St., Ore. Vol. 1, § 194*.

58. *Colo.*—*People v. Boughton*, 5 *Colo.* 487, 488. *Ind.*—*State ex rel. Coghten v. Porter*, 86 *Ind.* 404; *State ex rel. Atty.-Gen. v. Newton County*, 66 *Ind.* 216. *Mo.*—*State ex rel. Wenner v. Cummings*, 151 *Mo.* 49, 52 *S. W.* 29. *Mont.*—*State v. Aetna Bkg. & Tr. Co.*, 34 *Mont.* 379, 87 *Pac.* 268; *State v. Northern Pac. Exp. Co.*, 27 *Mont.* 419, 71 *Pac.* 404, 94 *Am. St. Rep.* 824. *Neb.*—*Providence W. Ins. Co. v. Weston*, 63 *Neb.* 764, 89 *N. W.* 253; *State ex rel. Casper v. Moore*, 37 *Neb.* 13, 55 *N. W.* 299; *State v. Babcock*, 22 *Neb.* 614, 35 *N. W.* 941. *N. Y.*—*People v. Fitchburg R. Co.*, 133 *N. Y.* 239, 30 *N. E.* 1011; *People v. Mutual Endow. & Acc. Ins. Assn.*, 92 *N. Y.* 622; *People v. Binghamton Tr. Co.*, 65 *Hun* 384 20, *N. Y. Supp.* 179. *Okla.*—*Territory ex rel. Sampson v. Clark*, 2 *Okla.* 82, 35 *Pac.* 822. *Tenn.*—*State v. Wilson*, 2 *Lea* 204.

59. *Woodruff v. People*, 193 *N. Y.* 560, 86 *N. E.* 562, *reversing* 127

*App. Div.* 934, 111 *N. Y. Supp.* 1150.

60. As in the following cases: *Cal.*—*County of Los Angeles v. Kellogg*, 146 *Cal.* 590, 80 *Pac.* 861; *County of San Diego v. Schwartz*, 145 *Cal.* 49, 78 *Pac.* 654; *County of Humboldt v. Stern*, 136 *Cal.* 63, 68 *Pac.* 324; *Dodge v. San Francisco*, 135 *Cal.* 512, 67 *Pac.* 973; *Kiernan v. Swan*, 131 *Cal.* 410, 63 *Pac.* 768; *Board of Education v. Grant*, 118 *Cal.* 39, 50 *Pac.* 5; *Los Angeles v. State L. & T. Co.*, 109 *Cal.* 396, 42 *Pac.* 149; *Skinner v. City of Santa Rosa*, 107 *Cal.* 464, 40 *Pac.* 742; *Derby & Co. v. Modesto*, 104 *Cal.* 515, 38 *Pac.* 900; *Wetmore v. City of Oakland*, 99 *Cal.* 146, 33 *Pac.* 769; *Green v. County of Fresno*, 95 *Cal.* 329, 30 *Pac.* 544; *Prince v. City of Fresno*, 88 *Cal.* 407, 26 *Pac.* 606; *San Diego v. Granniss*, 77 *Cal.* 511, 19 *Pac.* 875. *Colo.*—*Strickler v. Colorado Springs*, 16 *Colo.* 61, 26 *Pac.* 313, 25 *Am. St. Rep.* 245; *Central City Water Co. v. Kimber*, 1 *Colo.* 475. *Ind.*—*Hawks v. Goshen*, 144 *Ind.* 343, 43 *N. E.* 304; *City of Shelbyville v. Phillips*, 149 *Ind.* 552, 48 *N. E.* 626. *Kan.*—*City of Ottawa v. Rohrbough*, 42 *Kan.* 253, 21 *Pac.* 1061; *Blake v. Commissioners*, 18 *Kan.* 266. *Mont.*—*Daly Bank & Tr. Co. v. Board of Commissioners*, 33 *Mont.* 101, 81 *Pac.* 950; *Northwestern Mut. L. Ins. Co. v. Lewis & Clark Co.*, 28 *Mont.* 484, 72 *Pac.* 982, 98 *Am. St. Rep.* 572; *Hauswirth v. Mueller*, 25 *Mont.* 156, 64 *Pac.* 324; *Board of Commissioners v. Gilliam*, 17 *Mont.* 333, 42 *Pac.* 852. *Neb.*—*Young v. Lane*, 43 *Neb.* 812, 62 *N. W.* 202. *N. Y.*—*Brownell v. Greenwich*, 114 *N. Y.* 518, 528, 22 *N. E.* 24; *Jefferson County v. Watertown*, 98 *App. Div.* 494, 90 *N. Y. Supp.* 790; *Department of Bldgs. v. Field*, 9 *App. Div.* 500, 41 *N. Y. Supp.* 1112; *Town of Salamanca v. Cattaraugus County*, 81 *Hun* 282, 30 *N. Y. Supp.* 790; *Kingsland v. Mayor*, 4 *N. Y. St.* 596, 4 *N. Y. Supp.* 685, 22 *N. Y. St.* 497; *City of Buffalo v. Mackay*, 15 *Hun* 204, *Williams v. Rochester*, 2 *Lans.* 169. *N. C.*—*Williams v. Iredell County*, 132 *N.*



municipality as such (e.g., a county) through its authorized officials.<sup>61</sup>

**Tribunals, Boards and Officers.**—Tribunals, boards and officers exercising judicial functions may not submit a controversy involving those functions in an agreed case.<sup>62</sup>

**Private Corporations.**—The Oregon statute expressly authorizes private corporations to become parties to agreed cases.<sup>63</sup> So, also, does the Illinois statute.<sup>64</sup> In other states private corporations have been parties to such cases, in which, however, the question of competency was neither raised by counsel nor discussed by the court.<sup>65</sup>

**Receivers.**—Whether a receiver is a competent party to an agreed case has been questioned but not decided by a New York court.<sup>66</sup>

**2. Real and Interested Parties.**—The submission of a controversy must be made by the real parties in interest.<sup>67</sup>

C. 300, 43 S. E. 896; *Jones v. Commissioners*, 88 N. C. 56. Ohio.—Newmark, etc. R. Co. v. Perry County, 30 Ohio St. 120. S. C.—Southern R. Co. v. City Council, 49 S. C. 449, 27 S. E. 652, s. c. 45 S. C. 602, 23 S. E. 952. Wis.—Town of Plainfield v. Village of Plainfield, 67 Wis. 525, 30 N. W. 673.

The Illinois statute authorizes the submission of a controversy in this way by a municipal corporation. *West Chicago Park Comrs. v. Riddle*, 245 Ill. 168, 91 N. E. 1060.

61. *Bailey v. Johnson*, 121 Cal. 562, 563, 54 Pac. 80, holding a tax collector to be without authority to submit.

An attorney employed by the county board "to attend to the county interest" in a claim by a town against the county for part of the expense of building a bridge, "now pending before the board," has no authority to submit the case. *Town of Salamanca v. Cattaraugus County*, 81 Hun 282, 30 N. Y. Supp. 790.

62. *In re DeLucca*, 146 Cal. 110, 112, 79 Pac. 853.

63. *Bellinger & Cotton's Ann. Codes & St. Ore.*, § 193.

64. *Hurd's Rev. St. Ill.* 1905, § 100.

65. Cal.—*San Francisco Lumb. Co. v. Bibb*, 139 Cal. 325, 73 Pac. 864; *Market St. R. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225; *City of Los Angeles v. State L. & T. Co.*, 109 Cal. 396, 42 Pac. 149; *E. M. Derby & Co. v. Modesto*, 104 Cal. 515, 38 Pac. 900. Colo.—*Molaudin v. Colorado Cent. R. Co.*, 3 Colo. 173. Ind.—*Hawks v. Goshen*, 144 Ind. 343, 43 N. E. 304; *Citizens' Ins. Co. v. Harris*, 108 Ind. 392, 9 N. E. 299; *Pennsylvania Co. v. Niblack*, 99 Ind. 149; *Hall v. Pennsylvania Co.*, 90 Ind. 457; *The Warrick Bldg. & L. Assn. v. Houghland*, 90 Ind. 115. Mo.—*Shed v. Kan-*

*sas City, etc. R. Co.*, 67 Mo. 687; *Brierre v. American Indemnity Co.*, 67 Mo. App. 384; *State Sav. Bank v. Gregg*, 67 Mo. App. 303. Mont.—*Daly Bank & Tr. Co. v. Board of Commissioners*, 33 Mont. 101, 81 Pac. 950; *Northwestern Mut. L. Ins. Co. v. Lewis & Clark Co.*, 28 Mont. 484, 72 Pac. 982, 98 Am. St. Rep. 572. N. Y.—*Associate Alumni v. General Theolog. Sem.*, 163 N. Y. 417, 57 N. E. 626; *Missouri, etc. R. Co. v. Union Tr. Co.*, 156 N. Y. 592, 51 N. E. 309; *Trustees of Hobart College v. Fitzhugh*, 27 N. Y. 130; *Knickerbocker Tr. Co. v. King*, 126 App. Div. 691, 111 N. Y. Supp. 192; *Herkimer Co. L. & P. Co. v. Johnson*, 37 App. Div. 257, 55 N. Y. Supp. 924; *Department of Bldgs. v. Field*, 9 App. Div. 500, 41 N. Y. Supp. 1112; *Judson v. Flushing Jockey Club*, 14 Misc. 350, 36 N. Y. Supp. 126; *Troy Waste Mfg. Co. v. Harrison*, 73 Hun 528, 26 N. Y. Supp. 109; *Patterson v. Mutual Life Assn.*, 11 N. Y. Supp. 636; *Brownell v. Greenwich*, 8 N. Y. St. 737; *Neilson v. Mut. Ins. Co.*, 3 Duer 455. N. C.—*Bank v. Wachovia L. & T. Co.*, 119 N. C. 553, 26 S. E. 131; *Piedmont R. Co. v. Reidsville*, 101 N. C. 404, 8 S. E. 124. Ohio.—*Newmark, etc. R. Co. v. Perry County*, 30 Ohio St. 120. S. C.—*Carolina Groc. Co. v. Burnet*, 61 S. C. 205, 39 S. E. 381, 58 L. R. A. 687; *Southern R. Co. v. City Council*, 49 S. C. 449, 27 S. E. 652; *Southern R. Co. v. City Council*, 45 S. C. 602, 23 S. E. 952. Tenn.—*Nashville Tr. Co. v. Fourth Nat. Bank*, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710.

66. *Waring v. O'Neill*, 15 Hun (N. Y.) 105.

67. Iowa.—*Keeline v. Council Bluffs*, 62 Iowa 450, 17 N. W. 668. Ky.—*Jones v. Hoffman*, 18 B. Mon.

**Interested Parties.**—Only interested parties are contemplated by the statutes,<sup>68</sup> and their interests must be adversary.<sup>69</sup> A tribunal, board, or officer exercising judicial functions is not authorized to litigate as a party the question whether, in the doing of an official act, it has exceeded its jurisdiction.<sup>70</sup>

**3. Necessary Parties.**—The necessary parties to an agreed case are those who would have been necessary parties if an action had been brought.<sup>71</sup> And parties who are strangers to the case but interested in the subject-matter cannot be made parties by order of the court without their consent.<sup>72</sup> So when it is apparent to the court that per-

656. **N. Y.**—*Dickinson v. Dickey*, 76 N. Y. 602; *Union Nat. Bank v. Kupper*, 63 N. Y. 617. **Tenn.**—*Ward v. Alsop*, 100 Tenn. 619, 46 S. W. 573.

*Dickinson v. Dickey*, 76 N. Y. 602. In this case it was held that the case submitted was entirely defective, and no decision could properly be given thereon, as § 1280 provides that upon filing the submission papers, the controversy then becomes an action, and is thereafter to proceed as an action; and judgment is to be rendered as in an action, while here there was no defendant. There could not be an action without two parties, and there could be no judgment against an undisclosed defendant.

**Res Inter Alios Acta.**—Parties are not called upon to make their cases with a view to the rights of others, and it is an axiom in the law that the rights of others are not affected by a decision between particular parties. *State v. Wilson*, 2 Lea (Tenn.) 204, 210.

**Collusion.**—When it is apparent that the sole object is to affect the rights of third parties, the proceeding is not adversary, but collusive, and should be dismissed. Such a proceeding is also a contempt. *Ward v. Alsop*, 100 Tenn. 619, 739, 46 S. W. 573.

68. **Cal.**—*In re DeLucca*, 146 Cal. 110, 79 Pac. 853. **Ia.**—*Keeline v. Council Bluffs*, 62 Iowa 450, 17 N. W. 668. **Ky.**—*Jones v. Hoffman*, 18 B. Mon. 656. **N. Y.**—*Union Nat. Bank v. Kupper*, 63 N. Y. 617.

A tax collector is not a competent party to submit on behalf of a county a question involving the validity of a tax, for he is not an interested party contemplated by the statute authorizing submission of controversies. He is but the agent of the county for the collection of the tax, with no interest other than that of an officer performing a duty enjoined by law, and with

only such power and authority as the statute gives. He was not concerned in the question of the validity of the tax. If he failed to collect it because of its illegality he was not responsible to the county; and if he collected it and it subsequently proved to have been illegally assessed, he was not responsible to the aggrieved taxpayer. It is quite obvious, therefore, that he is not a "party," within the statute, authorized to submit the controversy without action. *Bailey v. Johnson*, 121 Cal. 562, 54 Pac. 80.

69. *In re DeLucca*, 146 Cal. 110, 112, 79 Pac. 853.

When a submission consists merely of a series of questions which numbers of people undoubtedly have a curiosity or desire to have decided by the court, the court will not answer, for it cannot sit to answer questions proposed by anybody. The question submitted was for the purpose of determining the validity of a grand jury. *People ex rel. Atty. Gen. v. Wallace*, 91 Cal. 535, 27 Pac. 767.

70. *In re DeLucca*, 146 Cal. 110, 79 Pac. 853, holding that a justice of the peace who has issued a search warrant is not an adverse party in interest against the one against whom such warrant was issued.

71. *Berlin Iron Bridge Co. v. Wagner*, 56 Hun 648, 10 N. Y. Supp. 215.

"It follows that all persons having an interest in the controversy must be parties, to the end that they may be concluded by the judgment, and the controversy be finally adjudicated as in case of an action instituted in the usual way." *McKethan v. Ray*. 71 N. C. 165.

72. *Potter v. Talkington*, 6 Idaho 649, 59 Pac. 362; *Wood v. Squires*, 60 N. Y. 191; *Trustees of Hobart College v. Fitzhugh*, 27 N. Y. 130, 134.

**Proceedings Coram Non JUDGE.**—An

sons or corporations are interested in the subject-matter of the case and are not parties to the submission, and the court cannot determine the controversy between the parties before it without prejudice to such other persons, the case will be dismissed.<sup>73</sup>

**E. THE AGREEMENT. — 1. In General.** — The agreement provided by statute is necessary to confer upon the court jurisdiction of the parties and of the subject-matter.<sup>74</sup>

**2. Designation of Parties.** — The parties should be designated as plaintiff and defendant.<sup>75</sup>

order by which a stranger is attempted to be made a party to an agreed case without his consent is without authority of law, and all the proceedings thereunder are *coram non iudice*. Potter v. Talkington, 6 Idaho 649, 59 Pac. 362.

73. Wood v. Squires, 60 N. Y. 191; Trustees of Hobart College v. Fitzhugh, 27 N. Y. 130; Davin v. Davin, 105 App. Div. 580, 94 N. Y. Supp. 281 (holding a mutual benefit society a necessary party to a controversy as to the person entitled to the proceeds of a benefit certificate, where the determination depended on a construction of provisions of the charter); Heasty v. Lambert, 98 App. Div. 177, 90 N. Y. Supp. 595; Baumgrass v. Brickell, 7 N. Y. St. 685; McKethan v. Ray, 71 N. C. 165 (holding heirs at law and devisees of the residuary interest to be necessary parties to an action seeking the construction of a will). See also Schreyer v. Arendt, 83 App. Div. 335, 82 N. Y. Supp. 122.

"The court will not decide questions in which parties not before the court are interested, the effect of which would be to foreclose their rights without a hearing, even though it might lead to the settlement of a particular controversy. Kennedy v. Mayor, 79 N. Y. 361; Dickinson v. Dickey, 76 N. Y. 602; Union Nat. Bank v. Kupper, 63 N. Y. 617; Wood v. Squires, 60 N. Y. 191; Davin v. Davin, 105 App. Div. 580, 94 N. Y. Supp. 281; Schreyer v. Arendt, 83 App. Div. 335, 82 N. Y. Supp. 122; Kelly v. Hogan, 69 App. Div. 251, 74 N. Y. Supp. 682." Doyle v. Olson Realty Co., 132 App. Div. 200, 116 N. Y. Supp. 834.

**Ordering Moneys Paid to Persons Not Parties to the Suit.** — Moneys found to be equitably due from one to another of the parties to the proceeding, may be ordered to be paid to one who is not a party to the suit, but who, as between himself and the party to whom

the money is found to be due, is equitably entitled to it. Farwell v. Sturges, 58 Ill. App. 462.

**Adjournment Over Term.** — The case may be remanded that the consent of one necessary party may be procured. Campbell v. Cronly, 150 N. C. 457, 64 S. E. 213.

74. Central City Water Co. v. Kimber, 1 Colo. 475.

And so the parties by agreement not only consent to the statement of facts, but in effect bind themselves to treat their agreement as unalterable and irrevocable. State ex rel. Webb v. McCune, 29 Mo. App. 511, 107 S. W. 1030.

75. On submission of a controversy one of the parties should be designated as plaintiff and the other as the defendant, and the claim of each, in the nature of a prayer for judgment, should be set forth. This is especially important where it is provided by statute that upon the filing of the submission the controversy becomes an action and that each provision of law relating to a proceeding in an action then becomes applicable. *In re Yerk's Estate*, 97 App. Div. 632, 89 N. Y. Supp. 869.

"The parties as plaintiff and defendant shall state, in writing, a case containing the facts upon which the controversy depends, and subscribe the same in person or by their attorneys." Bellinger & Cotton's Ann. Codes & St., Ore. Vol. 1, § 194.

The code contemplates the existence and presentation of a state of facts upon which the person named as plaintiff in the submission could bring an action at law or in equity against the person named therein as defendant, and which of themselves, if established by proof in such an action, would entitle the person named as plaintiff to some sort of judgment against his adversary, if the court agreed with the plaintiff as to the law applicable to the facts. Clapp v. Guy, 31 App. Div. 535, 52 N.



**3. The Statement of Facts.**—a. *Must Show Cause of Action.*—It must appear from the statement of the case that there exists a cause of action in favor of one of the parties and against the other.<sup>76</sup> A state of facts which calls for redress by a special proceeding as distinguished from an action cannot be presented to the court in an agreed case.<sup>77</sup> So generally where mandamus, prohibition, *quo warranto*, certiorari, etc., are recognized as special proceedings, this form of proceeding cannot be resorted to where the relief must be by *quo warranto*,<sup>78</sup> or mandamus,<sup>79</sup> or certiorari.<sup>80</sup>

Y. Supp. 33. And see, to the same effect, *Woodruff v. People*, 193 N. Y. 560, 86 N. E. 562, 563.

76. *Gregory v. Perdue*, 29 Ind. 66.

77. *Woodruff v. People*, 193 N. Y. 560, 86 N. E. 562, reversing 127 App. Div. 934, 111 N. Y. Supp. 1150; *Associate Alumni v. General Theolog. Sem.*, 163 N. Y. 417, 57 N. E. 626; *People v. Binghamton Tr. Co.*, 65 Hun 384, 20 N. Y. Supp. 934; *Patterson v. Mutual Life Assn.*, 11 N. Y. Supp. 636; *South Carolina Soc. v. Gurney*, 3 S. C. 51; *McKenzie v. Alexander*, 2 S. C. 81 (where it was held that the title to an office might be settled in this way, a "civil action" taking the place of *quo warranto* by express statutory provision).

In South Carolina the statute excepted from the operation of a provision providing for this form of proceeding, proceedings by mandamus or prohibition. *South Carolina Soc. v. Gurney*, 3 S. C. 51.

78. *Woodruff v. People*, 193 N. Y. 560, 86 N. E. 562; *People v. Mutual Endow. & Acc. Ins. Assn.*, 92 N. Y. 622; *City of Buffalo v. Mackey*, 15 Hun (N. Y.) 204; *South Carolina Soc. v. Gurney*, 3 S. C. 51; *McKenzie v. Alexander*, 2 S. C. 81, *Contra*, *Frazer v. Miller*, 12 Kan. 356.

79. In *Woodruff v. People*, 193 N. Y. 560, 86 N. E. 562, if the judgment had been given in favor of the plaintiff, the relief would have been a peremptory writ of mandamus directing defendant highway commissioners to lay out a highway; and if in favor of the defendant, the relief would have been by writ of certiorari. The court could award neither form of relief in this proceeding. But in *Carolina Groc. Co. v. Burnet*, 61 S. C. 205, 39 S. E. 381, 58 L. R. A. 687, the supreme court of South Carolina ordered the issuance of a writ of mandamus in the exercise of original jurisdiction conferred upon it by the constitution.

See to the same effect, *State v. Babcock*, 22 Neb. 614, 35 N. W. 941; *Johnson v. Cameron*, 2 Okla. 266, 37 Pac. 1055; *Territory ex rel. Sampson v. Clark*, 2 Okla. 82, 35 Pac. 882.

**Form.**—*Johnson v. Cameron*, 2 Okla. 266, 37 Pac. 1055, was an original proceeding in the supreme court asking for a writ of mandamus and commanding the territorial auditor to audit accounts against the territory, and to deliver to the plaintiff warrants on the treasurer to reimburse him for the care of the insane. The agreed statement submitted was as follows: "In pursuance and by virtue of § 4419, chap. 66, of the Oklahoma statutes, providing for submitting a question which might be the subject of a civil action to a court having jurisdiction thereof, the parties above named come now and stipulate and agree that the facts in this controversy are as set forth in the petition and application for peremptory writ of mandate, filed herein, except that the reason for the defendant's not auditing said account not being stated in said application, it is agreed that the defendant refuses to audit said accounts for the reason that there was not, at the time they were presented, nor is not now, any money in the treasury with which to pay said warrants, and for the further reason that the appropriation made by the territorial legislature for transportation and care of the insane for the years 1893 and 1894 was, at the time said accounts were presented, entirely exhausted and covered by warrants previously issued against said appropriation. The decision of the court is respectfully asked on the question of the right of the defendant, as auditor of the territory, to audit accounts that are proper claims against the territory after the appropriation made for the purpose of paying said accounts has been exhausted."

80. *Woodruff v. People*, 193 N. Y. 560, 86 N. E. 562.

In New York the code provision prohibits the granting of an order of arrest, a warrant of attachment or a temporary injunction without process. This section allows the granting of a permanent injunction in a case submitted without controversy.<sup>81</sup>

Where, however, the facts justify relief by action and also by special procedure, though the court cannot grant relief under the latter head it may retain the case for disposition as to the facts constituting the action.<sup>82</sup>

b. *Scope of the Statement.*—The statement is limited to the facts,<sup>83</sup> and must contain all the facts essential to constitute a cause of action in favor of one of the parties to the proceeding and against the other<sup>84</sup> in the courts of the state in which the proceeding is brought.<sup>85</sup>

c. *Nature of the Facts Stated.*—The facts stated as the basis for

81. See N. Y. Code Civ. Proc., § 1281 and *Associate Alumni v. General Theolog. Sem.*, 163 N. Y. 417, 57 N. E. 626; *Cunard S. S. Co. v. Voorhis*, 104 N. Y. 525, 11 N. E. 49; *People v. Binghamton Tr. Co.*, 65 Hun 384, 20 N. Y. Supp. 179; *Patterson v. Mutual Life Assn.*, 11 N. Y. Supp. 636.

An injunction was issued in *Skinner v. Santa Rosa*, 107 Cal. 464, 40 Pac. 742.

Specific performance may be decreed, though in this proceeding the court has not power to award an injunction. *Associate Alumni v. General Theolog. Sem.*, 163 N. Y. 417, 57 N. E. 626.

82. *Associate Alumni v. General Theolog. Sem.*, 163 N. Y. 417, 57 N. E. 626; *People v. Binghamton Tr. Co.*, 65 Hun 384, 20 N. Y. Supp. 179 (which was a case where if the violation of law claimed was found, the defendant was subject to a penalty).

83. They cannot control the court by stipulation as to any question of law to be determined under them. *San Francisco Lumb. Co. v. Bibb*, 139 Cal. 325, 73 Pac. 864.

84. *Colo.*—*Strickler v. Colorado Springs*, 16 Colo. 61, 26 Pac. 313, 25 Am. St. Rep. 245. *Ind.*—*Day v. Day*, 100 Ind. 460; *Henes v. Henes*, 5 Ind. App. 100, 31 N. E. 382; *Templeton v. Board of Commissioners*, 89 N. E. 880. *Mo.*—*Ford v. Cameron*, 19 Mo. App. 467. *N. Y.*—*Missouri, K. & T. R. Co. v. Union Tr. Co.*, 156 N. Y. 592, 51 N. E. 309; *Clark v. Wise*, 46 N. Y. 612 (where the court refused to consider the question whether or not an assignment was fraudulent); *Zarkowski v. Schroeder*, 60 App. Div. 457, 69 N. Y. Supp. 893. *N. C.*—*Moore v. Hinnant*, 87 N. C. 505. *S. C.*—*McKenzie v. Alexander*, 2 S. C. 81.

An agreed case in which the statement of facts is not sufficient to enable the court to render judgment in the proceedings should be dismissed with costs. *Clapp v. Guy*, 31 App. Div. 535, 52 N. Y. Supp. 33.

In a controversy between one claiming goods under a prior assignment and the sheriff who had levied upon the goods in behalf of creditors, the statement is defective in not specifying any goods attached, and to be restored, in case of a decision favorable to the plaintiff. *Moore v. Hinnant*, 87 N. C. 505.

**Agreed Case.—Contents. — Exhibits.** The summary method provided by the code for the submission of an action upon a case contemplates that all the facts necessary to a determination of the questions submitted shall be fully stated in the case agreed; and when it appeared that some of the facts were recited in exhibits which were not attached, and that leave was given the parties to add other matters, the cause was remanded to be perfected. *Piedmont R. Co. v. Reidsville*, 101 N. C. 404, 8 S. E. 124.

85. *White v. Clarke*, 111 Cal. 425, 44 Pac. 164, where the controversy was as to homestead rights under U. S. Rev. St., § 2289.

**Controversy Relating to Payment by Railroad for Right of Way.**—In *Donald v. The St. L., K. C. & N. R. Co.*, 52 Iowa 411, 3 N. W. 462, the railroad company had gone onto land and built a right of way without obtaining permission to do so and after having occupied for a number of years, refused to make payment therefor. The case between the railroad company and the vendee of the owner at the time of the entry by the railroad company was pre-

sented as follows: "In the above entitled cause it is agreed as follows: to-wit: 1st. That in the spring or summer of 1868, one G. was the owner in fee simple of the following described real estate, to-wit: [premises described]. 2nd. That at said time and during the time said G. owned said real estate the St. Louis & Cedar Rapids Railway Company, without first obtaining the right of way over and across said land, entered upon same, located and constructed its road over and across said land; and said St. Louis & Cedar Rapids Railway Company, its lessees and successors and grantees, have continued in the exclusive possession and use of said land on which said road is built on said land, ever since same was graded; to-wit: spring and summer of 1868. 3rd. That in the fall of 1868 the North Missouri Railroad Company leased said St. Louis & Cedar Rapids Railway for a term of twenty years, and continued to use and operate said road under said lease until August, 1871, at which last named date the North Missouri Railroad was sold on deed of trust, and was bought in, together with lease aforesaid, by J., trustee. That said J., as trustee, continued in possession of and operated said St. Louis & Cedar Rapids Railway through and over said land until February, 1872; that at the last named date he sold said North Missouri Railroad and said lease on the St. Louis & Cedar Rapids Railway to St. Louis, Kansas City & Northern Railway Company. 4th. That at the October term, 1872, of the United States Circuit Court for the district of Iowa, a mortgage, heretofore given by St. Louis & Cedar Rapids Railway Company on its said road, was foreclosed, and said road from the Iowa and Missouri State line to Ottumwa, Iowa, was, on the 18th day of March, 1873, sold under said foreclosure to Charles Parsons, trustee for bondholders, for the sum of \$500,000.00, and on the 1st day of October, 1875, said line of road was sold by Parsons, trustee, to the St. Louis, Ottumwa & Cedar Rapids Railway Company, and is now owned by said last named company. 5th. That the said St. Louis, Kansas City & Northern Railway Company have had possession of and operated said line of road from said state line to Ottumwa, Iowa, under lease from said St. Louis & Cedar Rapids Railway Company, Charles Parsons,

trustee, and St. Louis, Ottumwa & Cedar Rapids Railway Company ever since February, 1872, and it and its predecessors have been in exclusive possession of said line of road through and across said real estate ever since the spring or summer of 1868. 6th. That on the 19th day of February, 1874, G. sold and conveyed said land to D. by original deed, which is hereto attached, marked exhibit 'A,' and made a part hereof, and said D. still holds title to said lands described in deed. 7th. That none of the owners of said land, nor any railway companies, nor anyone in their behalf, or in behalf of the trustee aforesaid, ever commenced proceedings to condemn the right of way over and across the real estate hereinbefore described, and no right of way was ever conveyed across said land by anyone owning said land at any time. 8th. That the value of said right of way over and across said land is fixed by the parties thereto at one hundred and seventy-five dollars. 9th. That said St. Louis, Kansas City and Northern Railway Company and St. Louis, Ottumwa & Cedar Rapids Railway deny that they or either of them are liable to said D. for the value of said right of way, and deny that said D. can recover of them or either of them. 10th. Now, it is further agreed that the question of the liability of said St. Louis, Kansas City & Northern Railway Company and St. Louis, Ottumwa & Cedar Rapids Railway Company to said D. for said right of way shall be submitted to the Circuit Court of Appanoose county, Iowa, at the August term, 1878, on the agreement of facts herein stated, and no other evidence be submitted or admitted. That if said court finds that said companies, or either of them, are liable, then judgment shall be entered against both of said companies, for the sum of \$175.00 and costs, but no execution to issue thereon until said D. conveys to said companies or to such of them as they may elect at the time judgment is rendered, the right of way over and across said real estate one hundred feet wide, being fifty feet on each side of the center of the railroad track as now constructed on said land. The title to said right of way to be free and clear of all liens. That in case said court finds said companies are not liable, then judgment shall be rendered against D. for all costs. 11th. It is



the decision must be ultimate as distinguished from evidentiary facts,<sup>86</sup> and must be real as distinguished from hypothetical facts<sup>87</sup> representing adverse interests of the parties themselves, and disclosing a situa-

expressly agreed and understood that by this agreement neither of the parties hereto waive their right of appeal to the Supreme Court, and that each party hereto may appeal from the judgment rendered in this case to the Supreme Court of Iowa in the manner and form as required to appeal cases to said court. 12th. That said railroad (St. Louis & Cedar Rapids) was constructed over and across said land without the knowledge or consent of the said G. and without any agreement with him in regard to same. 13th. That neither the St. Louis, Ottumwa & Cedar Rapids Railway Company, nor any of the subsequent owners or lessees, or any other corporation or person, ever paid either the said Mathias Gregory or the plaintiff, John Donald, anything for the right of way over said land, or ever agreed to pay anything for said right of way. That the defense of statute of limitation against plaintiff is waived, if any such defense exists, and for the purpose of the trial of this case it is agreed that this action be deemed as pending since March 1st, 1878."

**Controversy Concerning Payment of License Tax by Railway Company.**—In *Southern R. Co. v. Greenville*, 45 S. C. 602, 23 S. E. 952, the railway company, being duly authorized thereto, purchased two lines running into the City of Greenville, each of which possessed a depot there, and thereafter for the convenience of the public maintained both depots and was required by the city to pay two licenses. The licenses were paid and the parties submitted the question as to the propriety thereof for adjudication in the following case: "1. That the Southern Railway Company is a corporation created under the laws of Virginia and legally doing business in the State of South Carolina, and that the City Council of Greenville is a municipal corporation, created under the laws of the State of South Carolina, and vested with power to conduct the municipal affairs of the city of Greenville. 2. That the fiscal year of said city runs from January to January, and taxes are collected in advance. That the regular tax ordinance for the year

1895 contains the following, amongst other sections: Section 4. No person, firm or corporation shall carry on any business or profession hereinafter mentioned without having first paid a special license tax therefor, as follows, to-wit: the provision as to railroads being, 'Railroads, for business done within the State, and not including that done without the State, \$300.' 3. That the Southern Railway Company owns and operates what was lately known as the Columbia and Greenville Railroad and the Atlantic and Charlotte Air Line Railway, both of which run into the City of Greenville, and are under one management and have but one agent in said city, though having, for the convenience of the public, more than one depot, with ticket agent at each, connected by its tracks; said roads having separate charters, the Columbia and Greenville Road being chartered by the State of South Carolina, and the Atlanta and Charlotte Air Line by the States of North Carolina, South Carolina and Georgia, but operated by the Southern Railway Company, under the statute of the State allowing foreign corporations to own property and carry on business in the State, under certain conditions, which conditions have been complied with. 4. That the Southern Railway Company contended and contends that it is liable for but one license tax under the tax ordinance aforesaid, while the contention of the said city of Greenville was and is that said company should pay two license taxes by reason of its ownership aforesaid, or that the two roads are each liable for its said license fee. 5. That, being unable to agree, the said Southern Railway Company paid the said two licenses under protest, filing with the treasurer of said city council, at the time of paying the same, the protest, a copy of which is hereto attached, and marked exhibit 'A'." The court reversed the judgment below and held that only one license was required.

86. *Marx v. Brogan*, 188 N. Y. 431, 81 N. E. 231.

87. *Keeline v. Council Bluffs*, 62 Iowa 450, 17 N. W. 668; *Jones v. Hoffman*, 18 B. Mon. (Ky.) 656.

tion that calls for relief,<sup>88</sup> and must furnish a proper basis for an effectual judgment in favor of one and against the other of the parties to the submission which would be *res judicata* in a subsequent litigation involving the same facts,<sup>89</sup> and which can be enforced by some known process.<sup>90</sup>

The facts must present legal rights as distinguished from mere claims.<sup>91</sup>

88. Colo.—Central City Water Co. v. Kimber, 1 Colo. 475. Ind.—Henes v. Henes, 5 Ind. App. 100, 31 N. E. 832. Iowa.—Keeline v. Council Bluffs, 62 Iowa 450, 17 N. W. 668. Ky.—Jones v. Hoffman, 18 B. Mon. 656. N. Y.—Heasty v. Lambert, 98 App. Div. 177, 90 N. Y. Supp. 595; *In re York's Estate*, 97 App. Div. 632, 89 N. Y. Supp. 869; Clapp v. Guy, 31 App. Div. 535, 52 N. Y. Supp. 33; *In re Attorney*, 10 App. Div. 491, 42 N. Y. Supp. 268, 278; Judson v. Flushing Jockey Club, 14 Misc. 562, 36 N. Y. Supp. 128; Judson v. Flushing Jockey Club, 14 Misc. 350, 36 N. Y. Supp. 126; Wood v. Nesbitt, 64 Hun 639, 19 N. Y. Supp. 423. Tenn.—Ward v. Alsop, 100 Tenn. 619, 46 S. W. 573; State v. Wilson, 2 Lea 204.

A suit will be dismissed though plaintiff has a good cause of action, if his principal object in prosecuting it is not to redress his own grievances, but to obtain a decision that will affect third persons who are litigating the same question in another suit pending in another court or jurisdiction. Ward v. Alsop, 100 Tenn. 619, 46 S. W. 573.

A question of practice cannot be submitted to the court in this form of proceeding. Potter v. Talkington, 5 Idaho 317, 49 Pac. 14.

If a sheriff has money in his hands raised under executions in favor of different creditors against the same defendant, if the creditors set up conflicting claims to the money, this is not such a case as may be submitted to a judge, without action, under the C. C. P., § 315, by adverse claimants. "That provision is only applicable to a case where there are parties to a question in dispute which might be the subject of a civil action in which a judgment might be rendered for one party against the other. . . . In this case the parties have no claim—the one against the other; but they may have separate claims against the sheriff, and he is not a party to this

controversy." Bates v. Lilly, 65 N. C. 232.

89. White v. Clarke, 111 Cal. 425, 44 Pac. 164; Cunard S. S. Co. v. Voorhis, 104 N. Y. 525, 11 N. E. 49.

In Cunard S. S. Co. v. Voorhis, 104 N. Y. 525, 529, 11 N. E. 49, the court summed up the situation thus: "The parties present to the court for decision a question which if decided for the plaintiff could be followed by no relief, and if for the defendant, would not be *res judicata* in any subsequent litigation." So the proceeding should have been dismissed below.

Subject of Action.—"The Code contemplates the existence and presentation of a state of facts upon which the person named as plaintiff in the submission could bring an action at law or in equity against the person named therein as defendant, and which of themselves, if established by proof in such an action, would entitle the person named as plaintiff to some sort of a judgment against his adversary, if the court agreed with the plaintiff as to the law applicable to the facts." Clapp v. Guy, 31 App. Div. 535, 52 N. Y. Supp. 33, quoted approvingly in Woodruff v. People, 193 N. Y. 560, 86 N. E. 562.

90. Johnson v. Malloy, 74 Cal. 430, 16 Pac. 228, where it was improperly attempted to procure a direction to modify an assessment, where the assessor's term had expired.

Enforceable Process.—Where the effect of the judgment asked would be to subject a sheriff in executing the decree of one circuit court to the orders of another circuit court in disregard of the terms of the decree, the proceeding was dismissed. Gregory v. Perdue, 29 Ind. 66.

91. White v. Clarke, 111 Cal. 425, 44 Pac. 164. And so an allegation that a certain claim has not been paid amounts to nothing without the statement of facts which show an obligation to pay it. Green v. Fresno County, 95 Cal. 329, 30 Pac. 544. So also a



d. *Manner of Stating Facts.*—While formal pleadings are not required in this proceeding,<sup>92</sup> it has been held that the rules of pleading prescribed by the code may with propriety be applied to the statement of facts required by the statutes authorizing the submission of controversies; and no greater precision is required than the rules of pleading require in an action.<sup>93</sup>

The statement should not be a mere narration of the facts out of which the controversy arises, but should contain a statement of the subject-matter of the controversy and of the conflicting claims of the

claim of right is not sufficient unless there is a showing of interference and injury. *Clapp v. Guy*, 31 App. Div. 535, 52 N. Y. Supp. 33.

92. In *Overman v. Sims*, 96 N. C. 451, 2 S. E. 372, the court said: "The statute manifestly contemplates the existence of a controversy, and the case agreed should set out its nature, so that the Court may understand what is intended to be submitted, and render an intelligent decision. An analogy in the practice is found in suits in equity, when a bill of interpleader is filed to bring contesting claimants to the thing in the hands of the complainant, before the Court, for a binding and definite determination of the right, in which the contentions of the adversary parties are set out; and similar in this feature is the bill filed by a trustee to obtain the advice of the Court as to the disposition of a trust fund among rival claimants."

93. Section 532 of the Code of Civ. Proc. of New York provides for pleading judgments as follows: "In pleading a judgment, or other determination, of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment or determination may be stated to have been duly given or made. If that allegation is controverted, the party pleading must, on the trial, establish the facts conferring jurisdiction." In referring to the submission of a controversy under § 1279 of the Code to test the validity of certain town bonds in connection with certain adjudications of the county judge and appointment of commissioners by said judge pursuant to statutory powers conferred upon him and to be exercised in proceedings preliminary to the issuance of such bonds, the court of appeals on pages 527, 528, said: "We also think that the rule of pleading facts prescribed by section 532 of

the Code of Civil Procedure may with propriety be applied to the statement of facts required by section 1279; and that whatever is a sufficient statement of the facts, according to the former, to impliedly allege jurisdiction, is a sufficient statement of the fact, according to the latter, that jurisdiction existed (*Rockwell v. Merwin*, 45 N. Y. 166). There is no reason for greater particularity in admitting facts for the submission of a controversy than in alleging them in a pleading." And the court held that the admissions in the statement that the county judge "duly adjudged, determined and ordered," and that the county judge duly appointed and commissioned the commissioners, who accepted, qualified and acted, meant that every preliminary step required by the statute had been taken; that duly, in legal parlance, means according to law; it does not relate to form merely, but includes form and substance both; that the expression "duly adjudged," as used in the statement for the submission, meant adjudged according to law, that is, according to the statute governing the subject, and implies the existence of every fact essential to perfect regularity of procedure, and to confer jurisdiction both of the subject-matter and of the parties affected by the judgment. The final step, in particular, the making of the judgment, cannot be "duly" taken unless all the preliminary steps upon which it is based have likewise been duly taken. Such a submission therefore admits that persons appointed become commissioners of the town *de jure*, with authority to issue the bonds, and their acts within the scope of their authority were the acts of the town; and that said commissioners would lawfully employ an agent to sell the bonds and invest the proceeds as directed. *Brownell v. Greenwich*, 114 N. Y. 518, 520, 22 N. E. 24, affirming 44 Hun (N. Y.) 611.



litigants.<sup>94</sup> The controversy must clearly appear from the agreement submitted.<sup>95</sup>

While no particular form is required, it is just as essential that the statement in an agreed case should set forth facts constituting a cause of action as it is in a complaint in a civil action.<sup>96</sup>

94. As the court cannot go outside of the case, for it constitutes the entire action, in a brief explanation of the statute for the pleadings in an ordinary record, there should be in it some subject-matter of the contesting claims, to enable the court to hear and determine the case, thus presented. *Overman v. Sims*, 96 N. C. 451, 2 S. E. 372.

95. *Board of Comrs. v. Gilliam*, 17 Mont. 333, 42 Pac. 852, where it was held that answering or deciding a question which does not clearly appear from the agreement, or show the existence of a real controversy, does not constitute an order which can be enforced, or from which an appeal can be taken.

Approved Forms.—In the case of *People ex rel. Daniels v. Henshaw*, 76 Cal. 436, 18 Pac. 413, the case came up on a judgment roll, containing the following agreed statement of facts:

It is hereby stipulated and agreed by and between the respective parties hereto, plaintiff and defendant,—

1. That there was a municipal election held in the city of Oakland, on the eighth day of March, 1886, at which relator, S. F. Daniels, received the highest number of votes cast for police judge of the city of Oakland, for the full term of two years next ensuing after such election, to succeed himself, he then being the duly elected, qualified and acting incumbent of the office.

2. That within the time prescribed by law, he took the oath of office, and duly qualified as required by law.

3. That he is eligible, qualified, and competent to discharge and perform the duties of the office.

4. That he is of right entitled to have, hold, and enjoy the rights and emoluments of the office of police judge of the city of Oakland, for the full term of two years from and after his said election, and that he should be let and put into possession of the said office, and should receive its emoluments, if such office now exists.

5. It is further stipulated and agreed that the only question involved in this proceeding is, whether or not the office of police judge of the city of

Oakland was abolished by an act of the legislature of the State of California, entitled "An act to provide for police courts in cities having thirty and under one hundred thousand inhabitants, and to provide for officers thereof," approved March 18, 1885.

It being further stipulated and agreed that if the act above named did abolish the office of police judge of the city of Oakland, as provided by an act of the legislature entitled "An act to establish a police court in the city of Oakland, and define its jurisdiction, duties, and fees of courts and its officers," approved March 10, 1886, and the supplementary and amendatory acts thereto, then the defendant is entitled to have and hold the said office, and exercise its functions; but that if the said act did not abolish said office, then and in that event, the relator, S. F. Daniels, should be let and put into possession of the said office, and have and receive its emoluments and exercise the functions of said office. The court commended this statement as eliminating from the problem all questions except one, namely, was the office of police judge of the city of Oakland abolished by the act of the legislature in paragraph 5 referred to.

(Title of Court and Cause.)

The County of Los Angeles, by the district attorney, and C. G. K., respectfully show to the court as follows:

That they are the parties to a question in difference, which might be the subject of a civil action, as hereinafter set forth;

That they have agreed upon a case, upon which the controversy depends, and present herewith a submission of the same, to the Superior Court of the county of Los Angeles, state of California, which is the court which would have jurisdiction if an action had been brought to recover in said matter;

Taat heretofore, to-wit, etc.

96. *Woodruff v. People*, 193 N. Y. 560, 86 N. E. 562, reversing 127 App. Div. 934, 111 N. Y. Supp. 1150; *Wood v. Squires*, 60 N. Y. 191; *McKethan v. Ray*, 71 N. C. 165.

Exhibits may be attached to the statement for the purpose of explanation and reference, but the statement should contain all the facts and the court should not be required to hunt for them in exhibits.<sup>97</sup>

e. *Formalities.*—Consent of the parties cannot confer upon a court authority to treat as an agreed case a statement that does not comply with the formalities prescribed by the statute.<sup>98</sup> Unless the statute expressly authorizes an oral statement<sup>99</sup> it must be in writing,<sup>1</sup> and must be signed by the parties,<sup>2</sup> and, in some jurisdictions, verified.<sup>3</sup> The Oregon statute provides that the statement must be verified by the oath of the parties, or where there is more than one plaintiff or defendant, by at least one of each.<sup>4</sup>

In Oregon and Texas the statement may be signed by the attorneys of the parties.<sup>5</sup>

Contents.—In *Woodruff v. People*, *supra*, it was said: "The Code contemplates the existence and presentation of a state of facts upon which the person named as plaintiff in the submission could bring an action at law or in equity against the person named therein as defendant, and which of themselves, if established by proof in such an action, would entitle the person named as plaintiff to some sort of a judgment against his adversary, if the court agreed with the plaintiff as to the law applicable to the facts."

97. Where it appeared that some of the facts were recited in exhibits which were not attached and that leave was given the parties to add other matters, the cause was remanded to be amended and perfected so as to present all the facts—not by references to be hunted up, but in direct and positive form—in this form it may be decided in the court below, and reviewed, on appeal, in the supreme court. *Piedmont, etc. R. Co. v. Reidsville*, 101 N. C. 404, 8 S. E. 124.

98. *Colo.*—*Central City Water Co. v. Kimber*, 1 *Colo.* 475. *Mo.*—*State ex rel. Webb v. McCune*, 129 *Mo. App.* 511, 107 S. W. 1030. *N. Y.*—*Woodworth v. People*, 193 N. Y. 560, 86 N. E. 562; *Troy Waste Mfg. Co. v. Harrison*, 73 Hun 528, 26 N. Y. Supp. 109; *Lang v. Ropke*, 1 *Duer* 701.

99. *As it Does in Illinois.*—*Hurd's Rev. St.* 1905, c. 110, §§ 100, 101. But in that state the judgment must contain a statement as to what matters in controversy were submitted and such statement shall be conclusive.

1. *Geisen v. Reder*, 151 *Ind.* 529, 51 N. E. 353, 1060.

2. *Town of Salamanca v. Catta-*

*raugus County*, 81 Hun 282, 30 N. Y. Supp. 790.

So As to "Special Case."—Under § 323 of the Court and Practice Act of Rhode Island—"The statement of facts upon which this court should properly act under said section 323 should be made by the parties over their own signatures; or if signed by an attorney on behalf of any party, there should be such evidence of authority so to represent the party to the statement as to prevent any question arising in future as to the authorized representation of the parties before the court." *Angell v. Angell*, 28 R. I. 330, 67 *Atl.* 325.

*Estoppel.*—When the agreement is signed by the appellant in person, and by the appellee, acting through the attorney who represented him in the court below, and who represents him as counsel in the supreme court, and it appears from the record that the agreement as to the facts was submitted to the trial court by the parties, that it was acted upon by the trial court, and that a finding and judgment were made upon it, and there is nothing in the record showing that the appellee repudiated the act of his attorney who represented him in the court below and represents him here, the appellee is bound by the agreement. *Booth v. Cottingham*, 126 *Ind.* 431, 26 N. E. 84.

3. *Sayles Civ. St., Tex.*, Vol. 1, § 1293.

4. *Oregon.*—*Bellinger & Cotton's Ann. Codes & St.*, Vol. 1, § 194.

5. In Oregon when the party to the controversy is the state, a county or other public corporation therein or a private corporation or minor, the statute provides that the statement shall be signed by any person who at the

**Acknowledgment Required.**—In some states the statement must be acknowledged or proved and certified in like manner as a deed to be recorded in the county where it is filed.<sup>6</sup>

**Judgment.**—The stipulation must provide also for the entry of an effectual judgment,<sup>7</sup> and a defect in this respect cannot be remedied by amendment or appeal.<sup>8</sup>

**4. The Submission.**—The statement or case must also contain or be accompanied by a stipulation or submission by which the parties submit their controversy to the court, and which is always essential to the jurisdiction of the court, and must be in writing.<sup>9</sup>

**Leave To File New Submission.**—If the submission is defective, as for example, if it fails to state that the papers contain a recital of the facts agreed upon, it will be dismissed, but leave may be given to file a new submission.<sup>10</sup>

A recognized form of submission is set out in the note.<sup>11</sup>

time sustains the relation to such state, county or minor as would authorize the service of summons upon him. *Bel-linger & Cotton's Ann. Codes & St.*, §§ 193-195.

6. *Bloomfield v. Ketchum*, 95 N. Y. 657; *Town of Salamanca v. Cattaraugus County*, 81 Hun 282, 30 N. Y. Sup. 790; *Wood v. Nesbitt*, 64 Hun 639, 19 N. Y. Supp. 423.

7. *Woodruff v. People*, 193 N. Y. 560, 86 N. E. 562, reversing 127 App. Div. 934, 111 N. Y. Supp. 1150; *Williams v. Rochester*, 2 Lans. (N. Y.) 169. See also *Central City Water Co. v. Kim-ber*, 1 Colo. 475.

8. *Woodruff v. People*, 193 N. Y. 560, 86 N. E. 562, reversing 127 App. Div. 934, 111 N. Y. Supp. 1150.

9. In Illinois, an oral statement is allowed, but even there the parties must execute first a written agreement to be entered of record in substantially the form set forth in the statute. *Hurd's Rev. St.*, 1905, c. 110, § 100; *Farwell v. Sturges*, 58 Ill. App. 462.

10. *Begen v. Curtis*, 81 App. Div. 91, 80 N. Y. Supp. 929.

11. *Hurd's Rev. St.*, Ill., 1891, §§ 100, 101, provides as follows:

"Sec. 1. That any two or more persons or corporations may appear in person or by attorney in any circuit court (or in the Superior Court of Cook County) and submit to any judge thereof, orally, and without formal pleadings, any matter in controversy, having first a written agreement (to be entered of record) and substantially in the following form, to wit:

In the Circuit Court of ——— County.

First. We (here insert names) do hereby mutually agree to submit to Judge (here insert name) of said court, certain matters in controversy between us for his determination, without a jury, he to hear the same forthwith and to enter the judgment or decree of the court therein within (here insert number of days or 'forthwith') days after such hearing is concluded.

Second. That said judgment or decree shall contain a statement as to what matters in controversy were so submitted, and such statement thereof shall be conclusive.

Third. That no record except of this agreement and of such judgment or decree shall be made as to the matters in controversy so submitted; or as to the proceedings had on the hearing thereof.

Fourth. That such judgment or decree may be enforced in like manner as other judgments and decrees of such court.

Fifth. That we each to the other hereby waive all right of appeal from such judgment or decree, and release all errors that may intervene in the hearing of the matter so submitted, and in the entering of the judgment or decree therein, and agree that this release of errors may be pleaded in bar of any writ of error that may be sued out as to such judgment or decree.

Witness our hands and seals, this ——— day of ———, A. D. ———"

See *Farwell v. Sturges*, 58 Ill. App. 462.



**5. The Relief.**—The submission or stipulation must contain a specific agreement that the court may render a judgment to be entered for plaintiff or defendant, the general nature of which is set forth in the stipulation,<sup>12</sup> and, it has been said, the court should not grant

**12. Woodruff v. People, 193 N. Y. 560, 86 N. E. 562, reversing judgment, 127 App. Div. 934, 111 N. Y. Supp. 1150; Marshall v. Hayward, 67 App. Div. 137, 73 N. Y. Supp. 592.**

If an agreed case does not indicate the judgment desired it will be dismissed, when the facts stated are such as tend to make out a cause of action in favor of the plaintiff against some of the defendants for trespass; they might, also, be possibly made the basis of a demand for equitable relief, in the nature of an injunction. A case must be presented in which a judgment may be rendered in favor of one and against the other of the parties to the submission; and the case must indicate what judgment is asked for. *Williams v. Rochester, 2 Lans. (N. Y.) 169.*

An insufficient agreement as to the judgment was in the case of *Central City Water Co. v. Kimber, 1 Colo. 475*, where the parties agreed that the decision of the court as to the right to divert certain waters should be final.

The frame of a prayer for judgment in a controversy between a municipality and a canal company respecting the liability for building a bridge is found in *Hawks v. Goshen, 144 Ind. 343, 43 N. E. 304*, as follows:

“It is agreed that after the court has decided the first question a writ of mandate may issue requiring the party adjudged to be liable, to proceed at once to erect a substantial bridge, sixteen feet wide, to be placed on stone abutments, with guarded approach from the northeast, so constructed as to allow teams to enter from Third street with ease. It is further agreed that after the court has decided the second question it shall enter judgment against any party which may be liable for the cost thereof, where such party is not the party charged with the duty of constructing the bridge, the amount to be proven to the satisfaction of the court upon the completion of the bridge.”

In a controversy between a municipality and a canal company concerning liability for the erection of a bridge, the following judgment was presented:

“Come the parties and this cause is submitted to the court on the agreed statement of facts filed herein, and the court having seen and examined the agreed statement, and being advised in the premises, finds that the owners of the hydraulic canal at the west end of North street, in said city, and that the defendants, C. & E. Hawks, being the owners of said canal at this time, are now liable for the construction of such a bridge, and that neither the plaintiffs herein nor the defendant board of commissioners are liable for the same, nor for any part of the cost thereof. It is, therefore, considered and adjudged that a peremptory writ of mandate issue out of and under the seal of the court to the defendants, C. & E. Hawks, commanding them, forthwith, to construct a substantial bridge across the hydraulic canal to the west end of North street, in the city of Goshen, the said bridge to be sixteen feet wide, supported on stone foundations, of which that on the west side of the canal shall be at the place where the west end of the present bridge is located, and that on the east side of the canal shall be ten feet north of the place where the east end of the present bridge is located, the sides of the said bridge and the approach at the northeast corner to be provided with substantial guards,” *Hawks v. Goshen, 144 Ind. 343, 43 N. E. 304.*

**Defective Submission.—Not Mutual.** Under N. Y. Code Civ. Proc., § 1280, providing that, after a controversy has been submitted on an agreed statement of facts, it is thenceforth an action, a submitted controversy, which provides that in case of a decision for the plaintiff he shall have judgment, but in case of decision for defendant the parties “shall be left in their present condition,” is defective, because not providing for judgment for defendant, and should, therefore, be dismissed. In this connection the court said: “The submission is further defective in not providing for judgment in defendant’s favor in case of a decision favorable to her. Upon submission the controversy becomes an action, pursuant to

a form of relief different from that contemplated by the submission.<sup>13</sup>

It has been held that a prayer for judgment is not essential.<sup>14</sup> But the contrary has also been held.<sup>15</sup>

**Costs.**—Where costs are discretionary with the court, a prayer for them is not essential.<sup>16</sup>

**6. The Affidavit.**—In most of the states, the submission must be accompanied by an affidavit that the controversy is real, and that the submission is made in good faith, for the purpose of determining the rights of the parties. Such an affidavit, where required, is jurisdictional,<sup>17</sup> and must appear in the tran-

section 1280 of the Code of Civil Procedure, 'and each provision of law relating to a proceeding in an action applies to the subsequent proceedings therein.' The action accordingly, however decided, should terminate in a judgment, and the condition in the submission that judgment may only be rendered in case of a decision in the plaintiff's favor is irregular." *Zarkowski v. Schroeder*, 60 App. Div. 457, 69 N. Y. Supp. 893.

**13. Kingsland v. New York**, 42 Hun (N. Y.) 599.

**14. Williams v. Comrs. of Iredell County**, 132 N. C. 300, 43 S. E. 896, where it was said that even where a complaint is filed it is immaterial if the prayer for relief is omitted, or if the wrong relief is asked, for the court will give any relief to which the facts alleged and proved entitle the party to receive.

**15. Woodruff v. People**, 193 N. Y. 560, 86 N. E. 562, 563.

The claim of each party in the nature of a prayer for judgment should be set out. *In re York's Estate*, 97 App. Div. 632, 89 N. Y. Supp. 869.

**16. People v. Fitchburg R. Co.**, 133 N. Y. 239, 30 N. E. 1011.

**17. Cal.**—*White v. Clarke*, 111 Cal. 425, 44 Pac. 164. **Ind.**—*Geisen v. Reder*, 151 Ind. 529, 532, 51 N. E. 353; *City of Shelbyville v. Phillips*, 149 Ind. 552, 553, 48 N. E. 626; *Myers v. Lawyer*, 99 Ind. 237; *Manchester v. Dodge*, 57 Ind. 584; *Sharpe v. Sharpe's Admr.*, 27 Ind. 507. See also *Witz v. Dale*, 129 Ind. 120, 121, 27 N. E. 498. **Ia.**—*Keeline v. Council Bluffs*, 62 Iowa 450, 17 N. W. 668. **Ky.**—*Jones v. Hoffman*, 18 B. Mon. 656. **N. Y.**—*Lax v. Fourteenth St. Store*, 49 Misc. 627, 97 N. Y. Supp. 396. **N. C.**—*Grandy v. Gulley*, 120 N. C. 176, 26 S. E. 779; *Arnold v. Porter*, 119 N. C. 123, 25 S. E. 785; *Jones v. Commissioners*, 88 N.

**C.** 56; *Wilmington v. Atkinson*, 88 N. C. 54, approving *Grant v. Newsom*, 81 N. C. 36; *Harvey v. Edmonds*, 68 N. C. 243. **Ohio.**—*Newark, etc. R. Co. v. Perry County*, 30 Ohio St. 120. **Okla.**—*Johnson v. Cameron*, 2 Okla. 266, 37 Pac. 1055. **S. C.**—*Reeder v. Workman*, 37 S. C. 413, 416, 16 S. E. 187.

In *Jones v. Hoffman*, 18 B. Mon. (Ky.) 656, the court of appeals said: "The language of this section is explicit, and admits of but one construction. The jurisdiction of the court to hear and determine an agreed case depends upon the conditions prescribed by the latter clause, and without the required affidavit, setting forth the facts mentioned, the court has no authority to hear or determine the case, or to render a valid judgment. The wisdom and policy of this restriction upon the exercise of jurisdiction in such cases is too obvious to require illustration. It was never intended that the dockets of the courts should be encumbered with controversies wholly fictitious, suggested by either the curiosity or interest of lawyers or litigants, and devised for no other purpose than that of obtaining a judicial opinion upon abstract questions of law, in the decision of which they have, or may expect to have, an interest. Courts of justice were established for very different purposes. Their time and labor are required to be devoted to real controversies between real parties."

**Rule of Court.**—In Colorado, this requirement is demanded by a rule of court. *Molandin v. Colorado Cent. R. Co.*, 3 Colo. 173.

**Mere Award and Not Appealable.**—Without such affidavit, it is said in *Town of Plainfield v. Village of Plainfield*, 67 Wis. 525, 30 N. W. 673, the decision of the court is not appealable, and is, at most, a mere award as in a common law arbitration. To the same

script on appeal or no question is presented to the court.<sup>18</sup>

**Function of Affidavit.**—The affidavit is intended to supply to the court the protection against the imposition of fictitious controversies which in other proceedings is supplied by pleadings and proof.<sup>19</sup> If this affidavit be wanting the case is not an agreed case.<sup>20</sup> But the affidavit cannot convert an agreed statement of facts in an action into an agreed case.<sup>21</sup>

**Signature.**—In most of the states the affidavit must be signed by a party.<sup>22</sup> And this is probably so wherever the statutes contain no explicit direction upon the subject, as for example, in Indiana.<sup>23</sup> In one state it must be signed by the parties, or where there is more than one plaintiff or defendant, by at least one of each.<sup>24</sup> Unless the stat-

effect, see *Molandin v. Colorado Cent. R. Co.*, 3 Colo. 173.

In *Bank v. Wachovia L. & T. Co.*, 119 N. C. 553, 554, 26 S. E. 131, however, when the case was docketed in the appellate court it did not contain the affidavit required by statute. But upon motion of plaintiff (the defendant being present and not objecting) the plaintiff was allowed to file the required affidavit and the court proceeded to hear the case.

**Form of Affidavit.**—An affidavit which, instead of showing that the controversy is real, states that "the statement of the case" is "a real controversy" and which instead of stating that the proceedings are in good faith, states that the "contention" is in good faith, is insufficient. *White v. Clarke*, 111 Cal. 425, 44 Pac. 164.

**Corporation a Party.**—In *Hawks v. Goshen*, 144 Ind. 343, 43 N. E. 304, the controversy was between a canal company and a municipality and the accompanying affidavit was attached to the case:

"State of Indiana, } ss.  
Elkhart County. }

The city of Goshen, Indiana, by its attorney, A. S. Zook, the board of commissioners of Elkhart county, by A. Griner, one of the members thereof, and C. & E. Hawks, by F. E. C. Hawks, one of the members of said firm, being severally duly sworn, say that the controversy submitted in the foregoing case is real, and the proceedings are in good faith to determine the rights of the parties.

A. S. Zook, Att'y of said City.

A. Griner,

Chairman Board County Commissioners.

F. E. C. Hawks.

Subscribed and sworn to before me

this 29th day of September, 1894.

Charles W. Miller,  
Notary Public."

(L. S.)

18. *Mellois v. Chaine*, 20 Cal. 679;  
*Myers v. Lawyer*, 99 Ind. 237.

The certificate of the clerk that the affidavit was filed is sufficient. *Myers v. Lawyer*, 99 Ind. 237.

19. *Canaday v. Hopkins*, 7 Bush (Ky.) 108, 111, where, however, there was no affidavit, and testimony was taken—an irregular and inconvenient mode of procedure.

20. *Witz v. Dale*, 129 Ind. 120, 27 N. E. 498; *Godfrey v. Wilson*, 70 Ind. 50; *Manchester v. Dodge*, 57 Ind. 584.

21. In *Pennsylvania Co. v. Niblack*, 99 Ind. 149, there were pleadings, and an issue and trial of the court, and a general finding, and the facts were agreed upon in writing, with an affidavit annexed that the controversy was real. The agreement was simply evidence, and to be part of the record must be made so by bill of exceptions or order of the court.

22. *New York Code Civ. Proc.* § 1279; *Bloomfield v. Ketcham*, 95 N. Y. 657; *Town of Salamanca v. Cattaraugus County*, 81 Hun 282, 30 N. Y. Supp. 790; *Bradford v. Buchanan*, 39 S. C. 237, 17 S. E. 501 (where time was a change of issue); *Reeder v. Workman*, 37 S. C. 413, 16 S. E. 187 (where the parties attempted to repudiate the proceedings). See *supra*, III, E, e.

23. *Booth v. Cottingham*, 126 Ind. 431, 26 N. E. 84.

24. *Bellinger & Cotton's Ann. Codes & St., Ore.*, Vol. 1, § 194.

**Where Corporation or Minor Is a Party.**—In Oregon "where either party to the controversy is the state, a county, or other public corporation therein, or a private corporation or



ute expressly provides that the affidavit may be made by an attorney,<sup>25</sup> an affidavit so made is insufficient.<sup>26</sup> The same is true as to an attorney in fact.<sup>27</sup>

**Estoppel To Deny Consent.**—In some cases parties may be estopped to deny consent to a case irregularly signed.<sup>28</sup>

**IV. PRACTICE.**—A. PRESENTATION OF CASE.—The filing is a presentation of the submission,<sup>29</sup> and is to be regarded as the commencement of the suit.<sup>30</sup>

By rule of court in some states the plaintiff must furnish the necessary papers for argument.<sup>31</sup>

**What To Be Filed and When.**—The case, submission, and affidavit

minor, the statement of the case may be subscribed and verified by any person who at the time sustains the relation to such state, corporation, county, or minor as would authorize the service of a summons upon him." *Bellinger & Cotton's Ann. Codes & St., Ore., Vol. 1, § 194.*

25. As in Arizona (Rev. St., 1901, § 1391) and Tennessee (Shannon's Code, Vol. 2, § 5207).

26. *Bloomfield v. Ketcham*, 95 N. Y. 657.

27. *Bloomfield v. Ketcham*, 95 N. Y. 657.

In Illinois an attorney in fact, duly authorized, may sign. *Hurd's Rev. St., § 100.*

28. *Farwell v. Sturges*, 165 Ill. 252, 42 N. E. 189, holding that though the agreement of submission may have been executed by the counsel for one of the parties without authority, yet if such party appears and acts thereunder and induces the court and the parties to rely upon it he is estopped to deny its binding force as conferring jurisdiction.

29. "The filing is a presentation of the submission; and thenceforth the controversy becomes an action; and each provision of law, relating to a proceeding in an action, applies to the subsequent proceedings therein except as otherwise prescribed." *N. Y. Code Civ. Proc., § 1280.*

Oregon.—After filing the agreed case the court has the same jurisdiction as if it were an action pending after a special verdict found and authorized to proceed to hear and determine the same accordingly. *Bellinger & Cotton's Ann. Codes & St., Vol. 1, § 195.*

30. *Nashville Tr. Co. v. Fourth Nat. Bank*, 91 Tenn. 336, 18 S. W. 822, 15

*L. R. A. 710*, which was a suit to recover the amount of certain deposits which the defendant contested because it claimed a set-off. The court said: "The second question presented by the agreed case is, whether the legal right of set-off existed when the suit was commenced. The indebtedness on both sides being then due, and mutual under the rules herein announced, it would seem that the only question remaining is, whether the agreed case is to be treated as in effect a suit to recover the deposit. We are of opinion that it must be so treated. We do not so hold simply because the assignee appears as complainant on the record and in the agreed statement. That is a circumstance, it is true; and the case being a controversy between parties, one or the other must be regarded as the actor or complainant. Looking to the substance of the controversy and relief sought, it is seen that the assignee asserts the right to recover the deposit, in the first instance, or, if not, then to have the Court to declare its right to charge up the amount of the deposit to the bank as so much cash paid on its *pro rata*, which is manifestly the same thing, as the statement shows the bank will be entitled to receive more than that amount in any event. On the other hand, the bank is seeking no decree at the hands of the Court, further than to have declared valid its previous act applying the deposit as a payment on the notes, or its right now to have it so applied—either right being sufficient to repel the assignee. We think, therefore, that the case is in effect a suit by the assignee to recover the deposit, commenced on the date the case was filed."

31. *Bliss's N. Y. Code*, 5th ed., Vol. 2, § 1279.

must be filed in the office of the clerk of the court to which the submission is made.<sup>32</sup>

**B. THE TRIAL.—1. Nature of the Issues.**—The hearing is a trial of an issue of law.<sup>33</sup> Questions as to the competency, relevancy, admissibility,<sup>34</sup> sufficiency, or weight of evidence, or inferences to be drawn therefrom,<sup>35</sup> cannot be presented in an agreed case, the primary feature of which is to invite a decision upon facts not controverted but fully agreed upon and presented by the case as the ultimate facts which are the basis for conclusions of law. If questions of evidence are presented the court has no jurisdiction.<sup>36</sup>

As has been pointed out,<sup>37</sup> the agreed statement of facts in the statutory agreed case eliminates and takes the place of pleadings;<sup>38</sup> and if pleadings are filed they should be disregarded;<sup>39</sup> nor can any question be made upon them in the appellate court.<sup>40</sup>

**Trial of Issues of Fact.**—A case is not a statutory agreed case which involves in any way a trial of an issue of fact; and if it involves such a trial, the court is without jurisdiction and must dismiss the proceeding.<sup>41</sup>

**2. Powers of the Court.**—In an agreed case the court cannot, against the objection of either party, strike out an admission of fact,<sup>42</sup> or refer the facts to a jury for determination.<sup>43</sup> Nor can it

32. The case, submission, and affidavit, must be filed in the office of the clerk of the court to which the submission is made. If the submission is made to the supreme court they must be filed in the office of the county clerk, if any, specified in the submission; if no county clerk is so specified, they may be filed in the office of any county clerk. N. Y. Code Civ. Proc., § 1280.

**Filing Not Jurisdictional.**—The direction in the statute that the written agreement of the parties is to be entered of record does not go to the jurisdiction of the judge to hear and determine the matters to be submitted, but is authority to the clerk of the court to record the agreement. *Farwell v. Sturges*, 58 Ill. App. 462, 493, holding that it was a sufficient compliance with the statute that the agreement was recorded for the first time as a part of the decree.

33. *Neilson v. Commercial Mut. Ins. Co.*, 3 Duer (N. Y.) 455.

34. *Cannon v. Handley*, 72 Cal. 133, 143, 13 Pac. 315 (where the parties attempted to reserve for decision objections to competency, relevancy and admissibility of the facts); *Geisen v. Reder*, 151 Ind. 529, 532, 51 N. E. 353.

35. *Marx v. Brogan*, 188 N. Y. 431, 433, 435, 81 N. E. 231.

36. *Geisen v. Reder*, 151 Ind. 529,

532, 51 N. E. 553, 1060 (where the principal questions presented related to the admissibility of evidence); *Marx v. Brogan*, 188 N. Y. 431, 434, 81 N. E. 231.

37. See *supra*, II, "Nature and Purpose."

38. *Donald v. St. Louis, etc. R. Co.*, 52 Iowa 411, 3 N. W. 462.

39. *The Warrick Bldg. & L. Assn. v. Hougland*, 90 Ind. 115; *Thaison v. Sanchez*, 13 Tex. Civ. App. 73, 35 S. W. 478.

40. *The Warrick Bldg. & L. Assn. v. Hougland*, 90 Ind. 115.

41. *Geisen v. Reder*, 151 Ind. 529, 532, 51 N. E. 353, 1060; *Marx v. Brogan*, 188 N. Y. 431, 436, 81 N. E. 231.

42. *Fearing v. Irwin*, 5 Daly (N. Y.) 383.

43. *Neilson v. Commercial Mut. Ins. Co.*, 3 Duer (N. Y.) 455.

When a fraud or mistake is alleged, the court, as a court of equity, may have power to vacate the submission and the judgment, but this relief can be obtained only in a suit instituted for that purpose. In this connection, the court in *Lang v. Ropke*, 1 Duer (N. Y.) 701, said: "The submission of a controversy under the Code, is a contract of a high and solemn nature, and it is only upon the fullest evidence of fraud or mutual error, that a court of equity would ever adjudge it to be

amend the case on the motion of either party,<sup>44</sup> or permit the withdrawal of a party from the case.<sup>45</sup>

The contract of submission may be set aside or canceled only by a direct proceeding in equity on the ground that it was procured through fraud or duress, or that through mutual mistake it fails to express the real agreement of the parties.<sup>46</sup>

Pending a suit for cancellation of the contract of submission, or any appeal thereon, a mandamus will not lie to compel the judge to proceed with the agreed case.<sup>47</sup>

When the nature of the controversy and good faith of the submission are called in question the court may postpone a hearing on the merits or decision until these preliminary questions have been determined.<sup>48</sup>

The court must construe the submission,<sup>49</sup> and in so doing is confined to the facts agreed upon and has no power to draw any inferences therefrom such as a jury might draw if the facts were before it, or in any way to depart from or go beyond the statement presented.<sup>50</sup>

void; and then only in a form in which their decision might be reviewed, and if erroneous, reversed." And see *State ex rel. Webb v. McCune*, 129 Mo. App. 511, 107 S. W. 1030, where a party alleging inadvertence and mistake asked that the case be set aside.

44. *Peake v. Webb*, 132 Mo. App. 601, 112 S. W. 13.

Should the court permit either party to inject new matter into the case, obviously the submission would not consist of the state of facts voluntarily brought to the court by the parties, but of an entirely different case, and one not approved by mutual consent. The statute (§ 793) does not contemplate that a controversy may be lodged in court for determination without the bringing of suit in the manner provided by law except in cases where the parties not only agree on all the facts but, in effect, bind themselves to treat their agreement as unalterable and irrevocable. *State ex rel. Webb v. McCune*, 129 Mo. App. 511, 10 S. W. 1030.

45. *State ex rel. Webb v. McCune*, 129 Mo. App. 511, 107 S. W. 1030.

46. *Peake v. Webb*, 132 Mo. App. 601, 112 S. W. 13; *State ex rel. Webb v. McCune*, 129 Mo. App. 511, 107 S. W. 1030; *Lang v. Ropke*, 1 Duer (N. Y.) 701.

47. *State ex rel. Webb v. McCune*, 129 Mo. App. 511, 107 S. W. 1030.

48. *Judson v. Flushing Jockey Club*, 14 Misc. 350, 36 N. Y. Supp. 126; *Ward*

*v. Alsop*, 100 Tenn. 619, 46 S. W. 573.

49. *Neillson v. Commercial Mut. Ins. Co.*, 3 Duer (N. Y.) 455.

50. *Cal.*—*Green v. Fresno County*, 95 Cal. 329, 30 Pac. 544; *Crandall v. Amador County*, 20 Cal. 72. *Ky.*—*Frazier v. Spear*, 2 Bibb 385. *Md.*—*Hysinger v. Baltzell*, 3 Gill & J. 158. *Mass.*—*Mayhew v. Durfee*, 138 Mass. 584. *Mo.*—*State Sav. Bank v. Gregg*, 67 Mo. App. 303, holding that the mere recital of the execution of a warranty deed does not authorize the inference that there was a warranty against the lien of a tax. *N. Y.*—*Marx v. Brogan*, 188 N. Y. 431, 436, 438, 81 N. E. 231; *Kneller v. Lang*, 137 N. Y. 589, 33 N. E. 555; *Fearing v. Irwin*, 55 N. Y. 486; *Clark v. Wise*, 46 N. Y. 612; *Doyle v. Olson Realty Co.*, 132 App. Div. 200, 116 N. Y. Supp. 834, 839; *Wetyen v. Fick*, 90 App. Div. 43, 85 N. Y. Supp. 592 (holding that a statement that defendants collected rents and profits does not authorize the inference of actual occupancy); *Herkimer County L. & P. Co. v. Johnson*, 37 App. Div. 257, 55 N. Y. Supp. 924; *Dept. of Bldgs. v. Field*, 9 App. Div. 500, 41 N. Y. Supp. 1112; *Beer v. Simpson*, 65 Hun 17, 19 N. Y. Supp. 578; *Crosby v. Thedford*, 13 Daly 150.

A statement that a person was in undisturbed possession of land for twenty years and upwards under a deed, is not sufficient to establish title by adverse possession, as it does not necessarily follow therefrom that the entry and



Questions raised in argument but not by the facts found in the record cannot be considered by either the court of first instance or the appellate court.<sup>51</sup> But the court is not so bound as to the law to be deduced from the facts. No stipulation can prevent the court from declaring a conclusion of law which follows from the facts.<sup>52</sup>

A conclusion of law in an agreed case is mere supererogation.<sup>53</sup>

C. NATURE OF THE RELIEF AWARDED. — When parties agree upon a statement of facts under the code, waiving the formalities and technicalities of an action, and ask the decision of the court on the facts

possession were exclusive of any other right. *Kneller v. Long*, 137 N. Y. 589, 33 N. E. 555.

In *Pelton v. Macy*, 124 App. Div. 367, 108 N. Y. Supp. 713, it was stipulated that on a specified day P was married to H "and is now her lawful husband." This was a stipulation in part of a legal conclusion, but since the marriage could have taken place without the state stipulation was accepted as proof of that fact.

In *Brownell v. Greenwich*, 114 N. Y. 518, 22 N. E. 24, the statement recited "that the county judge duly adjudged, determined and ordered" after reciting the jurisdictional facts. "Duly," said the court of appeals, "means according to law. . . . It does not relate to form merely, but includes form and substance both. The expression 'duly adjudged,' as used in the statement for the submission of this controversy, therefore, means adjudged according to law, that is, according to the statute governing the subject, and implies the existence of every fact essential to perfect regularity of procedure, and to confer jurisdiction both of the subject-matter and of the parties affected by the judgment, including the defendant. A judicial officer has jurisdiction, when he has power to inquire into the facts, to apply the law and to pronounce the judgment. Any step in the cause or proceeding before him is necessarily the exercise of jurisdiction, and that step cannot be 'duly' taken unless jurisdiction exists. The final step, in particular, the making of the judgment, cannot be 'duly' taken unless all of the preliminary steps upon which it is based have likewise been duly taken."

In *Knickerbocker Trust Co. v. King*, 126 App. Div. 691, 111 N. Y. Supp. 192, the court said: "The submission does not expressly show that the daughter died intestate, but it appears that her stepsister, the defendant King, was ap-

pointed administratrix of her estate, which would indicate that there was no will. The daughter died in 1867, but her administratrix was not appointed until the 27th day of May, 1907. The interest of the daughter of the testator in the fund should be paid to her administratrix and the interest of the widow of the testator should be paid to her administratrix. Inasmuch as this fund is now personal property, and there is no evidence that any of it is the proceeds of real estate of the testator, and the daughter of the testator's widow by a subsequent marriage, who will ultimately take the surplus for distribution, represents both estates as administratrix, and in as much as the trust company has assumed that the submission is sufficient to authorize the court to decree the distribution of the fund, we shall assume that the fund is the proceeds of personal property."

51. *Missouri, K. & T. R. Co. v. Union Trust Co.*, 156 N. Y. 592, 51 N. E. 309.

Statement Involving Question of Law.—In *Fearing v. Irvin*, 55 N. Y. 486, the question was as to whether plaintiffs could convey a clear title to lands over which certain highways passed, which were claimed by plaintiffs to have been closed by law. It was admitted that if said highway shall have been closed by law, the title to the abutting half of each of them (plaintiff and defendant) to the land in question would revert to the estate of plaintiff's testator. This admission, although involving questions of law, was for the purposes of the submission to be taken as a statement of fact, and was controlling.

52. *San Francisco Lumb. Co. v. Bibb*, 139 Cal. 325, 73 Pac. 864; *Jefferson County v. City of Watertown*, 98 App. Div. 494, 90 N. Y. Supp. 790.

53. *Southern R. Co. v. City Council*, 49 S. C. 449, 27 S. E. 652.

stated, the court must declare their rights thereon; and this whether they rest upon an application of legal or equitable principles.<sup>54</sup>

Specific performance may be decreed even though the court, under the statute, may not award a temporary injunction in this proceeding.<sup>55</sup>

Judgment by default is not contemplated by the statutes permitting the submission of agreed cases.<sup>56</sup>

The court may always correct a mere mistake of figures apparent upon the face of the record upon motion of either party.<sup>57</sup> But in one case it has been held that the court may not in any substantial way alter the relief or judgment for which the parties stipulate.<sup>58</sup>

D. ENTRY OF JUDGMENT. — The statutes themselves contain express provisions requiring the entry of judgment, as in other cases,<sup>59</sup> declaring, in most of the jurisdictions, that the judgment shall be enforced as if it had been rendered in an action, and that it shall be in the same manner subject to an appeal,<sup>60</sup> and providing that it shall be "with costs."<sup>61</sup>

54. *Woodruff v. People*, 193 N. Y. 560, 86 N. E. 562; *Weed v. Calkins*, 24 Hun (N. Y.) 582.

#### Form of Order.

(Title of Court and Cause)

This matter having been heretofore, by stipulation of the parties hereto, under the provisions of section — of the Code of Civil Procedure, submitted upon an agreed statement of facts to this court for decision; and argument having been made by said parties and the court being fully advised as to the premises herein, now renders its decision in favor of — and against the said —.

It is adjudged and decreed, &c.

55. *Associate Alumni v. General Theolog. Sem.*, 163 N. Y. 417, 57 N. E. 626; *Campbell v. Crowley*, 150 N. C. 457, 64 S. E. 213 (specific performance of contract to purchase land).

56. *Heasty v. Lambert*, 98 App. Div. 177, 90 N. Y. Supp. 595.

57. *State v. Porter*, 86 Ind. 404.

58. So a motion by plaintiffs to amend the clause for relief in a case submitted upon an agreed state of facts must be denied. *Kingsland v. Mayor of New York*, 4 N. Y. St. 596.

59. *Form of Judgment Entry.* — "Upon the facts stated the court made the following entry and judgment: 'Comes now the plaintiff, by T. B. Cunningham, his attorney, and the defendant, by John Higgins, its attorney, and presents to the court an agreed case and file herein their agreed statement of their cause and of the matter of controversy between them

and of the facts connected therewith, together with their affidavit showing said cause and controversy to be real, and which statement is in the words and figures as follows: (Here the agreed statement of facts follows.) And the court having seen and inspected said statement, and being duly advised in the premises, finds the law in the case and of said controversy to be:'" *Templeton v. Board of Comrs. (Ind.)*, 89 N. E. 880.

60. "The parties to submission and agreed cases are entitled to all the benefits of the proceedings for the correction of errors." *Shannon's Code, Tenn.*, Vol. 2, § 5210.

In *Arkansas* it may be otherwise provided in the submission. *Sand. & Hill's Dig.*, 1894, § 5905.

In *Illinois* the parties must agree to waive appeal. *Hurd's Rev. St.*, 1905, §§ 100, 101.

61. In case no agreement shall be entered into as to the costs of such action, the same shall follow the event, and be received by the successful party. *McClain's Ann. St.*, Ia., 1880, § 3408.

"The parties will give bond and security for the costs of an agreed case, unless they pay the clerk's fees and state tax in advance; and all costs incurred will be borne equally by the parties, unless they agree that the costs shall abide the event of the cause." *Shannon's Code, Tenn.*, Vol. 2, § 5209.

"Costs . . . are always in the discretion of the court, . . . If the statement of facts contained in the

**E. COSTS. — STIPULATION AS CONTROLLING COSTS.**—When the statute providing this procedure leaves the costs in the discretion of the court, the parties cannot, by claiming costs as part of their relief, deprive the court of its power to regulate the matter.<sup>62</sup> Under some statutes where the statement of facts agreed upon is so defective that the court cannot render judgment, the submission may be dismissed without costs to either party;<sup>63</sup> unless the court, in its discretion, may permit the parties to file an additional statement, without prejudice to the original statement.<sup>64</sup> This does not apply, however, where there is a defect of necessary parties.<sup>65</sup>

Generally costs are not allowed for any proceeding prior to trial.<sup>66</sup>

**Illustrative Decisions in Reference to Costs.**—A number of decisions in reference to costs are embodied in a note.<sup>67</sup>

**F. THE APPEAL. — 1. The Right To Appeal.**—The right to an appeal depends not upon the stipulation of the parties,<sup>68</sup> but only

case, is not sufficient to enable the court to render judgment, an order must be made dismissing the submission, without costs to either party." N. Y. Code Civ. Proc., § 1281.

62. *Tandom v. Walmuth*, 27 N. Y. Supp. 717, where the parties agreed that the judgment should be without costs. See *Herkimer County L. & P. Co. v. Johnson*, 37 App. Div. 257, 55 N. Y. Supp. 924.

**Additional Allowance.**—So the question whether or not an additional allowance shall be granted remains with the court, as such an allowance is an incident of costs. *People v. Fitchburg R. Co.*, 133 N. Y. 239, 30 N. E. 1011.

63. N. Y. Code Civ. Proc., § 1281; *Kelley v. Hogan*, 69 App. Div. 251, 74 N. Y. Supp. 682; *Clapp v. Guy*, 31 App. Div. 535, 52 N. Y. Supp. 33.

64. N. Y. Code Civ. Proc., § 1281; *In re Yerk's Estate*, 97 App. Div. 632, 89 N. Y. Supp. 869; *Kelley v. Hogan*, 69 App. Div. 251, 74 N. Y. Supp. 682.

65. *Kelley v. Hogan*, 69 App. Div. 251, 74 N. Y. Supp. 682.

66. Before notice of trial no costs can be taxed. *People v. Fitchburg R. Co.*, 133 N. Y. 239, 30 N. E. 1011.

67. When neither party is entitled to judgment the court should dismiss the case and divide the costs. *Frazer v. Miller*, 12 Kan. 356; *Herkimer County L. & P. Co. v. Johnson*, 37 App. Div. 257, 55 N. Y. Supp. 924; *Gray v. Daniels*, 18 App. Div. 465, 45 N. Y. Supp. 1106.

When the court has no jurisdiction of the controversy submitted, the judgment of the lower court will be reversed, and the submission dismissed, without costs to either party. *Wood-*

*ruff v. People*, 193 N. Y. 560, 86 N. E. 562, reversing 127 App. Div. 934, 111 N. Y. Supp. 1150; *People v. Mutual Endow. & Acc. Assn.*, 92 N. Y. 622; *Town of Salamanca v. Cattaraugus County*, 81 Hun 282, 30 N. Y. Supp. 790; *City of Buffalo v. Mackay*, 15 Hun (N. Y.) 204 (which involved the right to a public office).

An extra allowance of costs may not be granted in a controversy submitted upon an agreed case. *People v. Fitchburg Co.*, 133 N. Y. 239, 30 N. E. 1011.

A trial fee may be taxed, since the argument upon admitted facts is a trial of questions of law. *Dickinson v. Dickey*, 76 N. Y. 602; *Wood v. Squires*, 60 N. Y. 191; *Trustees of Hobart College v. Fitzhugh*, 27 N. Y. 130; *Kelley v. Hogan*, 69 App. Div. 251, 74 N. Y. Supp. 682; *Baumgrass v. Brickell*, 7 N. Y. St. 685; *Neilson v. Commercial Mut. Ins. Co.*, 3 Duer (N. Y.) 455; *Fisher v. Stilson*, 9 Abb. Pr. (N. Y.) 33.

When the case is of an equitable nature the court has a discretion as to the costs, which will be best exercised by denying costs to either party. *Van Sickel v. Van Sickel*, 8 How. Pr. (N. Y.) 265.

If the submission is defective, it should be dismissed, without costs to either party. *Kelley v. Hogan*, 69 App. Div. 251, 74 N. Y. Supp. 682; *Zakowski v. Schroeder*, 60 App. Div. 457, 69 N. Y. Supp. 893.

The fee of the circuit court clerk authorized by *Wagner Mo. St.*, § 10, applies to this proceeding. *Shed v. Kansas City, etc. R. Co.*, 67 Mo. 687.

68. *Molandin v. Colorado Cent. R. Co.*, 3 Colo. 173.



upon the statutes, many of which provide that the judgment shall be subject to review in the same manner as if it had been rendered in an action.<sup>69</sup>

The appellate court will not take jurisdiction of an agreed case unless there has been a final judgment entered in the *nisi prius* court.<sup>70</sup>

**Consent of Parties** cannot confer upon an appellate tribunal authority to answer questions of law or to review a decision as distinguished from a judgment.<sup>71</sup>

**2. Record on Appeal.**—The record or judgment roll, by the statutes generally, consists of the case, the submission and the judgment.<sup>72</sup>

In Illinois the record consists of the stipulation and judgment or decree; the judgment or decree to state the matters submitted. The stipulation may be made a part of the final decree.<sup>73</sup>

In New York.—“The case, submission, affidavit, and a certified copy of the judgment, and of any order or paper necessarily affecting the judgment, constitute the judgment roll.”<sup>74</sup>

In Texas.—The statement agreed to and signed and certified by the court to be correct, and the judgment rendered thereon, constitute the record.<sup>75</sup>

**69. Agreement not to appeal is provided for in the statutes of Indiana** (Harris' Ann. St., 1894, Vol. 1, § 564); Iowa (McClain's Ann. St. 1880, § 2412); Kansas (Dassler Gen. St., 1905, § 5452); Missouri (Ann. St., 1906, p. 758); Nebraska (Cobbey's Ann. St., 1903, Vol. 1, p. 497, Civ. Code, tit. XV. c. II, § 1574); Ohio (Dates' Ann. St. [Everett's 5th ed.], Vol. 2, § 5209); Oklahoma (Wilson's Rev. & Ann. St., 1903, Vol. 2, § 4719); Wyoming (Rev. St., 1899, §§ 2632, 3664).

**No Appeal in Illinois.**—The Illinois statute provides a form of submission by which the parties waive all right of appeal from the judgment and release all errors, and agree that such release may be pleaded in bar for any writ of error that may be sued out as to such judgment. And so parties will be estopped from taking an appeal when the agreed case contains a release of errors; and when the release of errors appeared in the record it is unnecessary to plead such release on appeal where the trial court had jurisdiction to enter the judgment. Farwell v. Sturges, 165 Ill. 252, 46 N. E. 189.

**70. Idaho.**—Potter v. Talkington, 5 Idaho 317. Ill.—Crull v. Keener, 17 Ill. 246; Plumleigh v. White, 9 Ill. 388. Tenn.—Aldrich v. Pickard, 12 Lea 657.

Filing opinion of the court does not

take the place of judgment. Moore v. Hinnant, 87 N. C. 505.

**71. Ill.**—Plumleigh v. White, 9 Ill. 388. N. Y.—Troy Waste Mfg. Co. v. Harrison, 73 Hun 528, 26 N. Y. Supp. 109. Tenn.—Aldrich v. Pickard, 12 Lea 657.

**72.** This is so in the following states: Arkansas, California, Idaho, Indiana, Iowa, Kansas, Minnesota, Montana, Nebraska, New York, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Texas, Utah, Washington, Wisconsin, and Wyoming. For a reference to the statutory provisions of these states see supra, note 2 under II.

**73.** The provisions of § 1 of the “act to enable parties to avoid delay in the administration of justice,” requiring the agreement by which matters in controversy are submitted for determination, “to be entered of record,” are directory only, and not jurisdictional. It is a sufficient compliance with the provisions of § 1 of the act, requiring the clerk to enter the agreement of submission of record, to spread the same upon the records of the court as a part of the final decree. Farwell v. Sturges, 58 Ill. App. 462, construing Hurd's Rev. St., Ill., 1905, § 100.

**74. N. Y. Code Civ. Proc., § 1281.**  
**75. Sayles' Tex. Civ. St., Vol. 1, § 1293.**

**Preliminaries to Appeal.**—And so, generally, neither motion for a new trial<sup>76</sup> nor a bill of exceptions<sup>77</sup> is necessary to present the alleged error to the appellate court. But there are jurisdictions in which an exception must be taken to the conclusion of law,<sup>78</sup> at the time of its rendition,<sup>79</sup> and where such conclusion must be assigned as error<sup>80</sup> in order to secure a review by the higher court.

**3. Proceedings in the Appellate Court.**—The parties may not supply an essential element of the case by amendment in the appel-

76. *Pennsylvania R. Co. v. Niblack*, 99 Ind. 149, 151; *Hall v. Pennsylvania Co.*, 90 Ind. 459, 465; *Lofton v. Moore*, 83 Ind. 112; *State ex rel. Atty. Gen. v. Newton County*, 66 Ind. 216; *Manchester v. Dodge*, 57 Ind. 584; *Fisher v. Purdue*, 48 Ind. 323; *Lang v. Ropke*, 1 Duer (N. Y.) 701. See also same title under IV, F, "Appeal."

77. *Lofton v. Moore*, 83 Ind. 112.

In *Brown & Co. v. Mott & Bros.*, 22 Ohio St. 149, 159: "It is suggested by counsel, . . . that in order to enable the plaintiffs to have the case reviewed on error, there should have been a motion for a new trial and a bill of exceptions. We do not so understand the law. There was no issue of fact. The facts were ascertained and agreed upon by the parties. Their agreed statements took the place of a special finding by the jury, and the court only pronounced the law arising upon those facts. There was nothing to put in a bill of exceptions. The record was complete without it. The provisions of the code under which the proceeding was had (§§ 495-497), declare that 'the case, the submission, and the judgment shall constitute the record.'"

78. *Geisen v. Reder*, 151 Ind. 529, 51 N. E. 353, 1060; *City of Shelbyville v. Phillips*, 149 Ind. 552, 48 N. E. 626; *Pennsylvania Co. v. Niblack*, 99 Ind. 149, 151; *Warrick Bldg. & L. Assn. v. Hougland*, 90 Ind. 115; *Lofton v. Moore*, 83 Ind. 112; *Manchester v. Dodge*, 57 Ind. 584; *Fisher v. Purdue*, 48 Ind. 323.

79. *Hall v. Pennsylvania Co.*, 90 Ind. 459, 465, *citing* *Lofton v. Moore*, 83 Ind. 112; *Manchester v. Dodge*, 57 Ind. 584; *Fisher v. Purdue*, 48 Ind. 323.

See also *Zeller v. The City of Crawfordsville*, 90 Ind. 262, 264; *Thatcher v. Ireland*, 77 Ind. 486.

**Motion To Modify Judgment.**—In *Hawks v. Goshen*, 144 Ind. 343, 43 N. E. 304, the record, after the judgment, recited: "To which decision of the court defendants . . . at the time excepted." The court said: "It may be the exception to the action of the trial court was both to the conclusions of law and the judgment, and that such exception challenged the correctness of both. Be that as it may, the assignment of error here calls in question nothing but the judgment. Generally, where there is an objection to the judgment, a motion to modify it must be made in the trial court before any question can be presented to this court concerning the same. . . . Whether it was that part of the judgment adjudging the appellants liable to build the bridge in question, or that part ordering the issue of a peremptory writ of mandate, commanding them to so build it, that is objected to, is not disclosed by the exception or the assignment of error. If it was the former, an exception to the conclusions of law was the proper remedy, and would have made the objection available to test the right of appellees to recover such a judgment. If the objection was to the part of the judgment awarding a peremptory writ of mandamus, a motion to modify the same must precede an appeal to this court, in order to present any question thereon, where the overruling such motion might be assigned for error."

80. *Pennsylvania Co. v. Niblack*, 99 Ind. 149, 151; *Warrick Bldg. & Loan Assn. v. Hougland*, 90 Ind. 115. See also *Manchester v. Dodge*, 57 Ind. 584.

late court,<sup>81</sup> but may correct a mistake.<sup>82</sup> When there is a defect of parties,<sup>83</sup> or if the statement fails to disclose a good cause of action in favor of the plaintiff who has prevailed below,<sup>84</sup> the judgment will not be upheld.

Any jurisdictional question may be presented for the first time on appeal; and may be raised either by the parties or by the court *sua sponte*.<sup>85</sup>

On appeal all the facts are before the appellate court which will try the case *de novo*, and will decide for itself, and will not indulge presumptions in support of the judgment of the trial court as in other cases,<sup>86</sup> and will direct the proper judgment.<sup>87</sup>

**Cost on Appeal.** — Where defendant is responsible for the litigation, though from an honest mistake as to his rights, the plaintiff, if successful, must be awarded the costs of the appeal.<sup>88</sup>

81. *Woodruff v. People*, 193 N. Y. 560, 86 N. E. 562, *reversing Drowne v. Drowne*, 127 App. Div. 934, 111 N. Y. Supp. 1117. But perhaps we may refer to the stipulation as part of the argument of counsel, in order to learn the position of the parties, because it shows conclusively that the function which they sought to have the submission perform is such only as could be attained through one or more special proceedings.

82. *State ex rel. Coghlen v. Porter*, 86 Ind. 404.

83. *Dickenson v. Dickey*, 76 N. Y. 602.

84. *Henes v. Henes*, 5 Ind. App. 100, 31 N. E. 832.

85. *Reder v. Workman*, 37 S. C. 413, 416, 16 S. E. 187.

**Submission of Controversy.**—Jurisdiction of Courts.—When a controversy, submitted upon an agreed statement of facts under § 1279 of the New York Code of Civil Procedure, presents

a pure question of law, the supreme court has power to decide it, and the court of appeals may review its decision; but if the question of law cannot be decided without first disposing of conflicting or equivocal inferences of fact, the supreme court is without jurisdiction, and a judgment entered upon such a decision must be reversed and the proceeding dismissed. *Marx v. Brogan*, 188 N. Y. 431, 81 N. E. 231.

86. *Day v. Day*, 100 Ind. 460; *Warwick Bldg. & L. Assn. v. Hougland*, 90 Ind. 115; *Hannum v. State*, 38 Ind. 32; *Indianapolis, etc. R. Co. v. Kinney*, 8 Ind. 402; *Henes v. Henes*, 5 Ind. App. 100, 31 N. E. 382; *Thomen v. Sullivan*, 9 Kan. App. 887, 60 Pac. 755.

87. *Board of Education v. Grant*, 118 Cal. 39, 44, 50 Pac. 5; *Newark S. & S. R. Co. v. Commissioners*, 30 Ohio St. 120.

88. *Associate Alumni v. General Theolog. Sem.*, 163 N. Y. 417, 57 N. E. 626.



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### CROSS-REFERENCES:

Criminal Conversation;

Husband and Wife.

Vol. I

**I. THE ACTION.—A. HUSBAND'S RIGHT OF ACTION.—1. Generally.** For many generations the law has regarded the husband's right to the conjugal affection and society of his wife as a valuable property, and has recognized his right to maintain an action to recover damages for the alienation of her affections.<sup>1</sup>

The gist of the action is the loss of the comfort, society, aid and affection of the wife.<sup>2</sup>

**2. Distinguished From Criminal Conversation.**—The alienation of the affections of a wife constitutes a cause of action altogether distinct from and independent of an action for criminal conversation. While, as has been pointed out, in an action for alienation of the wife's affections the gist of the action is the alienation of the affections and the loss of the consortium, in an action for criminal conversation the gravamen of the action is the criminal conversation itself, and on failure to prove it the plaintiff cannot recover for the loss of the wife's society.<sup>3</sup>

The basis of the action of criminal conversation is trespass *vi et armis*, "on the theory that the wife is not a free agent or separate person, and that therefore her consent is immaterial, so that the adulterer is pursued as a mere trespasser;" while the action for alienation rests on the theory of service, and originated either at the common law or under the Statute of Laborers (23 Edward III).<sup>4</sup>

An action for alienation of affections, then, was properly an action in case. Where it was sought to recover for both immediate and consequential injuries, either case or trespass was appropriate.<sup>5</sup>

**1. Leading Case.**—*Winsmore v. Greenbank*, Willes (Eng.) 577, was decided in 1745. To an objection that there was no precedent for such an action, the Lord Chief Justice replied: "A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy; but there must be *new facts* in every special action on the case."

**2.** *Boland v. Stanley*, 88 Ark. 562, 115 S. W. 163, 165. See also: *Ind.*—*Farneman v. Farneman*, 90 N. E. 775. *Ky.*—*McGregor v. McGregor*, 115 S. W. 802. *N. Y.*—*Hanor v. Housel*, 128 App. Div. 801, 113 N. Y. Supp. 163, 165; *Heermance v. James*, 47 Barb. 120. *Vt.* *Knapp v. Wing*, 72 Vt. 334, 47 Atl. 1075. *Eng.*—*Weedon v. Timbrell*, 5 Term 357, 101 Eng. Reprint 199.

**3.** *Wood v. Mathews*, 47 Iowa 409.

**4.** *Crocker v. Crocker*, 98 Fed. 702, citing *Pollock on Torts*, 4th ed., 209, 212.

In *Lellis v. Lambert*, 24 Ont. App. 653, *Osler, J. A.*, said: "The declaration in the action for criminal conversation, whether framed in trespass or in case—and it might be indiffer-

ently in either, though it was considered as more properly in trespass, the law supposing that the wife had no power to consent (*Selwyn's N. P.*, 9th ed., p. 9; 1 *Stephen's N. P.*, p. 6; *Chitty on Pleading*, Vol. 2, pp. 642 (n), 856, vol. 1, pp. 134, 167; *Chamberlain v. Hazlewood*, 5 M. & W. at p. 517)—always alleged that the defendant debauched and carnally knew the plaintiff's wife. The alienation of the wife's affections was mere matter of aggravation and the loss of the wife's consortium the necessary consequence of the injury even though she continued to live with her husband. The latter could even maintain the action against a man who committed adultery with the wife after she had obtained a decree of divorce *a mensa et thoro*."

**5.** *Barbee v. Armstead*, 32 N. C. 530, 51 Am. Dec. 404.

In *Hanor v. Housel*, 128 App. Div. 801, 113 N. Y. Supp. 163, 165, the complaint was held to state a cause of action for alienation of affections of the plaintiff's wife, the allegations of illicit intercourse, undue and improper attention, flattery, and other acts and wiles

**3. Action for Criminal Conversation a Bar.**—A plaintiff suing in case for the alienation of his wife's affections is precluded from recovery, if the defendant has already been mulcted in damages in an action of trespass for criminal connection with the plaintiff's wife.<sup>6</sup>

**B. WIFE'S RIGHT OF ACTION.**—At common law the husband and wife were treated as one person and the marriage operated as a suspension, in most cases, of the legal existence of the wife. From this legal unity of husband and wife sprang the disability of the wife to maintain an action for the alienation of her husband's affections. The majority of the courts of this country, however, assert the equality of husband and wife in the right to the conjugal aid, affection and society, and declare that the law has power to afford the wife relief when her rights in this respect are violated. Where the right of action is not sustained upon the theory of the power and policy of the law to afford a remedy whenever an injury has been suffered, it is based upon the removal by statute of the disabilities of married women.<sup>7</sup> And the wife may

being merely statements of the means by which the defendant accomplished and brought about the loss.

In *Weston v. Weston*, 86 App. Div. 159, 83 N. Y. Supp. 528, the complaint was held to be one for alienation, the allegations of criminal conversation being in aggravation of damages.

6. In *Gilchrist v. Bale*, 8 Watts (Pa.) 355, 34 Am. Dec. 469, in the earlier action the plaintiff did not declare for the criminal conversation alone, but also demanded damages for depriving him of the comfort and society of his wife during the whole time laid in the later action.

7. **U. S.**—*Ash v. Prunier*, 105 Fed. 722, 44 C. C. A. 675; *Waldron v. Waldron*, 45 Fed. 315; *Mehrhoff v. Mehrhoff*, 26 Fed. 13. **Cal.**—*Humphrey v. Pope*, 122 Cal. 253, 54 Pac. 847 (where there is a discussion); *Codoni v. Donati*, 6 Cal. App. 83, 91 Pac. 423 (where, however, there was held to be no evidence to establish loss of the husband's affection). **Colo.**—*Williams v. Williams*, 20 Colo. 31, 37 Pac. 614. **Conn.**—*Noxon v. Remington*, 78 Conn. 296, 61 Atl. 963; *Hart v. Knapp*, 76 Conn. 135, 55 Atl. 1021, 100 Am. St. Rep. 989; *Foot v. Card*, 58 Conn. 1, 18 Atl. 1027, 18 Am. St. Rep. 258, 6 L. R. A. 829. **D. C.**—*Dodge v. Rush*, 28 App. Cas. 149, 8 Am. Cas. 671. **Ill.**—*Betser v. Betser*, 186 Ill. 537, 58 N. E. 249, 78 Am. St. Rep. 303, 52 L. R. A. 630; *Huling v. Huling*, 32 Ill. App. 519; *Bassett v. Bassett*, 20 Ill. App. 543. **Ind.**—*Holmes v. Holmes*, 133 Ind. 386, 32 N. E. 932; *Wolf v.*

*Wolf*, 130 Ind. 599, 30 N. E. 308; *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389, 28 Am. St. Rep. 213, 14 L. R. A. 787; *Workman v. Workman* (Ind. App.), 85 N. E. 997; *Railsback v. Railsback*, 12 Ind. App. 659, 40 N. E. 276, 1119; *Reed v. Reed*, 6 Ind. App. 317, 33 N. E. 638, 51 Am. St. Rep. 310. **Ia.**—*Hardwick v. Hardwick*, 130 Iowa 230, 106 N. W. 639; *Bailey v. Bailey*, 94 Iowa 598, 63 N. W. 341; *Price v. Price*, 91 Iowa 693, 60 N. W. 202, 51 Am. St. Rep. 360, 29 L. R. A. 150. **Kan.**—*Nevins v. Nevins*, 68 Kan. 410, 75 Pac. 492; *Eagon v. Eagon*, 60 Kan. 697, 57 Pac. 942. **Ky.**—*Deitzman v. Mullin*, 108 Ky. 610, 57 S. W. 247, 94 Am. St. Rep. 390, 50 L. R. A. 808; *Klein v. Klein*, 31 Ky. L. Rep. 28, 101 S. W. 382. **Md.**—*Wolf v. Frank*, 92 Md. 138, 48 Atl. 132, 52 L. R. A. 102. **Mich.**—*Bowersox v. Bowersox*, 115 Mich. 24, 72 N. W. 986; *Rice v. Rice*, 104 Mich. 371, 62 N. W. 833; *Warren v. Warren*, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545. **Minn.**—*White v. White*, 101 Minn. 451, 112 N. W. 627; *Lockwood v. Lockwood*, 67 Minn. 476, 70 N. W. 784. **Miss.**—*Tucker v. Tucker*, 74 Miss. 93, 19 So. 955, 32 L. R. A. 623. **Mo.**—*Nichols v. Nichols*, 147 Mo. 387, 48 S. W. 947; *s. c.*, 134 Mo. 187, 35 S. W. 577; *Clow v. Chapman*, 125 Mo. 101, 28 S. W. 328, 46 Am. St. Rep. 468, 26 L. R. A. 412; *Leavell v. Leavell*, 114 Mo. App. 24, 89 S. W. 55; *Love v. Love*, 98 Mo. App. 562, 73 S. W. 255. **Neb.**—*Harvey v. Harvey*, 75 Neb. 557, 106 N. W. 660; *Hodgkinson v. Hodgkinson*, 43 Neb. 269,



maintain this action, though she has divorced the husband,\* and

61 N. W. 577, 47 Am. St. Rep. 759, 27 L. R. A. 120; Rath v. Rath, 2 Neb. (Unof.) 600, 89 N. W. 612. N. H.—Seaver v. Adams, 66 N. H. 142, 19 Atl. 776, 49 Am. St. Rep. 597. N. Y.—Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; Kuhn v. Hemmann, 43 App. Div. 108, 59 N. Y. Supp. 341; Wilson v. Coulter, 29 App. Div. 85, 51 N. Y. Supp. 804; Whitman v. Egbert, 27 App. Div. 374, 50 N. Y. Supp. 3; Buchanan v. Foster, 23 App. Div. 542, 48 N. Y. Supp. 732; Romaine v. Decker, 11 App. Div. 20, 43 N. Y. Supp. 79; Van Olinda v. Hall, 88 Hun 452, 34 N. Y. Supp. 777; Manwarren v. Mason, 79 Hun 592, 29 N. Y. Supp. 915; Pollock v. Pollock, 9 Misc. 82, 29 N. Y. Supp. 37; Jaynes v. Jaynes, 39 Hun 40; Churchill v. Lewis, 17 Abb. N. C. 226; Warner v. Miller, 17 Abb. N. C. 221; Baker v. Baker, 16 Abb. N. C. 293; Breiman v. Paasch, 7 Abb. N. C. 249. N. C.—Brown v. Brown, 124 N. C. 19, 32 S. E. 320, 70 Am. St. Rep. 574; Brown v. Brown, 121 N. C. 8, 27 S. E. 998, 38 L. R. A. 242. N. D.—King v. Hanson, 13 N. D. 85, 99 N. W. 1085. Ohio—Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397; Clark v. Harlan, 1 Cin. Sup. Ct. Rep. 418. Pa.—Gerner v. Gerner, 185 Pa. 233, 39 Atl. 884, 64 Am. St. Rep. 646, 40 L. R. A. 549. R. I.—Tillinghast v. Sawyer, 68 Atl. 478. S. C.—Messervy v. Messervy, 82 S. C. 559, 64 S. E. 753. Tenn.—Smith v. Smith, 98 Tenn. 101, 38 S. W. 439, 60 Am. St. Rep. 838; Hester v. Hester, 88 Tenn. 270, 12 S. W. 446. Vt.—Knapp v. Wing, 72 Vt. 334, 47 Atl. 1075. Wash. Beach v. Brown, 20 Wash. 266, 55 Pac. 46, 72 Am. St. Rep. 98, 43 L. R. A. 114; Young v. Young, 8 Wash. 81, 35 Pac. 592.

The statutes removing disabilities of married women give the wife a separate legal existence, and because of that fact new personal rights and obligations flow to her. Moreover many of the statutes confer upon the wife the right to sue for any violation of her "personal rights"—a term of very wide significance. Clow v. Chapman, 125 Mo. 101, 28 S. W. 328, 46 Am. St. Rep. 468, 26 L. R. A. 412; Seaver v. Adams, 66 N. H. 142, 19 Atl. 776, 49 Am. St. Rep. 597; Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397.

The gist of the wife's action is the

same as the gist of the husband's action, namely, the loss of the consortium. See cases cited *supra* this note. Of course, the wife's action cannot rest upon loss of the husband's services. Baker v. Baker, 16 Abb. N. C. (N. Y.) 293.

In Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553, a leading case, Judge Vann said: "The actual injury to the wife from the loss of the consortium, which is the basis of the action, is the same as the actual injury to the husband from that cause. . . . A remedy, not provided by statute, but springing from the flexibility of the common law, and its adaptability to the changing nature of human affairs, has long existed for the redress of the wrongs of the husband. As the wrongs of the wife are the same in principle, and are caused by acts of the same nature as those of the husband, the remedy should be the same."

**Ruling Cases.**—This question is discussed and the rule settled for the respective states by the following cases which have been cited with approval in many jurisdictions: Cal.—Humphrey v. Pope, 122 Cal. 253, 54 Pac. 847. Conn.—Foot v. Card, 58 Conn. 1, 18 Atl. 1027, 18 Am. St. Rep. 258, 6 L. R. A. 829. Ind.—Haynes v. Nowlin, 129 Ind. 581, 29 N. E. 389, 28 Am. St. Rep. 213, 14 L. R. A. 787. Md.—Wolf v. Frank, 92 Md. 138, 48 Atl. 132, 52 L. R. A. 102. Mich.—Warren v. Warren, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545. Minn.—Lockwood v. Lockwood, 67 Minn. 476, 70 N. W. 784. Mo.—Clow v. Chapman, 125 Mo. 101, 28 S. W. 328, 46 Am. St. Rep. 468, 26 L. R. A. 412. Neb.—Hodgkinson v. Hodgkinson, 43 Neb. 269, 61 N. W. 577, 47 Am. St. Rep. 759, 27 L. R. A. 120. N. H.—Seaver v. Adams, 66 N. H. 142, 19 Atl. 776, 49 Am. St. Rep. 597. N. Y.—Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553. Ohio.—Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397. 8. U. S.—Waldron v. Waldron, 45 Fed. 315. Ore.—Keen v. Keen, 49 Ore. 362, 90 Pac. 147, 10 L. R. A. (N. S.) 504. Wash.—Beach v. Brown, 20 Wash. 266, 55 Pac. 46, 72 Am. St. Rep. 98, 43 L. R. A. 114.

Compare Purdy v. Robinson, 133 App. Div. 155, 117 N. Y. Supp. 295.

though the husband has not separated himself from her,<sup>9</sup> and notwithstanding the fact that any damages she may recover would be community property.<sup>10</sup>

In some jurisdictions, however, either from the construction which the courts have given to enabling statutes or for reasons of public policy, the wife is still denied the right to maintain this action.<sup>11</sup>

**The Massachusetts Rule.**—The Supreme Judicial Court of Massachu-

9. *Foot v. Card*, 58 Conn. 1, 18 Atl. 1027, 18 Am. St. Rep. 258, 6 L. R. A. 829.

10. *Humphrey v. Pope*, 122 Cal. 253, 54 Pac. 847, which case did not decide, however, that such damages would be community property.

11. Me.—*Morgan v. Martin*, 92 Me. 190, 42 Atl. 354; *Doe v. Roe*, 82 Me. 503, 20 Atl. 83, 17 Am. St. Rep. 499, 8 L. R. A. 833. N. J.—*Hodge v. Wetzler*, 69 N. J. L. 490, 55 Atl. 49. Wis.—*Lonstorf v. Lonstorf*, 118 Wis. 159, 95 N. W. 961; *Duffies v. Duffies*, 76 Wis. 374, 45 N. W. 522, 20 Am. St. Rep. 79, 8 L. R. A. 420. Can.—*Lellis v. Lambert*, 24 Ont. App. 653.

**Stare Decisis.**—The supreme court of New Jersey in the recent case of *Sims v. Sims* (N. J. L.), 72 Atl. 424, adhered to its decision in *Hodge v. Wetzler*, 69 N. J. L. 490, 55 Atl. 49, notwithstanding that after the decision of the latter case the legislature passed "an act for the protection and enforcement of the rights of married women" (P. L., p. 525), in which it was provided that "a married woman may maintain an action in her own name and without joining her husband therein, for all torts committed against her and her property, in the same manner that she lawfully might if a *feme sole*."

In *Lonstorf v. Lonstorf*, 118 Wis. 159, 95 N. W. 961, it was held that the rule laid down in earlier Wisconsin cases would not be disturbed though by statute a married woman is given power to sue in her own name for "any injury to her person or character." By a statute of 1905, however (c. 17, Laws 1905), the wife is expressly authorized to sue for the alienation of her husband's affections. See *White v. White*, 140 Wis. 538, 122 N. W. 1051.

The reluctance of some courts to allow this action to the wife seems to be based on the fact that the damages are of a sentimental character, "since the husband's misconduct cannot deprive the wife of her right to be supported by him." *Lellis v. Lambert*, 24 Ont. App. 653, 662.

In England the question has been left in doubt by the case of *Lynch v. Knight*, 9 H. L. Cas. 577, 11 Eng. Reprint 854. There it was contended that the slander which was complained of, which the law recognized as the basis of the action, would furnish a ground for recovery in connection therewith for the loss of the husband's society and affection, but it was held that the loss of the consortium was not the natural and reasonable consequence of the slander. The Lord Chancellor and Lord Cranworth declared that the wife should be allowed the same rights of action as the husband, but Lord Wensleydale declared that the common law furnished no foundation for such action by the wife. See *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397, where the wife recovered on a complaint which alleged alienation of her husband's affections by the slanderous statements of the defendant.

In *Lynch v. Knight*, 9 H. L. Cas. 577, 11 Eng. Reprint 854, referred to elsewhere herein, the complaint alleged alienation by false charges of immorality made against the wife to the husband. Lord Brougham said: "The words here are not such as would in an ordinary case, and with ordinary persons, naturally produce the effect which they appear to have produced in this case. That is the ground upon which I would hold that the judgment of the Court below is wrong. The words did not impute to the wife actual criminality before marriage. My late noble and learned friend seems to have thought that if they had imputed actual criminality before marriage the parties would stand in a different position. I rather doubt that; but, however, it becomes quite unnecessary to decide that, because the words do not impute actual criminality, and therefore we need not now consider what would be the effect of words of that kind."

setts distinguishes the action for alienation of affections and other kindred actions, and refuses to allow the maintenance of such a suit where there is no allegation that the plaintiff's husband committed adultery with the defendant.<sup>12</sup>

C. LIMITATIONS. — The action is not one "for an injury to the person,"<sup>13</sup> nor for "words spoken,"<sup>14</sup> within the meaning of a statute prescribing a limitation on the right to bring such actions. And the right of action does not necessarily accrue upon the speaking of some of the words alleged to have caused the alienation.<sup>15</sup>

Where the wife by virtue of coverture is expressly exempt from the operation of the statute of limitations, the statute does not begin to run against her action for alienation of affections until coverture is terminated.<sup>16</sup>

**II. THE COMPLAINT. — A. NECESSARY ALLEGATIONS. — 1. Ultimate Facts Sufficient.** — In an action for alienating affections, it is sufficient to allege in the complaint the ultimate facts, without stating in de-

12. *Houghton v. Rice*, 174 Mass. 366, 54 N. E. 843, 75 Am. St. Rep. 351, 47 L. R. A. 310, where Judge Lathrop, said: "No adultery is alleged, and therefore the action is not for criminal conversation, where the allegation, when a husband sues, is that the defendant debauched and carnally knew the plaintiff's wife. The alienation of the wife's affection in such a case is a mere matter of aggravation, and the loss of the wife's *consortium* is the actionable consequence of the injury. Adultery was the essential fact to be proved, and, if this was not proved, the action failed. At common law, also, a husband could maintain an action against one who 'persuaded, procured, and enticed his wife to continue absent and apart from him, and to secrete, hide, and conceal herself from him, whereby during the time she continued absent he lost her comfort and society, and her aid and assistance in his domestic affairs.' He could also maintain an action against one for receiving his wife, and unlawfully harboring, concealing, and secreting her from him, and refusing to deliver her to him. In such cases adultery need not be alleged."

A similar ruling was made in *Lellis v. Lambert*, 24 Ont. App. 653, 654, where it was said by Osler, J. A.: "The loss of a wife's affections, not brought about by some act on the defendant's part which necessarily caused or involved the loss of her *consortium*, never gave a cause of action to the husband. His wife might permit an admirer to

pay her attentions, frequent her society, visit at her home, spend his money upon her, and by such means alienate her affections from him, resulting even in her refusal to live with him, and, so far as she could bring it about, in the breaking up of his home, and yet, there being no adultery and no 'procuring and enticing,' or 'harboring and secreting' of the wife, no action lay at the suit of the husband against the man. A wife can be in no better position to maintain an action against a woman guilty of similar conduct towards her husband."

Some indication of a change in the attitude of the Massachusetts court is afforded by the reasoning in the recent case of *Nolin v. Pearson*, 191 Mass. 733, 77 N. E. 890, 4 L. R. A. (N. S.) 643, where the wife was allowed to maintain an action against another woman for criminal conversation.

13. *Bassett v. Bassett*, 20 Ill. App. 543, 548, holding that the statute is limited to actions for physical injuries.

14. *Gerner v. Gerner*, 185 Pa. 233, 39 Atl. 884, 64 Am. St. Rep. 646, 40 L. R. A. 519.

15. *Bockman v. Ritter*, 21 Ind. App. 250, 52 N. E. 100, holding that a complaint alleging that defendant began to poison the mind of plaintiff's spouse four years before was not demurrable, it appearing that the latter did not leave plaintiff until two weeks prior to the commencement of the action.

16. *Lünc v. Vorbaner*, 104 Mo. App. 368, 79 S. W. 478.



tail the acts done and the artifices used by the defendant to accomplish the alienation.<sup>17</sup>

17. Colo. — *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614; *French v. Deane*, 19 Colo. 504, 36 Pac. 609, 24 L. R. A. 387. Ill. — *Reaveley v. Harris*, 145 Ill. App. 545. Ind. — *Bockman v. Ritter*, 21 Ind. App. 250, 52 N. E. 100; *Jonas v. Hirshburg*, 18 Ind. App. 581, 48 N. E. 656. Kan. — *Nevins v. Nevins*, 68 Kan. 410, 75 Pac. 492. Ky. — *Jenkins v. Chisin*, 25 Ky. L. Rep. 736, 76 S. W. 405. N. Y. — *Hanor v. Housel*, 128 App. Div. 801, 113 N. Y. Supp. 163.

In the leading case this was held. In that case it was alleged that the defendant "unlawfully and unjustly procured," etc. The court held that this was sufficient and that it was not necessary to set forth all the facts to show how it was unlawful, as that would make the pleadings intolerable and would increase the length and expense unnecessarily. *Winsmore v. Greenbank*, Willes (Eng.) 577.

Forms. — In *Nichols v. Nichols*, 134 Mo. 187, 193, 35 S. W. 577, the substantial charge in the petition was that defendant enticed, influenced and induced plaintiff's husband to abandon her, and to live separate and apart from her, thereby depriving and intending to deprive her of his affection, comfort, society and support. Defendant demurred on the ground that this was but a statement of a conclusion of law, and insisted that the acts done and the words spoken should have been stated. The court held the petition sufficient, saying: "The ultimate fact which is constitutive of the cause of action in this case, is that of wrongfully inducing the husband of plaintiff to abandon her. The methods adopted to accomplish that purpose are mere matters of evidence from which the ultimate fact is proved or may be inferred. Various methods may have been adopted to accomplish the purpose, and a denial of them, if stated, would not form a single issue involving the whole remedial right. They would be probative and not constitutive facts. In the opinion of the jury an inference that defendants wrongfully induced plaintiff's husband to leave her, might not be drawn from one or more acts proved, but might readily be drawn from them all taken in the aggregate."

In *Foot v. Card*, 58 Conn. 1, 18 Atl. 1027, 18 Am. St. Rep. 258, 6 L. R. A. 829, "the plaintiff alleged that in the year 1872 she was living happily with and in the enjoyment of the conjugal affection and society of her husband, Enos Foot; that in that year the defendant, by her arts, blandishments, and persuasion, induced the said Enos Foot to begin, and from thence hitherto to continue, an adulterous intercourse with her; and that she thereby alienated from the plaintiff his conjugal affection, induced him to deny to her his conjugal society, and persuaded him to abandon her."

In *French v. Deane*, 19 Colo. 504, 36 Pac. 609, the complaint alleged: "That said plaintiff has at all times from the date of his said marriage lived in the city of Denver with his wife and has provided her with a comfortable home, and at all times his said wife has lived with him at his said home happily and contentedly until the occurrence of the matters hereinafter set forth.

"That said defendant, about the year 1876, became and was acquainted with the said wife of this plaintiff, and shortly afterwards the said defendant commenced to acquire, and did acquire, and since then has had and now has, an improper influence over the wife of said plaintiff, and the said defendant, by means of said undue influence, did, maliciously and with the intent to injure the plaintiff, and to deprive him of the comfort, society and assistance of his said wife, seduce the said wife and seduce and alienate her affections away from the plaintiff and to the defendant, and the said defendant further intending to injure this plaintiff and to deprive him of the comfort, society and assistance of his wife, did on or about the first day of December, A. D. 1889, entice her away from the said plaintiff against his consent, by means whereof among other things his home has been made desolate and ruined.

"That by reason of the premises, the plaintiff has been and still is wrongfully deprived by the defendant of the comfort, society and aid of his said wife, and has suffered great distress in body and mind in consequence thereto, and is damaged in the sum of \$100,000."

**Exception.**—But it has been held that where the alienation is alleged to have been affected by a charge of adultery, the time and place of such charge, and if possible the words spoken, should be set out in the complaint.<sup>18</sup>

**Necessary Allegations of the Complaint.**—In an action for alienation of affections, the complaint should set forth the marriage relation, and the loss by the plaintiff of the person, affection, society and aid of his or her wife or husband, and that the same was accomplished by the intentional, wrongful, or malicious conduct of the defendant. These are the ultimate facts, and constitute the gist of the action.<sup>19</sup>

“Wherefore, the said plaintiff prays judgment against the defendant in the sum of \$100,000 and costs of suit.”

In *Humphrey v. Pope*, 122 Cal. 253, 54 Pac. 847, “a demurrer to the amended complaint was sustained without leave to further amend, and judgment was given in favor of defendant, from which this appeal is prosecuted. The complaint alleged that at all the times mentioned in the complaint plaintiff and one W. G. Humphrey were husband and wife; on the \_\_\_\_\_ day of September, 1896, the husband wilfully deserted plaintiff, and by reason of said desertion plaintiff ‘is living separate and apart from him’; defendant, ‘wilfully and wrongfully intending to injure plaintiff and to deprive her of the affection, support, comfort, fellowship, society, aid, and assistance of . . . the said husband, wrongfully, . . . at divers days and times before the commencement of this action, and while such marriage existed, alienated and destroyed the affection of the . . . husband of this plaintiff . . . and did illegally persuade, entice, and abduct said W. G. Humphrey from plaintiff, whereby plaintiff has wholly lost and been deprived of the assistance, comfort, fellowship, society, aid, and support of . . . her said husband, to all of which plaintiff during all said time was entitled . . . and otherwise would have had, but for the illegal persuasion, conversation, and the enticement, abduction, and doings and actions of defendant, as hereinbefore recited.’” Judgment was reversed.

18. In *Mehrhoff v. Mehrhoff*, 26 Fed. 13, the plaintiff alleged that the defendants, father and mother of her husband, conspired to separate the plaintiff and her said husband and alienate his affections from her; that to accomplish the said purposes, the defendants began

systematically to poison and prejudice the mind of her husband against her by telling him false stories about the plaintiff, and charging her with unwillingness and inability to do housework, and by treating plaintiff in her husband’s presence with disrespect, and finally by falsely and maliciously charging the plaintiff in her husband’s presence with having committed adultery, by reason whereof, etc. The court in ruling upon a general demurrer said: “It is very doubtful if the words or conduct imputed to the defendant are sufficient to base this action upon, with the exceptions of the words charging the plaintiff with adultery. . . . As to this particular charge, the time and place and, if possible, the words spoken should be set out in the petition, so that the defendants may be informed exactly what charge they are required to meet.”

19. *Del.*—*Prettyman v. Williamson*, 1 Penne. 224, 39 Atl. 731. *D. C.*—*Dodge v. Rush*, 28 App. Cas. 149. *Ind.*—*Gregg v. Gregg*, 37 Ind. App. 210, 75 N. E. 674, 684; *Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266. *Mo.*—*Nichols v. Nichols*, 147 Mo. 387, 48 S. W. 947. *N. Y.*—*Hanor v. Housel*, 128 App. Div. 801, 113 N. Y. Supp. 163.

An averment in a complaint that the defendant had knowingly, purposely and maliciously alienated the affection of the plaintiff’s wife from him, and broken up his family, sufficiently shows knowledge of defendant that the woman was the wife of plaintiff. *Bockman v. Ritter*, 21 Ind. App. 250, 52 N. E. 100; *Boland v. Stanley*, 88 Ark. 562, 115 S. W. 163, 165. See also *McGregor v. McGregor* (Kv.), 115 S. W. 802.

In *Weston v. Weston*, 86 App. Div. 159, 83 N. Y. Supp. 528, the complaint alleged that the defendant, “contriving and wrongfully . . . intending to injure the plaintiff and wrongfully



deprive him of the affections . . . society . . . and assistance of plaintiff's wife, did wrongfully plan and undertake to alienate the affections of the plaintiff's said wife . . . and did finally acquire an improper influence over her," and then alleged sexual intercourse with the wife of the plaintiff, and further that the improper influence of defendant over plaintiff's said wife, have been so used by defendant that the love, affection and respect of plaintiff's said wife for plaintiff has been since Sept. 11, 1899, wholly alienated and destroyed, and that by reason of the premises the plaintiff has been wrongfully deprived of the comfort and society of his wife, and his home has been made desolate. It was held, that this complaint, while perhaps containing sufficient averments for an action of criminal conversation, includes also all the essential elements of a complaint for the alienation of the wife's affections, the court saying: "The prominent charge in the complaint is that the defendant has weaned from the plaintiff, the love and affection which the wife had hitherto entertain for him, and consequently deprived him of the chief blessing of the marriage state. . . . Sexual intercourse is not a necessary element of this action, although it is quite apt to accompany the enticement, and is an aggravation of the damages inflicted."

The marriage relation is sufficiently alleged by an averment describing a named person as the plaintiff's husband. *Reavely v. Harris*, 145 Ill. App. 545.

**Complaint by Wife Alleging False Representations, Etc.**—In *Jenkins v. Chism*, 25 Ky. L. Rep. 736, 76 S. W. 405, the petition after alleging marriage, etc., continued: "That on or about the — day of September, 1901, whilst she and her husband were living in the aforesaid county and state, the defendant, J. C. Jenkins, made frequent visits to the home of herself and husband for the purpose of misrepresenting her to her said husband, to poison his mind against her, alienate his affections from her, and induce him to mistreat and abandon her; that said defendant did, by his flattery and misrepresentations of plaintiff, and by his malicious, wrongful, and persuasive advice and other inducements, poison her said husband's mind against her, alienate his affections, and cause him to

mistreat and abandon her, thereby separating them as husband and wife; that defendant had destroyed her happiness and home forever; that the loss of her said husband, his comfort and assistance, and his affections and companionship, has caused her suffering mentally," etc.

**Complaint Charging Slander.**—"That on the 21st day of October, A. D. 1873, at said county, said Welling B. Westlake was the husband of said plaintiff, and the said Joseph Westlake, well knowing the same, on said 21st day of October, A. D. 1873, and on divers other days and times prior thereto, wrongfully, unlawfully, and maliciously, without any just cause or provocation therefor, in order and for the express purpose of enticing and procuring the said Welling B. Westlake, her husband, to become alienated in feeling and affection for and disgusted at and with the plaintiff, as his wife, wickedly, willfully, and maliciously spoke of and concerning her, said plaintiff, to her said husband and divers good people, and cause to be circulated and told to her said husband, for the purpose aforesaid, divers false, scandalous, and defamatory words of and concerning her, the said plaintiff, expressly in order to procure and cause said Welling B. Westlake to believe his said wife was an unchaste woman, and to cause him to become alienated from her and despise and refuse to live with her, and to induce said Welling B. Westlake to drive and banish her, said plaintiff, from the home, society, and companionship of her said husband, and in order to further procure and induce her said husband to become alienated from her, and drive and banish her from the home and companionship of her said husband the said Joseph Westlake promised and proposed to reward the said Welling B. Westlake with property and money if he would expel and drive her, said plaintiff, from his home and companionship; and the plaintiff further avers that by reason of the false, scandalous, and defamatory words spoken and circulated as aforesaid, by said Joseph Westlake, of and concerning her, this plaintiff, and by reason of the promise of reward by him made to said Welling B. Westlake, and causing the same to be believed and relied on by said husband for the purposes aforesaid, caused the said Welling B. West-



**Conspiracy.**—Where conspiracy between the defendants is alleged merely to show their joint liability, it is not the gist of the action and need not be proved,<sup>20</sup> except to support a joint judgment.<sup>21</sup>

lake to become so alienated and disaffected from and toward this plaintiff as his wife, that the said Welling B. Westlake, on said 21st day of October, A. D. 1873, against the will and consent of this plaintiff, caused her, this plaintiff, to be removed from the home, society, and companionship of her said husband, and then and there, by reason of the said conduct and sayings of said Joseph Westlake, the said Welling B. Westlake, against the plaintiff's will and without her consent, but in compliance with the request, orders, and commands of said defendant, Joseph Westlake, did take said plaintiff, with a small amount of personal property, into a wagon and hauled her and said property to the distance of seven miles, and there unloaded and deposited her and said property into a small tenement house on the land of T. C. Mitchell, and from thence, hitherto by reason of the conduct and sayings of said Joseph Westlake, refuses to permit her, said plaintiff, to return to him, said Welling B. Westlake, and cohabit with him as his wife, and refuses to provide for and support her, or to contribute anything toward her support, although said plaintiff has since repeatedly applied to said Welling B. Westlake personally to permit her to return to him as his wife, and to live with him as such. She further avers that said Welling B. Westlake, her husband, has no just or other cause to refuse to receive her back as his wife, than the false and slanderous sayings and unlawful doings of said defendant, Joseph Westlake. She further avers she is damaged by reason of the premises by said defendant, Joseph Westlake, in the sum of five thousand dollars." *Westlake v. Westlake*, 34 Ohio St. 621.

20. *Huot v. Wise*, 27 Minn. 68, 6 N. W. 425. See *White v. White*, 140 Wis. 538, 122 N. W. 1051. But see *Barton v. Barton*, 119 Mo. App. 507, 531, 94 S. W. 574. *Leavell v. Leavell*, 114 Mo. App. 24, 89 S. W. 55 (holding it error to neglect to charge that a finding of the alleged conspiracy and co-operation was essential to a verdict for plaintiff).

21. *De Ronde v. Bell*, 116 App. Div. 191, 101 N. Y. Supp. 497.

**Form of Complaint Charging Conspiracy.**—"That soon after said marriage, and after said Edwin L. Lockwood had taken this plaintiff to said defendants' home, and made the same his home and the home of this plaintiff, for the reason and as hereinbefore alleged, and at once after said defendants formed said agreement and conspiracy as hereinbefore alleged, said defendants, by reason of said agreement and said conspiracy, and to execute and carry out the same, jointly and severally, wrongfully, maliciously, unlawfully, and wickedly behaved and conducted themselves continuously until September 26, 1895, towards this plaintiff in an unkind, unsociable, cruel, and inhuman manner, thereby gradually undermining and destroying this plaintiff's happiness, peace of mind, and health, said conduct and behavior of said defendants towards this plaintiff continually growing worse and more cruel; and by reason thereof said plaintiff's health and happiness became gradually more undermined and destroyed, until on the 26th day of September, 1895, when solely by reason of said conduct of said defendants towards her, in conjunction with the conduct of said Edwin L. Lockwood, her husband, towards her, as hereinafter alleged, this plaintiff's health was entirely destroyed, and she was at said time in her said home, and in the home of her said husband and of these defendants, dangerously sick, confined to her bed, and under the care of her physician. That during the whole time during which said defendants behaved themselves towards this plaintiff as hereinbefore alleged, which produced the effects upon this plaintiff as hereinbefore alleged, by reason of, in pursuance of, and in execution of said agreement and conspiracy, said defendants wrongfully, wickedly, unlawfully, and maliciously, jointly and severally, and continuously until the 26th day of September, 1895, enticed, induced, begged, persuaded, and urged said Edwin L. Lockwood to deprive this plaintiff of all the things which, as hereinbefore alleged, it was the duty of said Edwin L. Lockwood to furnish to this plaintiff as his wife, and to abandon

**Bill of Particulars.**—If the complaint charges generally that the defendant has alienated the affections of plaintiff's wife by means of "gifts, promises, threats, and seductive and deceitful arts and wiles," the defendant is entitled on motion to a bill of particulars specifying the gifts, etc., by which it is claimed that the wife's affections were alienated, together with the time when and places where such means were employed.<sup>22</sup>

**2. Allegations of Malice.**—In an action against parents for the alienation of a husband's or wife's affections the complaint must aver that the acts charged against the defendant were maliciously done,<sup>23</sup>

and desert her, and to live apart from her, and to refuse to live with her, and to neglect her and drive her away from his and her said home and the home of these defendants, and to compel her to continuously remain away from her said home, and for himself to remain and live with themselves alone, as he had done before said marriage, as hereinbefore alleged." *Lockwood v. Lockwood*, 67 Minn. 476, 70 N. W. 784.

*White v. White*, 132 Wis. 121, 111 N. W. 1116, was an action for damages for conspiracy between the husband of plaintiff, his parents and a servant, which stated generally what was done in execution of the conspiracy, and that the purpose of the conspiracy (to separate the plaintiff and her husband) was accomplished. This was held sufficient as against a demurrer on the ground of insufficiency. See the title "Conspiracy."

**22.** *Wood v. Gledhill*, 20 N. Y. Civ. Proc. 155, 12 N. Y. Supp. 764, where the defendant originally filed a complaint for criminal conversation, pleading specific acts of adultery, but afterwards amended his complaint omitting the specific act charged, and merely alleging that the defendant had alienated his wife's affections by the means set out in the text. See also *Gary v. Eaton*, Circuit Judge, 132 Mich. 105, 92 N. W. 774.

In *Kirby v. Kirby*, 34 App. Div. 25, 54 N. Y. Supp. 1074, the defendant appealed from an order denying his motion for a bill of particulars. The order was as follows: "A bill of particulars would be a difficult matter to frame in an action such as this. A wife charges her husband's uncle with alienating her husband's affection and breaking up her home. There is no impropriety alleged other than a continued depreciation of the plaintiff as a wife. Such a complaint must be

made out by proof, presumably, of many instances, and probably on many occasions,—here a little and there a little. The general allegation is made: 'You depreciated me to my husband and destroyed my happiness.'"

**23. Ind.**—*Gregg v. Gregg*, 37 Ind. App. 210, 75 N. E. 674; *Reed v. Reed*, 6 Ind. App. 317, 33 N. E. 638, 51 Am. St. Rep. 310. See also *Kelso v. Kelso*, 43 Ind. App. 115; 86 N. E. 1001. *Mass.* *Multer v. Knibbs*, 193 Mass. 556, 79 N. E. 762, 9 Ann. Cas. 958. *Neb.*—*Sickler v. Mannix*, 68 Neb. 21, 93 N. W. 1018. *N. Y.*—*Bennett v. Smith*, 21 Barb. 439; *Hutcheson v. Peck*, 5 Johns. 196. *Wis.*—See *Jones v. Monson*, 137 Wis. 478, 119 N. W. 179.

Malice in this connection, "does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind, not sufficiently cautious before it occasions an injury to another, 11 Serg. & R. 39, 40. If the conduct of the defendant was unjustifiable and actually caused the injury complained of by the plaintiff, which was a question for the jury, malice in law would be implied from such conduct, and the court should have so charged." *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397. See also *Boland v. Stanley*, 88 Ark. 562, 115 S. W. 163; *Sickler v. Mannix*, 68 Neb. 21, 93 N. W. 1018.

The gravamen of the cause of action in such a case is maliciously inducing one spouse to abandon the other. *Barton v. Barton*, 119 Mo. App. 507, 94 S. W. 574; *Brown v. Brown*, 124 N. C. 19, 32 S. E. 320, 70 Am. St. Rep. 574.

"The presumption, in fact and in law, in all such cases, must be and is that the parent will act only for the best interest of the child and for the honor of the family." *Brown v. Brown*,

and if exemplary damages are sought, malice must be alleged.<sup>24</sup>

**B. UNNECESSARY ALLEGATIONS. — 1. Sexual Intercourse.** — As a general rule it is not necessary to allege or prove criminal conversation in order to sustain an action for alienating the affections of husband or wife.<sup>25</sup> But in Massachusetts it is held that criminal conversation is the gist of the action and must be alleged in the declaration, and that it is not sufficient to allege the alienation of affections alone, as that is a matter of aggravation.<sup>26</sup> And in any case, evidence of sexual intercourse between defendant and plaintiff's spouse is admissible only when supported by a corresponding averment in the complaint.<sup>27</sup>

**2. Miscellaneous Allegations.** — The complaint need not allege that any pecuniary loss was sustained by the plaintiff,<sup>28</sup> nor that the husband and wife were living together peaceably and happily previous to the alienation,<sup>29</sup> nor that the alienation was without the fault of

124 N. C. 19, 32 S. E. 320, 70 Am. St. Rep. 574, the plaintiff was the daughter-in-law of the defendant. The complaint substantially charged that the defendant maliciously alienated the affections of her husband from her, and caused him to abandon her.

The court instructed the jury as follows: "If the jury find that the defendant wilfully caused the plaintiff's husband to forsake and abandon her, the plaintiff is entitled to recover." It was held that there was error in the instruction, the court saying, the word 'wilfully' does not mean maliciously. 'Wilfully' implies that an act done in that spirit is done knowingly and obstinately and persistently, but not necessarily maliciously. . . . Before a parent can be held liable in damages for advising his married child to abandon his wife or her husband, the conduct of the parent should be alleged and proved to be malicious. But see *Kelso v. Kelso*, 43 Ind. App. 115, 86 N. E. 1001. Compare *Zimmerman v. Whitely*, 134 Mich. 39, 95 N. W. 989.

24. *Yowill v. Vaughn*, 85 Mo. App. 206.

25. *Ind.* — *Higham v. Vanosdol*, 101 Ind. 160; *Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792. *Mo.* — *Rinehart v. Bills*, 82 Mo. 534. *N. Y.* — *Weston v.*

*Weston*, 86 App. Div. 159, 83 N. Y. Supp. 528. *Ore.* — *Ireland v. Ward*, 51 Ore. 102, 93 Pac. 932. *Pa.* — *Keath v. Shiffer*, 37 Pa. Super. 573; 93 Pac. 932.

And see *Callis v. Merrieweather*, 98 Md. 361, 57 Atl. 201.

26. *Houghton v. Rice*, 174 Mass. 366, 54 N. E. 843, 75 Am. St. Rep. 351, 47 L. R. A. 310.

*Canada.* — In *Lellis v. Lambert*, 24 Ont. App. 653, the court, by Osler, J. A., said: "The loss of a wife's affections not brought about by some act on the defendant's part which necessarily caused or involved the loss of her *consortium*, never gave a cause of action to the husband. His wife might permit an admirer to pay her attentions, frequent her society, visit at her home, spend his money upon her, and by such means alienate her affections from him, resulting even in her refusal to live with him, and, so far as she could bring it about, in the breaking up of his home, and yet, there being no adultery and no 'procuring and enticing,' or 'harbouring and secreting' of the wife, no action lay at the suit of the husband against the man. A wife can be in no better position to maintain an action against a woman guilty of similar conduct towards her husband."

27. *Perry v. Lovejoy*, 49 Mich. 529, 14 N. W. 485.

28. *Prettyman v. Williamson*, 1 Penn. (Del.) 324, 39 Atl. 731.

29. *Gregg v. Gregg*, 37 Ind. App. 210, 75 N. E. 674, 677; *Jonas v. Hirshburg*, 18 Ind. App. 581, 48 N. E. 656; *Bowersox v. Bowersox*, 115 Mich. 24, 72 N. W. 986. See *Reaveley v. Harris*, 145 Ill. App. 545.



the plaintiff,<sup>30</sup> nor that there was an actual physical separation of husband and wife,<sup>31</sup> nor that plaintiff had requested defendant to deliver the spouse and that such request was refused.<sup>32</sup>

C. CERTAINTY OF ALLEGATIONS. — The allegations of the complaint must be reasonably certain as to the period of time within which the alienation was effected.<sup>33</sup>

D. JOINDER OF COUNTS. — A count for alienating the affections and a count for criminal conversation may be joined in one complaint.<sup>34</sup>

An apparent misjoinder of causes of action should be taken advantage of by demurrer and it is too late to object for the first time after trial and judgment.<sup>35</sup>

E. JOINDER OF PARTIES. — 1. Parties Plaintiff. — The wife cannot be required to make her husband a co-plaintiff.<sup>36</sup> And under a statute

30. *Jonas v. Hirshburg*, 18 Ind. App. 581, 48 N. E. 656.

31. *Hernance v. James*, 32 How. Pr. (N. Y.) 142.

Abandonment by Husband. — There may be a recovery by the husband where, as in *Callis v. Merrieweather*, 98 Md. 361, 57 Atl. 201, he alleges that by reason of the conduct of the defendant he was "forced to leave and abandon" his wife.

32. *Gilchrist v. Bale*, 8 Watts (Pa.) 355, 34 Am. Dec. 469.

33. *Mehrhoft v. Mehrhoff*, 26 Fed. 13.

But where it is averred that the alienation occurred during the marriage and before the commencement of the action it is not proper to dismiss the complaint for uncertainty in the averment even on special demurrer. *Humphrey v. Pope*, 122 Cal. 252, 54 Pac. 847.

34. *Belcher v. Ballou*, 124 Iowa 507, 100 N. W. 474.

35. *Love v. Love*, 98 Mo. App. 562, 73 S. W. 255, where a wife sued the father and mother of her husband for alienating his affections from her and obtained a joint judgment.

36. *Foot v. Card*, 58 Conn. 1, 18 Atl. 1027, 18 Am. St. Rep. 258, 6 L. R. A. 829, a leading case, where Pardee, J., said: "It is the pith and marrow of the complaint that in alienating the husband's conjugal affection from the wife, in inducing him to deny his conjugal society to her, in persuading him to give his adulterous affections and society to the defendant, the latter has inflicted upon the plaintiff an injury by which from the nature of the case it is impossible for the husband to suffer injury; for which it is impossible for him to ask redress either for himself or

for his wife. To ask in his name would be to plant the seeds of death in the cause at the outset, and the law does not compel those who have suffered wrong so to ask for redress as to insure denial."

In *Humphrey v. Pope*, 122 Cal. 253, 54 Pac. 847, the court said: "Section 370 of the Code of Civil Procedure requires the husband to be joined when a married woman is a party, which is the common-law rule; but the section introduces certain exceptions, and among them: '3. When she is living separate and apart from her husband by reason of his desertion of her, or by agreement in writing entered into between them, she may sue or be sued alone.' It was held under the provisions of the act of March 9, 1870 (Stats. 1869-70, p. 226), in *Tobin v. Galvin*, 49 Cal. 34, that the words 'while living separate and apart from her husband' do not mean a temporary absence of the wife. There must have been an abandonment on the part of the husband or wife, or a separation which was intended to be final. The code adds to the language of the former act the words 'by reason of his desertion of her.' The desertion through which comes the separation and forms the exception we do not think must necessarily have continued for the statutory period entitling the wife to a divorce. But the desertion must be such as is given as a cause for divorce by section 95 of the Civil Code, to-wit, a voluntary separation with intent to desert. The two sections should be read together to ascertain the meaning of the word 'desertion' in section 370 of the Code of Civil Procedure. Section 107 of the Civil Code fixes the time the desertion must continue; but what is

permitting her to sue for alienation of his affections he is not a proper party.<sup>37</sup>

**2. Joinder of Defendants.**—Persons who have acted in concert may be joined as defendants, although each did not participate in all the acts of the other.<sup>38</sup>

**III. DEFENSES.**—A. CERTAINTY IN ANSWER.—Affirmative matter in an answer must be stated so as to show clearly whether it is intended as a defense, or a partial defense, or matter in mitigation of damages.<sup>39</sup>

**B. CONDUCT OF PLAINTIFF.**—In an action for alienating affections, the defendant may properly set forth in his answer grossly immoral and improper conduct on the part of the plaintiff,<sup>40</sup> or his mistreatment of his spouse,<sup>41</sup> as contributing to or causing such alienation. But if plaintiff's misconduct would not have resulted in the alienation but for defendant's efforts it is no defense.<sup>42</sup>

**C. HONEST MOTIVES.**—A parent sued in this action may set up as a defense that the advice given or words spoken were parental advice given in good faith with honest motives.<sup>43</sup>

willful desertion is defined by section 95 of the Civil Code. It would be a harsh rule and unwarranted construction of the statute to hold that a husband may willfully separate from his wife with intent to desert, and yet that she could not maintain an action for a personal injury to herself if it occurred at any time within one year after the husband's desertion and abandonment of her. We think the allegations of the complaint sufficient upon this point." The material parts of this complaint are set out elsewhere. See also *Hester v. Hester*, 88 Tenn. 270, 12 S. W. 446; and the cases cited *supra*. I, B.

**37.** *White v. White*, 140 Wis. 538, 122 N. W. 1051. This was an action against the husband's parents where it was said that though the wrongdoers acted upon and through the husband to accomplish their wrongful purpose, he was not a joint tort-feasor.

**38.** *Price v. Price*, 91 Iowa 693, 60 N. W. 202, 51 Am. St. Rep. 360, 29 L. R. A. 150.

**39.** In *Simmons v. Simmons*, 4 N. Y. Supp. 221, the answer of the defendant among other things averred in two of its paragraphs, that the plaintiff and her husband were divorced at a time named, by a decree of a foreign court, and that previously they agreed to live separately, in consideration of which the plaintiff was paid \$5,000. It was held that the plaintiff was "en-

titled to an order requiring the defendant to make the allegations of said paragraphs more definite and certain, so that it will clearly appear whether such paragraphs are intended as defenses, or partial defenses, or as matter in mitigation of damages."

**40.** See *Hardwick v. Hardwick*, 130 Iowa 230, 106 N. W. 639; *Allen v. Besecker*, 55 Misc. 366, 105 N. Y. Supp. 416.

In *Schorn v. Berry*, 63 Hun 110, 17 N. Y. Supp. 572, an averment that plaintiff during his marriage had had intercourse with other women and boasted of the same to his wife, and importuned her to do likewise, was held improperly stricken out.

In *Lewis v. Roby*, 79 Vt. 487, 65 Atl. 524, such misconduct was held not to constitute a complete defense but pleadable in mitigation of damages.

**41.** *Prettyman v. Williamson*, 1 Penne. (Del.) 224, 39 Atl. 731; *Johnson v. Allen*, 100 N. C. 131, 5 S. E. 666. See also *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468; *Barnes v. Allen*, 1 Abb. Dec. (N. Y.) 111, 1 Keyes 390.

**42.** *Modisett v. McPike*, 74 Mo. 636.

**43.** See *Me.*—*Oakman v. Belden*, 94 Me. 280, 47 Atl. 553, 80 Am. St. Rep. 396. *Miss.*—*Tucker v. Tucker*, 74 Miss. 93, 19 So. 955, 32 L. R. A. 623. *Neb.*—*Rath v. Rath*, 2 Neb. (Unof.) 600, 89 N. W. 612, holding an instruction as to such matter properly refused because

**D. CONSENT OF SPOUSE.**—The defendant may allege in his answer as a complete bar to the action, that the plaintiff consented to acts causing the alleged alienation of affections.<sup>44</sup> Such an averment, however, is not necessary, since the same matter may be proved under a denial that plaintiff wrongfully caused the separation.<sup>45</sup>

**E. BAD CHARACTER OF PLAINTIFF'S SPOUSE.**—The bad character of the plaintiff's spouse prior to the marriage is not a defense, but is a mitigating circumstance which may or must be specially pleaded,<sup>46</sup> in accordance with the general rules elsewhere discussed as to the propriety or necessity of pleading matters in mitigation.<sup>47</sup>

**F. RELEASE OF RIGHT OF ACTION.**—A contract between the spouses, upon a pecuniary consideration,<sup>48</sup> releasing all rights of action for the alleged alienation, may be pleaded as a defense to the action.<sup>49</sup>

**IV. INTERVENTION.**—A person showing himself entitled to equitable relief may intervene in an action for alienating affections.<sup>50</sup>

**V. TRIAL.**—A. PROVINCE OF JURY.—In accordance with the general rules applicable to jury trials,<sup>51</sup> the court should not invade the province of the jury,<sup>52</sup> which includes the determination of questions of fact arising in the cause.<sup>53</sup>

**Malice**, in a case where one spouse is suing the other's parents, is a question of fact to be determined by the jury, and not a question of law.<sup>54</sup> And it is the duty of the court to charge the jury on this subject.<sup>55</sup>

**B. MEASURE OF DAMAGES.**—The plaintiff is entitled to recover for all the proximate results of the defendant's act,<sup>56</sup> including the loss

there was no pleading or evidence as to such defense.

**Advice of Guardian to Ward.**—*Trumbull v. Trumbull*, 71 Neb. 186, 98 N. W. 683.

44. See *Frank v. Berry*, 128 Iowa 223, 103 N. W. 358, where evidence was held insufficient to show consent or connivance.

45. *Jenkins v. Chism*, 25 Ky. L. Rep. 736, 76 S. W. 405.

46. *Frank v. Berry*, 128 Iowa 223, 103 N. W. 258.

47. See the title "Damages."

48. *Jenkins v. Chism*, 25 Ky. L. Rep. 736, 76 S. W. 405.

49. *McAllen v. Hodge*, 92 Minn. 68, 99 N. W. 424. See *Metcalf v. Tiffany*, 106 Mich. 504, 64 N. W. 479. But see *Jenkins v. Chism*, 25 Ky. L. Rep. 736, 76 S. W. 405.

50. Where an agreement has been made between the husband and wife upon a pecuniary consideration, whereby the alleged injured party releases all claims against any person for alienation of the spouse's affections and agrees not to sue thereon, the alleged guilty spouse may intervene in an ac-

tion by the other for alienation and plead the agreement as a defense. *McAllen v. Hodge*, 92 Minn. 68, 99 N. W. 424.

51. See the title "Trial."

52. **Remarks of the Court.**—During the trial of a case for alienating the affections, it is reversible error for the trial judge to make remarks in the presence of the jury, concerning his experience with, or observation of women generally. *Keen v. Keen*, 49 Ore. 362, 90 Pac. 147.

53. See **D. C.**—*Dodge v. Rush*, 28 App. Cas. 149, where defendant caused the alienation. **Mo.**—*Love v. Love*, 98 Mo. App. 562, 73 S. W. 255, amount of damages. **N. Y.**—*Eupes v. Nephue*, 120 App. Div. 621, 105 N. Y. Supp. 542, exemplary damages.

54. *Kelso v. Kelso*, 43 Ind. App. 115, 86 N. E. 1001; *Eagon v. Eagon*, 60 Kan. 697, 705, 57 Pac. 942. See also *Multer v. Knibbs*, 193 Mass. 556, 79 N. E. 762.

55. *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397.

56. *French v. Deane*, 19 Colo. 504, 36 Pac. 609. See *Lane v. Spence*, 70 Neb. 204, 97 N. W. 299.



of services,<sup>57</sup> loss of conjugal affection, society, support and protection,<sup>58</sup> mental anguish, disgrace and injury to the feelings.<sup>59</sup> The value of the wife's services is too broad a measure of damages to be awarded the husband, since he is also burdened with the obligation to clothe, support and care for her in sickness as well as in health.<sup>60</sup> The social standing of the parties may be regarded as well as the circumstances surrounding the wrong done,<sup>61</sup> and the prior affection<sup>62</sup> or lack of affection<sup>63</sup> of the spouses for each other, as well as the plaintiff's prior misconduct.<sup>64</sup>

57. A loss or lessening in value of the wife's services may result though she does not actually leave the plaintiff. *Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792.

58. *Noxon v. Remington*, 78 Conn. 296, 61 Atl. 963, *per Hall, J.* See also *Waldron v. Waldron*, 45 Fed. 315; *Neville v. Gile*, 174 Mass. 305, 54 N. E. 841; *Dunham v. McMichael*, 214 Pa. 485, 63 Atl. 1007.

It is not error to refuse an instruction limiting the recovery for loss of support and society to that which had occurred at the commencement of the action. *Nichols v. Nichols*, 147 Mo. 387, 48 S. W. 947. A wife may recover for such loss accruing after she has obtained a divorce instituted solely because of the husband's desertion and failure to provide. *Wilson v. Coulter*, 29 App. Div. 85, 51 N. Y. Supp. 804.

Loss of services is not essential to a recovery for a loss of consortium. *Gregg v. Gregg*, 37 Ind. App. 210, 75 N. E. 674.

There must be some evidence of the value of the husband's support to justify an award of damages for the loss thereof. *Rice v. Rice*, 104 Mich. 371, 62 N. W. 833. But direct evidence on this question is unnecessary where the circumstances and condition of the parties appear. *Stanley v. Stanley*, 32 Wash. 489, 73 Pac. 596.

59. *Colo.* — *French v. Deane*, 19 Colo. 504, 36 Pac. 609. *Kan.* — *Nevins v. Nevins*, 68 Kan. 410, 415, 75 Pac. 492. *Ky.* — *Adkins v. Kendrick*, 131 Ky. 779, 115 S. W. 814.

See also *Hart v. Shorey*, 12 Quebec Super. Ct. 84.

The jury in assessing damages may consider not only the loss of consortium but also the disgrace and dishonor cast upon the plaintiff. *Hartpence v. Rogers*, 143 Mo. 623, 45 S. W. 650; *Modisett v. McPike*, 74 Mo. 636;

*Linck v. Vorhauer*, 104 Mo. App. 368, 375, 79 S. W. 478.

Loss of support need not be shown by a wife to justify a recovery for mental anguish and injured feelings. *Rice v. Rice*, 104 Mich. 371, 62 N. W. 833.

Under General Allegation of Damages. — *Nevins v. Nevins*, 68 Kan. 410, 75 Pac. 492.

60. *Rudd v. Rounds*, 64 Vt. 432, 25 Atl. 438. See also *Prettyman v. Williamson*, 1 Penne. (Del.) 224, 39 Atl. 731.

In *Scott v. O'Brien*, 33 Ky. L. Rep. 450, 110 S. W. 260, it was said that there should be subtracted from the damages the amount of support which the law would compel a husband to provide.

61. *Keath v. Shiffer*, 37 Pa. Super. 573. See *Love v. Love*, 98 Mo. App. 562, 73 S. W. 255. But see *Bailey v. Bailey*, 94 Iowa 598, 63 N. W. 341.

62. *Keath v. Shiffer*, 37 Pa. Super. 573.

63. *Peek v. Traylor*, 17 Ky. L. Rep. 1312, 34 S. W. 705. See *N. Y.* — *Servis v. Servis*, 172 N. Y. 438, 65 N. E. 270 (refusal of instruction on this point, held error); *Van Olinda v. Hall*, 88 Hun 452, 34 N. Y. 777. *Tenn.* — *Payne v. Williams*, 63 Tenn. 583. *Wash.* — *Morris v. Warwick*, 42 Wash. 480, 85 Pac. 42.

64. See *Wolf v. Frank*, 92 Md. 138, 48 Atl. 132.

Plaintiff's intercourse with other women and his boasting of the same to his wife may be pleaded in mitigation of damages. *Schorn v. Berry*, 63 Hun 110, 17 N. Y. Supp. 572.

Such intimacy though unknown to the plaintiff may be shown. *Angell v. Reynolds*, 26 R. I. 160, 58 Atl. 625. Compare *Smith v. Hockenberry*, 138 Mich. 129, 101 N. W. 207.

Mitigating circumstances must be specially pleaded in some jurisdictions,<sup>65</sup> but the general rules in this regard are elsewhere treated.<sup>66</sup>

**Exemplary Damages.**—This action belongs to that class in which exemplary damages are properly allowed, since the wrong done to the plaintiff is incapable of being measured by a money standard and the damages assessed depend upon the degree of moral turpitude or atrocity of the defendant's conduct.<sup>67</sup>

**Special damages** must be averred in accordance with the rule generally applicable thereto.<sup>68</sup>

**C. VERDICT AND JUDGMENT.**—Where several defendants are sued jointly for alienation of affections, verdict and judgment may go against one or more, though the action may fail as to others.<sup>69</sup> The subsequent reunion of the spouses pending an appeal does not justify the setting aside of the judgment.<sup>70</sup>

**D. INJUNCTIVE RELIEF.**—In an action for alienating affections, the court may grant an injunction against the defendant upon proper showing.<sup>71</sup>

65. *Frank v. Berry*, 128 Iowa 223, 193 N. W. 358.

66. See the title "Damages."

67. **U. S.**—*Woldson v. Larson*, 164 Fed. 548; *Waldron v. Waldron*, 45 Fed. 315. **Del.**—*Prettyman v. Williamson*, 1 Penne. 224, 39 Atl. 731. **Kan.**—*White v. White*, 76 Kan. 82, 90 Pac. 1087; *Nevins v. Nevins*, 68 Kan. 410, 75 Pac. 492. **Mo.**—*Leavell v. Leavell*, 114 Mo. App. 24, 89 S. W. 55. **N. Y.**—*Eupes v. Nephue*, 120 App. Div. 62, 105 N. Y. Supp. 542. **Wis.**—*White v. White*, 140 Wis. 538, 122 N. W. 1051. See the following cases: **Me.**—*Plourd v. Jarvis*, 99 Me. 161, 58 Atl. 774. **Minn.**—*Lockwood v. Lockwood*, 67 Minn. 476, 70 N. W. 784. **Mo.**—*Hartpence v. Rogers*, 143 Mo. 623, 45 S. W. 650. **N. D.**—*Lindblom v. Sonstelie*, 10 N. D. 140, 86 N. W. 357.

Malice must be alleged and proved. *Yowell v. Vaughn*, 85 Mo. App. 206.

The motive animating the defendant may be considered in assessing the damages. *Wilson v. Coulter*, 29 App. Div. 85, 51 N. Y. Supp. 804.

In Colorado exemplary damages are recoverable where the cause of action arose subsequent to the act providing for such damages where the injury is caused by a wanton and reckless disregard of the injured party's rights and feelings (*Williams v. Williams*, 20 Colo. 51, 37 Pac. 614); but not where it arose prior thereto. *French v. Deane*, 19 Colo. 504, 36 Pac. 609, 24 L. R. A. 387.

68. As for example the benefit to be derived by plaintiff from his wife's property. *Zimmerman v. Whitely*, 134 Mich. 39, 95 N. W. 989.

69. *Huot v. Wise*, 27 Minn. 68, 6 N. W. 425.

70. *Jonas v. Hirshburg*, 18 Ind. App. 581, 48 N. E. 656.

71. *Ex parte Warfield*, 40 Tex. Crim. 413, 50 S. W. 933, 76 Am. St. Rep. 724, which was a suit for partial alienation of affections. The defendant was enjoined from speaking to plaintiff's wife. This was held proper, it appearing that defendant was not to be trusted in her society or to speak to her.

# ALIENS

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**CROSS-REFERENCES:**

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Naturalization.

**I. ALIEN'S RIGHT TO SUE.**—A. GENERALLY.—Unless restrained by treaty, or by a statute of the country of the forum, an alien-friend may sue in a court of a foreign state.<sup>1</sup>

**Right of Alien Enemy to Sue.**—As a general rule an alien enemy cannot sue in a court of a hostile country.<sup>2</sup> But an alien enemy residing in a hostile state under license may sue in the courts thereof.<sup>3</sup>

**Redress by Alien From Foreign State.**—An alien wronged by the act of a foreign state must seek redress through the political department of his own state; he cannot bring suit against the offending state unless such state consent to be sued.<sup>4</sup>

The United States has accorded the right to sue the government in certain cases to subjects of states which grant a similar privilege to United States citizens.<sup>5</sup>

1. *Taylor v. Carpenter*, 2 Woodb. & M. 1, 11, 23 Fed. Cas. No. 13,785; *Forbes v. Scannell*, 13 Cal. 242, 274.

In *Taylor v. Carpenter*, *supra*, it is said that under the laws of the United States aliens have the same right of suit as citizens.

**Personal Actions.**—*Pisani v. Lawson*, 6 Bingh. N. C. 90, 37 E. C. L. 293.

For personal actions which may be brought by aliens in federal courts see II, B, *post*.

For personal actions by aliens in state courts, see II, C, *post*.

**Real Actions.**—An alien friend may sue in a foreign state to protect his title to land situated therein. *Airhart v. Massieu*, 98 U. S. 491, 25 L. ed. 213.

2. *Mumford v. Mumford*, 1 Gall. 366, 17 Fed. Cas. No. 9,918.

In *Brandon v. Nesbit*, 6 T. R. 23, 101 Eng. Reprint 415, 3 R. R. 109, the plea stated that the persons interested in the goods, the insurance upon which was sued for, were aliens, and that prior to the sailing of the ship carrying said goods war broke out between the parties to the policy. Plaintiff's replication alleged that the persons interested were, prior to the war, indebted to plaintiff. Demurrer to this replication was sustained.

**Cannot Make Demise.**—An alien enemy, being himself incapable of suing, cannot make a demise so as to entitle his lessee to sue. *Jackson v. Decker*, 11 Johns. (N. Y.) 418.

**No Distinction Between Corporation and Individual.**—There is no distinction between an individual and a corporation, so far as the right to sue is dependant upon hostile character. The

*Society v. Wheeler*, 2 Gall. 105, 134, 22 Fed. Cas. No. 13,156.

**Execution Will Not Be Stayed if Plaintiff Become an Enemy After Judgment.**—The fact that after the rendition of a judgment in his favor the plaintiff—an alien—becomes an enemy, is not ground for setting aside or staying execution on such judgment. *Buckley v. Lyttle*, 10 Johns. (N. Y.) 117; *Vanbrynen v. Wilson*, 9 East 321, 103 Eng. Reprint 596.

3. **U. S.**—*Otteridge v. Thompson*, 2 Cranch (C. C.) 108, 18 Fed. Cas. No. 10,618. **N. Y.**—*Clarke v. Morey*, 10 Johns. 69. **Eng.**—*Wells v. Williams*, 1 Ld. Raym. 282, Lutw. 35, Salk. 46, 91 Eng. Reprint 1086; *Sparenburgh v. Bannatyne*, 1 Bos. & Pul. 163.

So an alien enemy may sue for the enforcement of a contract licensed by the state of the forum, or upon a cause of action growing out of a licensed transaction. *Crawford v. The William Penn*, Pet. (C. C.) 106, 6 Fed. Cas. No. 3,372. In this case the court permitted an action by an alien enemy to recover for repairs of a cartel-ship employed in bringing home American prisoners.

4. *Oppenheim Int. Law*, p. 345, § 291. *United States v. Dieckelman*, 92 U. S. 520; 23 L. ed. 742.

See *infra*, I, B, 2, c, "Court of Claims."

5. *Airhart v. Massieu*, 98 U. S. 491, 25 L. ed. 213; *Carlisle v. United States*, 16 Wall. (U. S.) 147, 21 L. ed. 426; *United States v. O'Keefe*, 11 Wall. (U. S.) 178, 20 L. ed. 131.

**Suits in Foreign Courts Between Aliens.** — One alien may sue another in a court of a country which is foreign to both parties, unless restrained by the laws of the forum.<sup>6</sup>

As a general rule the courts of the United States have no jurisdiction of controversies between aliens, in which no federal question is involved,<sup>7</sup> such controversies falling within the domain of the state courts.<sup>8</sup>

United States courts have jurisdiction of cases affecting ambassadors, other public ministers and consuls.<sup>9</sup>

**B. FEDERAL COURTS.** — 1. **Generally.** — An alien may sue in the federal courts upon any cause of action involving his personal or property rights.<sup>10</sup>

6. **Prohibited To Hold Interest in Subject-Matter of Action.** — One alien cannot sue another to recover an interest in land when state statute prohibits aliens to own land. *Madden v. State*, 68 Kan. 658, 75 Pac. 1023. This case involved a contest between aliens, one claiming the land in question under a deed, the other under a will. The land in question had been escheated and sold by the state. It was held that the aliens could not contest with each other, but that each might present a claim to the state for the proceeds of sale.

7. *Jackson v. Twentyman*, 2 Pet. (U. S.) 136, 7 L. ed. 374; *Montalet v. Murray*, 4 Cranch (U. S.) 46, 2 L. ed. 545; *Gage v. Riverside Trust Co.*, 156 Fed. 1002; *Pooley v. Luco*, 72 Fed. 561; *Laird v. Indemnity Mut. Assur. Co.*, 44 Fed. 712; *Rateau v. Bernard*, 3 Blatchf. 244, 20 Fed. Cas. No. 11,579; *Prentiss v. Brennan*, 2 Blatchf. 162, 19 Fed. Cas. No. 11,385; *Hinckley v. Byrne*, *Deady* 227, 12 Fed. Cas. No. 6,510.

The fact that an action between aliens relates to land situated within the district in which the court is held is not sufficient to give jurisdiction. *Pooley v. Luco*, 72 Fed. 561.

**Suit Against Alien Garnishee for Debt Due Alien Judgment Debtor.** — A citizen of the United States may bring an action in a United States circuit court against an alien to recover a debt due from defendant to another alien against whom plaintiff holds a judgment, although the original creditor could not have sued his debtor in such court. *Brandenstein v. Helvetia Swiss F. Ins. Co.*, 159 Fed. 589.

**District Court of Porto Rico.** — By virtue of the provisions of an act of March 2, 1901, 31 St. at L., p. 953, the

district court of the United States for Porto Rico has jurisdiction over controversies between aliens. *Ortega v. Lara*, 202 U. S. 339, 26 Sup. Ct. 707, 50 L. ed. 1055.

8. *Roberts v. Knights*, 7 Allen (Mass.) 449; *Rea v. Hayden*, 3 Mass. 24.

Same principle stated in *Barrell v. Benjamin*, 15 Mass. 354.

One alien may sue another in a state court when both parties are transiently in such state, upon a contract made abroad. *Roberts v. Knights*, 7 Allen (Mass.) 449. See *infra*, I, C.

9. U. S. Const., art. III, § 2.

An alien may sue a consul of his own state in a federal court for money fraudulently appropriated. *Lorway v. Lousada*, 1 Low. 77, 15 Fed. Cas. No. 8,517.

10. Sec. 1, Judiciary Act of March 3, 1875, as amended by act of March 3, 1887, and August 13, 1888; 25 St. at L., p. 434; *Breedlove v. Nicolet*, 7 Pet. (U. S.) 413, 8 L. ed. 731; *Taylor v. Carpenter*, 2 Woodb. & M. 1, 23 Fed. Cas. No. 13,785.

**Damages for Using Trade-Mark.** — *Taylor v. Carpenter*, 2 Woodb. & M. 1, 23 Fed. Cas. No. 13,785.

**Habeas Corpus.** — An alien may apply for *habeas corpus* to obtain his discharge from custody in which he is held under an unconstitutional state statute. *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550.

**Damages for Causing Death.** — In entertaining an action by a non-resident alien widow or child or by the administrator of a deceased alien's estate to recover damages for the negligent killing of husband, father, or intestate, the federal court in which the action is brought will follow the law of the state



in which such court is held. In pursuance of this rule, such actions have been allowed in the following cases: *Saveljich v. Lytle Logging & M. Co.*, 173 Fed. 277, 97 C. C. A. 443 (involving a statute of Washington); *Mahoning Ore and Steel Co. v. Blomfelt*, 163 Fed. 827, 91 C. C. A. 390 (involving a statute of Minnesota); *Patek v. American Smelt. & Ref. Co.*, 154 Fed. 190, 83 C. C. A. 284 (involving a statute of Colorado); *Baltimore & O. R. Co. v. Baldwin*, 144 Fed. 53, 75 C. C. A. 211 (involving a statute of Ohio); *Hirschowitz v. Pennsylvania R. Co.*, 138 Fed. 438 (involving a statute of New York); *Vetaboro v. Perkins*, 101 Fed. 393 (involving a statute of Massachusetts).

In Pennsylvania the United States courts have followed the decisions of the supreme court of that state (see cases under II, C, *post*) in holding that such action does not lie. See *Fulco v. Schuylkill Stone Co.*, 169 Fed. 98, 94 C. C. A. 498, *affirming* 163 Fed. 124; *DiPaolo v. LaQuin L. Co.*, 178 Fed. 877; *Zeiger v. Pennsylvania R. Co.*, 151 Fed. 348, *affirmed* by Circuit Court of Appeals, 158 Fed. 809.

**Right Not Conferred by Treaty.**—Nor is such alien entitled to sue in Pennsylvania by reason of a treaty between the United States and the state of which plaintiff is a subject which provides that the citizens of each signatory shall receive in the states and territories of the other protection and security for their persons and property, and shall have, in this respect, the same rights and privileges granted to natives, and which grants free access to courts for the maintenance and defense of their rights. *Fulco v. Schuylkill Stone Co.*, 169 Fed. 98, 94 C. C. A. 498, *affirming* 163 Fed. 124. For decision of supreme court of Pennsylvania on this subject, see *Maiorano v. Baltimore, etc. R. Co.*, 216 Pa. 402, 65 Atl. 1077, 116 Am. St. Rep. 778, 21 L. R. A. (N. S.) 271.

**Apparent Conflict in Federal Decisions.**—On this subject the United States courts for the eighth circuit have made diametrically opposite decisions upon the same statute. *Brannigan v. Union Gold Min. Co.*, 93 Fed. 164, involved a statute of the state of Colorado. As the supreme court of that state had not decided the question of the right to bring such an action, the circuit court followed the decision in

*Deni v. Pennsylvania R. Co.*, 181 Pa. 525, 37 Atl. 558, 59 Am. St. Rep. 676, in holding that the action did not lie.

In *Patek v. American Smelt. & Ref. Co.*, 154 Fed. 190, 83 C. C. A. 284, the same statute was involved. The court referred to *Brannigan v. Union Gold Min. Co.*, *supra*, saying that subsequently to the decision in that case the supreme court of Colorado had established a rule that statutes should be liberally construed, and, applying that rule to the statute allowing damages for negligent killing, the court held that a non-resident alien widow or child was within its provisions. A similar condition exists in regard to the decisions of the federal courts for the District of Washington. When the case of *Roberts v. Great Northern R. Co.*, 161 Fed. 239, came on for decision by the circuit court for the ninth circuit, the supreme court of the state of Washington had not passed upon this question, and the circuit court followed the supreme court of Wisconsin in *McMillan v. Spider Lake S. & L. Co.*, 115 Wis. 322, 91 N. W. 979, 95 Am. St. Rep. 947, in denying the right of action. Subsequently the supreme court of Washington construed the statute of that state to give such right. See *Anustasakas v. International Contract Co.*, 51 Wash. 119, 98 Pac. 93, 130 Am. St. Rep. 1089. In *Saveljich v. Lytle Logging & Mercantile Co.*, 173 Fed. 277, the circuit court for the ninth circuit followed that decision. As to such actions in state courts, see note under II, C, *post*.

**Habeas corpus will issue from a federal court to determine whether a person arrested by a state officer for a crime committed on board a foreign ship in a United States port shall be held for trial in a court of such state, or shall be delivered into the custody of the consul of the state to which such ship belongs, such consul claiming the right to exercise jurisdiction over the prisoner.** *Mali v. Keeper of the Common Jail*, 120 U. S. 1, 7 Sup. Ct. 385, 30 L. ed. 565.

**Habeas corpus will issue upon petition of an alien to test the legality of his arrest under an ordinance which such alien alleges to be unconstitutional on the ground that it discriminates against the race to which he belongs.** *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. ed. 220.

**Real Actions.**—Aliens may also bring actions concerning real property. Bona-

**Right Not Dependent Upon Residence.**—This right exists whether plaintiff is a resident or non-resident.<sup>11</sup>

**2. Jurisdiction.**—*a. Circuit Court.*—(I.) **In First Instance.**—An action by an alien against a citizen must be brought in the United States circuit court.<sup>12</sup>

**Venue.**—Such action may be brought in the circuit court of any district; but defendant may object to being sued in a district other than that of his residence; and an action brought against him in a district in which he does not reside will be dismissed upon his motion.<sup>13</sup>

*parte v. Camden & A. R. Co.*, Bald. 205, 3 Fed. Cas. No. 1,617.

**Foreclosure of Mortgage.**—*Hughes v. Edwards*, 9 Wheat. (U. S.) 489, 6 L. ed. 142. In this case it was contended that the alien plaintiff could not sue, as, by reason of the facts there involved, he could not hold real property in the United States, and his interest in the mortgaged land was an interest in realty. After discussing the effect of the treaty of 1794, the court says: "In the cases of *Harden v. Fisher* (1 Wheat. 300, 4 L. ed. 98), and *Orr v. Hodgson* (4 *Ibid.* 463), it was decided, that, under this treaty, it was not necessary for the alien to show that he was in the actual possession or seisin of the land, at the time of the treaty; because the treaty applies to the title, whatever that may be, and gives it the same legal validity as if the parties were citizens. Now, it is unquestionable, that at the time this treaty was made, the female plaintiff was entitled to assert a legal claim to the possession of this land, or to foreclose the equity of redemption, unless the debt with which it was charged was paid; in which case, equity would have considered her as a mere trustee for the mortgagor. But the objection is deprived of all its weight, and would be so, independent of the treaty, in a case where the mortgagee, instead of seeking to obtain possession of the land, prays to have his debt paid, and the property pledged for its security sold, for the purpose of raising the money. Under this aspect, the demand is, in reality, a personal one, the debt being considered as the principal, and the land merely as an incident; and, consequently, the alienage of the mortgagee, if he be a friend, can, upon no principle of law or equity, be urged against him."

**Action To Set Aside Deed.**—An alien claiming a mining claim as heir at law of a qualified locator may sue to set

aside a deed alleged to have been fraudulently made by such locator's administrator. *Lohmann v. Helmer*, 104 Fed. 178.

**Action To Enjoin Taking Land.**—An alien may bring a suit to restrain a railway company from entering upon and taking his land. *Bonaparte v. Camden & A. R. Co.*, Baldw. 205, 3 Fed. Cas. No. 1,617.

11. *Breedlove v. Nicolet*, 7 Pet. (U. S.) 413, 8 L. ed. 731.

12. Sec. 1, Judiciary Act of March 3, 1875, as amended by Act of March 3, 1887, and Act of Aug. 13, 1888; 25 St. at L. 434.

**Suit by Foreign Sovereign.**—United States circuit courts have jurisdiction of actions by foreign sovereigns or states against citizens of the United States. *The King of Spain v. Oliver*, 2 Wash. 429.

13. **District of Defendant's Residence Proper Venue.**—§ 2 of Act of March 3, 1875, as amended by Act of March 3, 1887, and Act of August 13, 1888; 25 St. at L. 434; *Galveston, etc. R. Co. v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. ed. 248; *Fribourg v. Pullman Co.*, 176 Fed. 981; *Cucciarre v. New York Cent. & H. R. R. Co.*, 163 Fed. 38, 90 C. C. A. 220; *Campbell v. Duluth, etc. R. Co.*, 50 Fed. 241; *Filli v. Delaware, L. & W. R. Co.*, 37 Fed. 65; *Denton v. International Co.*, 36 Fed. 1.

**Transaction of Business in District, no Bar.**—Defendant may make this objection, although it does business in the district in which suit is filed, and owns and operates the greater portion of its property therein. *Filli v. Delaware, L. & W. R. Co.*, 37 Fed. 65; *Denton v. International Co.*, 36 Fed. 1.

**Objection, How Made.**—Defendant may make objection by appearing specially for the purpose of objecting to the jurisdiction of the court, and, by plea or "preliminary answer" setting

(II.) Jurisdiction of Removed Cause. — The United States circuit courts also have jurisdiction of causes removed thereto by citizens in the exercise of their statutory right of removal.<sup>14</sup>

b. *District Court.* — Admiralty Suits Against Domestic Vessels or Individuals. United States district courts sitting in admiralty have jurisdiction over libels filed by aliens against domestic vessels or against individuals.<sup>15</sup>

**Foreign Vessels.** — Such courts also, in their discretion, may take

up the fact of his non-residence in the district where suit was commenced, and by moving to quash the summons and dismiss the action. *Denton v. International Co.*, 36 Fed. 1; *Campbell v. Duluth S. S. & A. R. Co.*, 50 Fed. 241. Or defendant may move to set aside service of process. *Felli v. Delaware, L. & W. R. Co.*, 37 Fed. 65.

In *Fribourg v. Pullman Co.*, 176 Fed. 981, defendant, a corporation, was sued in the circuit court of a district in which neither plaintiff nor defendant resided. Defendant entered a special appearance for the purpose of moving the court to set aside and vacate the summons and dismiss the action, and for the same purpose filed a special demurrer "for that it appears upon the face of the complaint that plaintiffs are citizens and residents of the republic of France and defendant is a citizen and resident of the state of Illinois." Defendant's motion to dismiss the action was granted.

14. *Barlow v. Chicago & N. W. R. Co.*, 163 Fed. 37; *s. c.* on petition for rehearing, 172 Fed. 513; *Creagh v. Equitable Life Assur. Soc.*, 83 Fed. 849; *Uhle v. Burnham*, 42 Fed. 1.

See the title "Removal of Causes."

**Corporation not resident of district in which suit is brought against it by an alien in a state court, although it transacts business and owns property there,** may remove the action to the United States circuit court for such district, and defendant's motion to remand to the state court will be denied. *Barlow v. Chicago & N. W. R. Co.*, 163 Fed. 37; *s. c.* on rehearing, 172 Fed. 513; *Sherwood v. N. M. & M. V. Val. Co.*, 55 Fed. 1.

*Contra.* — But it has been held that a corporation which does business and owns property in a state of which it is not a resident cannot remove to a circuit court an action commenced against it by an alien in a court of the first

state. *Mahopoulus v. Chicago, R. I. & P. R. Co.*, 167 Fed. 165.

**Waiver.** — By removing a cause brought against him by an alien in a state court to the United States court for the district in which suit was brought, a citizen defendant waives his right to claim that a suit against him in a United States court must be tried in the district of his residence. *Cucciarre v. New York Cent. & H. R. R. Co.*, 163 Fed. 38, 90 C. C. A. 220. A non-resident alien plaintiff cannot object to the removal to the United States circuit court of an action which he has commenced against a United States citizen in a state court of a district other than that of defendant's residence. *Iowa Lillooet Gold Min. Co. v. Bliss*, 144 Fed. 446.

15. **Domestic Vessel.** — Jurisdiction of causes in admiralty is conferred upon district courts by Rev. St. § 563. An alien's right to proceed against a vessel of the United States would follow from his general right to sue in the courts of this country.

**Individual.** — Such courts have jurisdiction of a libel *in personam* by an alien against a corporation of the United States to recover damages suffered by libellant's vessel from an obstruction placed in the water by defendant; and jurisdiction is not divested by the fact that the injury complained of was received in foreign waters. *Panama R. Co. v. Napier Shipping Co.*, 166 U. S. 280, 17 Sup. Ct. 572, 41 L. ed. 1004.

**Captured Property.** — An alien may proceed by libel to recover captured property brought into a United States port as prize by a public armed vessel of such alien's enemy. *The Santissima Trinidad*, 7 Wheat. (U. S.) 281, 5 L. ed. 454. In this case it was held that the exemption from local jurisdiction accorded to public armed vessels of a foreign state does not extend to their prizes.



jurisdiction of libels filed by foreign citizens against alien vessels.<sup>16</sup>

**16. Foreign Vessels — Jurisdiction Discretionary.**—It rests in the discretion of the court whether or not it will exercise jurisdiction in a given case. In exercising its discretion the court proceeds upon the idea that comity toward the state to which the vessel in question belongs requires such action. *The Troop*, 128 Fed. 856, 63 C. C. A. 584, *affirming* 118 Fed. 769; *The New City*, 47 Fed. 328.

In *The New City*, *supra*, the court says: "The object in each case is to prevent a failure of justice, and it (court) will not officiously interfere in any case after a fair hearing and decision of the matter in controversy has been given by an authorized agency of the government of the country to which the vessel belongs, as in this case."

In *The Topsy*, 44 Fed. 631, the court says: "When, therefore, upon examination it appears that the construction and enforcement of the laws of a foreign state are involved in a question arising between parties owing allegiance to, and contracting with reference to, such laws, and that the tribunals of their own country are open and accessible to them, the court withholds its hand, remitting the parties to their own courts, in which their own laws are better understood, and the means of enforcing them possibly more complete. And this is specially observed in the matter of seamen's wages, the contract of which is local in its character, and is made the subject of special legislation in all maritime countries. But when the circumstances of the case are such as demand immediate investigation, or when the seaman discharged from the ship would be put at disadvantage were she suffered to depart, or when she has departed he would be compelled to search the world for her, the court will proceed and decide the case against the wish, and, at times, against the protest, of the foreign consul. *The Russia*, 3 Ben. 471, 21 Fed. Cas. No. 12,168; *The Lilian M. Vigus*, 10 Ben. 385, 15 Fed. Cas. No. 8,346.

**When Jurisdiction Exercised.**—Jurisdiction will be exercised when such course is necessary to prevent injustice, or when to refuse it would work a hardship upon libelant, or when other cir-

cumstances require it. *The Bee*, 1 Ware 332, 3 Fed. Cas. No. 1,219.

**Not Unless Required by Special Reason.**—But jurisdiction will not be exercised unless required by some special reason. *The Pacific*, Blatch & H. 187, 18 Fed. Cas. No. 10,644; *The Becherdass Ambaidass*, 1 Low. 569, 3 Fed. Cas. No. 1,203.

**Will Not Be Exercised When Consul Has Acted.**—A court of the United States will not take jurisdiction of a libel for seaman's wages against a foreign vessel when a consul of the state to which such vessel belongs has already adjudicated the matter. *The New City*, 47 Fed. 328.

**Will Not Refuse Jurisdiction at Request of Consul.**—But the fact that a consul of the state to which the libelant and the ship belong requests the court not to exercise jurisdiction is not sufficient reason for refusing to hear the cause, if such refusal would work a hardship upon libelant. *The Topsy*, 44 Fed. 631; *Weiberg v. The St. Oloff*, 2 Pet. Adm. 428, 29 Fed. Cas. No. 17,357.

United States courts will, in such cases, enforce liens which are created by general admiralty law. *The Maggie Hammond*, 9 Wall. (U. S.) 435, 19 L. ed. 772. But such courts will not enforce a lien which is not created by admiralty law, or by the law of the place where the contract in question was made or in which the cause of action arose. *The Maggie Hammond*, 9 Wall. (U. S.) 435, 19 L. ed. 772.

**Libel for Wages.**—In the exercise of their discretion United States courts have entertained jurisdiction of libels filed by alien seamen against alien ships to recover wages. *The Kestor*, 110 Fed. 432; *The Gen. McPherson*, 100 Fed. 860; *The New City*, 47 Fed. 328; *The Topsy*, 44 Fed. 631; *Weiberg v. The St. Oloff*, 2 Pet. Adm. 428, 29 Fed. Cas. No. 17,357.

**Personal Injuries.**—Also the courts will entertain libels by alien seamen to recover damages for injuries inflicted upon libelants by the officers of the vessels in question. *The Troop*, 128 Fed. 856, 63 C. C. A. 584, *affirming* 118 Fed. 769. *The Kestor*, 110 Fed. 432.

**Consul's Right to Receive Wages Due Deceased Alien.**—In libel against for

c. *Court of Claims.*—An alien may sue the United States in the court of claims when a statute providing for actions against the United States by citizens extends such right to aliens.<sup>17</sup>

d. *Consular Court.*—An alien friend may bring suit in a consular court of a foreign state against a citizen of such state residing within the territorial jurisdiction of such court.<sup>18</sup>

C. IN STATE COURT.—1. *Generally.*—An alien may also sue a citizen of the United States, or another alien, in a state court upon a cause of action involving his personal or property rights.<sup>19</sup>

oreign vessel a consul of the state of which a deceased alien seaman was a subject cannot, upon intervention, claim wages due such deceased seaman, unless he is expressly authorized thereto by the heirs of such decedent. A consular convention authorizing consuls to act as legal representatives of subjects of their states does not constitute them administrators of the estates of deceased subjects. *The Gen. McPherson*, 100 Fed. 860.

*Damages Caused by Collision.*—An action by an alien ship or its owner against another alien ship to recover damages sustained in a collision between the two vessels. *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. ed. 152; *Thomassen v. Whitwell*, 9 Ben. 113, 23 Fed. Cas. No. 13,928.

*Salvage.*—Also in libel by alien against alien vessel for salvage. *The Bee*, 1 Ware 332, 3 Fed. Cas. No. 1,219.

17. *United States v. O'Keefe*, 11 Wall. (U. S.) 178, 20 L. ed. 131.

In *United States v. O'Keefe*, *supra*, a British subject sued the United States in the Court of Claims to recover the proceeds of sale of captured and abandoned property. The privilege of bringing such suits was conferred upon United States citizens by a statute (15 St. at L. p. 243), which extended it "to the subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts." It was contended that Great Britain did not accord such privilege to American citizens, because the mode of proceeding and the privilege of suing depended upon the will of the crown, while in the United States the right was absolute. The court held that, as it was the duty of the crown to grant such petitions, and as such requests were very rarely refused, and then only for political reasons, it must be considered that British subjects were within the terms

of the statute. This right of a British alien is recognized and *O'Keefe's* case cited in *Carlisle v. United States*, 16 Wall. (U. S.) 141, 21 L. ed. 426, and *Young v. United States*, 97 U. S. 39, 24 L. ed. 992.

18. *Foster v. Scannell*, 13 Cal. 242, 285.

19. *Suit by Foreign Sovereign.*—A foreign sovereign may sue a citizen of a state in a court of such citizen's state. *King of Prussia v. Knepper's Admr.*, 22 Mo. 550.

*Residence Not Necessary.*—An absent, non-resident alien may sue a citizen of one of the United States in a state court of another of the United States. *Peabody v. Hamilton*, 106 Mass. 217.

A state court will entertain an action by a non-resident alien against another alien only on the ground of comity, and will not give judgment if doing so would prejudice a citizen. *Disconto Gesellschaft v. Umbreit*, 127 Wis. 651, 106 N. W. 821, 115 Am. St. Rep. 1068, where an attaching citizen was given preference over an alien who had attached the same goods.

*Damages for Murder.*—An alien woman may sue a municipal corporation of the United States for damages caused to her by the murder of her husband by a mob, under statute giving such right of action to a citizen. *Luke v. Calhoun Co.*, 52 Ala. 115.

*Slander.*—*Libel.*—An alien may sue a citizen in a state court for slander (*Sidgreaves v. Myatt*, 22 Ala. 617), or for libel. *Crashley v. Press Pub. Co.*, 179 N. Y. 27, 71 N. E. 258, *affirming* 77 N. Y. Supp. 711.

*Assault and Battery.*—An alien seaman may sue the master of a foreign ship to recover damages for assault committed upon plaintiff by defendant, although such assault was committed upon the high seas. *Johnson v. Dalton*, 1 Cow. (N. Y.) 543, 13 Am. Dec. 564.

**May Take Advantage of State Insolvent Laws.** — A resident alien may take advantage of state insolvent laws.<sup>20</sup>

**Estates of Deceased Aliens.** — A state court has jurisdiction to appoint an administrator of the estate of a deceased alien or an executor of his will.<sup>21</sup>

**Injunction to Prevent Use of Trademark.** — Alien may sue for an injunction restraining a citizen from using plaintiff's trademark. *Taylor v. Carpenter*, 11 Paige (N. Y.) 292, 42 Am. Dec. 114.

**Action for Damages for Causing Death.** — A non-resident alien widow or minor child, or the administrator of the estate of a deceased alien, may sue a citizen of the United States in a state court for damages arising from the negligent killing of plaintiff's husband, father or intestate. The weight of authority supports this proposition, but the contrary has been held. Such right of action has been sustained in the following states: **Ariz.** — *Bonthron v. Phoenix L. & F. Co.*, 8 Ariz. 129, 71 Pac. 941, 61 L. R. A. 563. **Colo.** — *Ferrara v. Aurie Min. Co.*, 43 Colo. 496, 95 Pac. 952, 17 L. R. A. (N. S.) 964. **Del.** — *Szymauski v. Blumenthal*, 52 Atl. 347.

**Ill.** — *Kellyville Coal Co. v. Petraytis*, 195 Ill. 215, 63 N. E. 94, 88 Am. St. Rep. 191, *affirming* 95 Ill. App. 635. **Ind.** — *Cleveland, etc. R. Co. v. Osgood* (Ind. App.), 73 N. E. 285. **Ia.** — *Romano v. Capital City B. & P. Co.*, 125 Iowa 591, 101 N. W. 437, 106 Am. St. Rep. 323, 68 L. R. A. 132, 2 Ann. Cas. 682 (where administrator of deceased alien was held to be entitled to sue for such damages); *Rietveld v. Wabash R. Co.*, 129 Iowa 249, 105 N. W. 515 (action by administrator, heirs being non-resident aliens).

**Kan.** — *Atchison, T. & S. F. R. Co. v. Tajardo*, 74 Kan. 314, 86 Pac. 361, 6 L. R. A. (N. S.) 681. **Ky.** — *Trotta's Admr. v. Johnson*, 121 Ky. 827, 90 S. W. 540, 12 Ann. Cas. 222, action by administrator, heirs being non-resident aliens. **Mass.** — *Mulhall v. Fallon*, 176 Mass. 266, 57 N. E. 386, 79 Am. St. Rep. 309, 54 L. R. A. 934. **Mich.** — *Mascitelli v. Union Carbide Co.*, 151 Mich. 693, 115 N. W. 721, action by administrator, heirs being non-resident aliens. **Minn.** — *Renlund v. Commodore Min. Co.*, 89 Minn. 41, 93 N. W. 1057, 99 Am. St. Rep. 534. **N. Y.** — *Alfson v. Bush Co.*, 182 N. Y. 393, 75 N. E. 230, 108 Am. St. Rep. 815; *Tanas v. Municipal Gas Co.*, 88 App. Div. 251, 84 N. Y. Supp. 1053. **Ohio.** —

*P. C. C. & St. L. R. Co. v. Naylor*, 73 Ohio St. 115, 76 N. E. 505, 112 Am. St. Rep. 701, 3 L. R. A. (N. S.) 473; *Naylor v. R. Co.*, 26 Ohio C. C. 277. **Va.** — *Low Moor Iron Co. v. La Bianca*, 106 Va. 83, 55 S. E. 532, 9 Am. & Eng. Cas. Ann. 1177, and note. **Wash.** — *Anustasakas v. International Contract Co.*, 51 Wash. 119, 93 Pac. 93, 130 Am. St. Rep. 1089.

*Contra.* — Decisions of state courts denying such right: *Deni v. Pennsylvania R. Co.*, 181 Pa. 525, 37 Atl. 558, 59 Am. St. Rep. 676; *Maiorano v. Baltimore & O. R. Co.*, 216 Pa. 402, 65 Atl. 1077, 116 Am. St. Rep. 778, 21 L. R. A. (N. S.) 271; *McMillan v. Spider Lake & Co.*, 115 Wis. 322, 91 N. W. 979, 95 Am. St. Rep. 947.

**Right Fixed by Status of Heirs, Rather Than by That of Decedent.** — In *Pocahontas Collieries Co. v. Rukas' Admr.*, 104 Va. 278, 51 S. E. 449, which involved the right of heirs living in another state to bring such action, the court says: "An examination of the authorities relied on to sustain the overruled plea shows that the decisions are controlled by the status of the parties entitled to the recovery in an action for death by wrongful act, rather than by that of the decedent in his lifetime. The distinction is sharply drawn between the rights of non-resident and of resident relations of the deceased."

**Treaty Does Not Confer Right.** — In *Maiorano v. Baltimore & O. R. Co.*, 216 Pa. 402, 65 Atl. 1077, 116 Am. St. Rep. 778, 21 L. R. A. (N. S.) 271, it was claimed that, by reason of a treaty between plaintiff's home state and the United States securing property rights and rights of action to the citizens of the signatories, the rule of *Deni v. Pennsylvania R. Co.*, 181 Pa. 525, 37 Atl. 558, 59 Am. St. Rep. 676, did not apply. The court held that this treaty did not apply to a non-resident alien.

20. *Judd v. Lawrence*, 1 Cush. (Mass.) 531.

21. **Administrator.** — A state court may appoint such administrator, although deceased had no property in the state in which appointment is asked. *Trotta's Admr. v. Johnson*, 121 Ky. 827,



**2. Cannot Sue When Prohibited To Acquire Interest in Subject-Matter.** — But an alien cannot bring an action, nor inaugurate an adversary proceeding in an action brought by another person, when a state statute prohibits his acquisition of an interest in the subject of such action.<sup>22</sup>

**II. LIABILITY TO SUIT.** — **A. GENERALLY.** — An alien friend or an alien enemy may be sued in a court of a foreign state by a citizen thereof or by another alien.<sup>23</sup>

**Not Dependent Upon Express Enactment.** — An alien's liability to suit does not depend upon express enactment by the country in which suit is brought. It exists by reason of general principles of municipal and international law.<sup>24</sup>

90 S. W. 540. See the title "**Executors and Administrators.**"

**22. Will Contest.** — A non-resident alien cannot contest a will of real property, as he is not permitted to take such property by devise, and, therefore, cannot have such an interest in the subject-matter of his proposed contest as will warrant its institution. *Jele v. Lemberger*, 163 Ill. 338, 45 N. E. 279.

**23.** Bacon's Abr., title "**Alien,**" D. See cases cited under II, F; II, G.

A resident alien is, in contemplation of law, a citizen to the extent that he may be proceeded against by attachment as an absconding debtor. *Field v. Adreon*, 7 Md. 209.

**Alien Enemy.** — **U. S.** — *Washington Univ. v. Finch*, 18 Wall. 106, 21 L. ed. 818; *McVeigh v. United States*, 11 Wall. 259, 20 L. ed. 80. **Ill.** — *Seymour v. Bailey*, 66 Ill. 288, 297, action to foreclose lien. *Minn.* — *McNair v. Toler*, 21 Minn. 175.

A citizen may protect his property rights by suit in the courts of his own country against an alien enemy whenever such court can make service upon such alien or obtain jurisdiction of his property. *Masterson v. Howard*, 18 Wall. (U. S.) 99, 21 L. ed. 764; *Dorsey v. Kyle*, 30 Md. 512.

An alien enemy may appear in an action brought against him in an enemy's court, and may employ an attorney to represent him. *Russ v. Mitchell*, 11 Fla. 80, 89.

**Defendant Cannot Plead His Own Status as Alien Enemy.** — An alien enemy, when sued in a court of an enemy state by a citizen thereof, cannot plead that he is an enemy to such state. *Dorsey v. Kyle*, 30 Md. 512, 520. In this case the court says: "As a general rule, an alien enemy is not allowed to maintain suit in the courts of the

country with which he is, at the time, in hostility. This, however, is a personal disability, of a temporary duration, and is founded upon reason and policy, and, to some extent, upon the necessity of the case. But no such reason or policy forbids judicial proceedings against an alien enemy, in favor of a friendly citizen; and it is therefore, asserted by good authority, that while an alien enemy may not sue, he may be sued at law. *Bac. Abr. Alien, D.* Hence we know of no such thing as a plea by the defendant of his own alien enmity to the government in whose courts he is sued. The plea of alien enemy goes only to the disability of the plaintiff. It is not a matter of privilege, but a disability that suspends the right to maintain an action in the courts of the country to which the party is an enemy. And if a party, though an alien enemy, be suable at all, it is difficult to suggest a good reason why the same proceedings cannot be had by his creditors against his property remaining within the jurisdiction of the state, that can be taken against the property of any other non-resident debtor whatever. His being an alien enemy does not make him the less a non-resident debtor. The right of his creditors to proceed by attachment was not suspended because he thought proper to assume the position of an alien enemy. All the remedies provided by law against the property of an absent or non-resident debtor, remained open to them; and if they have pursued those remedies in the mode prescribed by law, the debtor himself can make no question of their right so to do, upon the ground that he no longer remained in amity with them or their government."

**24.** *Vattel's Law of Nations, Bk. II, c. VIII, § 100, p. 173.*

**Shipping.**—A merchant vessel when in a foreign port is subject to all of the laws of the state to which such port belongs.<sup>25</sup>

The liability of a foreign corporation to be sued in a particular jurisdiction need not be distinctly expressed in the statutes of that jurisdiction, but may be implied from a grant of authority in those statutes to carry on business there. *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. ed. 964.

25. *Mali v. Keeper of The Common Jail*, 120 U. S. 1, 7 Sup. Ct. 385, 30 L. ed. 565; *United States v. Diekelman*, 92 U. S. 520, 23 L. ed. 742.

**Comity Permits Flag State to Control Matters Occurring on Board.**—As a matter of international comity all things done on board a foreign vessel, and all matters of discipline which affect only the vessel or those belonging to her, and which do not involve the peace or dignity of the country, or the tranquillity of the port, are usually left by the local government to be dealt with by the authorities of the country to which such ship belongs. *Mali v. Keeper of The Common Jail*, *supra*.

**Law of Port State Controls in Matters Affecting Its Peace or Order.**—But in matters occurring on such vessel which affect the peace or dignity of the state to which the port belongs, local laws control. *Mali v. Keeper of The Common Jail*, *supra*. In this case a member of the crew of a Belgian ship lying in a harbor of the United States killed a fellow member, and was arrested by local police officers. The Belgian consul at the port took out *habeas corpus* in the United States circuit court to obtain the defendant's surrender to him, claiming that he was entitled to exercise jurisdiction over all matters occurring on board ships of his state by virtue of a consular convention which provided that "the respective consuls-general, consuls, vice consuls, and consular agents, shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of all differences which may arise either at sea or in port, between the captains, officers and crews, without exception, particularly with reference to the adjustment of wages and the execution of contracts. The local authorities shall not interfere, except when the disorder that has arisen is of such a nature as to disturb tranquillity and public order on shore, or in the

port, or when a person of the country or not belonging to the crew, shall be commenced therein." From a judgment discussing his petition, petitioner appealed to the supreme court of the United States, which, in affirming the judgment of the circuit court, said: "The treaty is part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere. If it gives the consul of Belgium exclusive jurisdiction over the offense which it is alleged has been committed within the territory of New Jersey, we see no reason why he may not enforce his rights under the treaty by writ of *habeas corpus* in any proper court of the United States. This being the case, the only important question left for our determination is whether the thing which has been done—the disorder that has arisen—on board this vessel is of a nature to disturb the public peace, or, as some writers term it, the 'public repose' of the people who look to the state of New Jersey for their protection. If the thing done—'the disorder,' as it is called in the treaty—is of a character to affect those on shore or in the port when it becomes known, the fact that only those on the ship saw it when it was done is a matter of no moment. . . . In such cases inquiry is certain to be instituted at once to ascertain how or why the thing was done, and the popular excitement rises or falls as the news spreads and the facts become known. It is not alone the publicity of the act, or the noise and clamor which attends it, that fixes the nature of the crime, but the act itself. If that is of a character to awaken public interest when it becomes known, it is a 'disorder' the nature of which is to affect the community at large, and consequently to invoke the power of the local government whose people have been disturbed by what was done. . . . The principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction."

An alien private vessel in a port held by a belligerent is subject to martial law established by such belligerent.<sup>26</sup>

**B. PERSONAL ACTION.**—An alien may be sued in a foreign court in an action *in personam* in any case in which jurisdiction of the subject-matter can be acquired.<sup>27</sup>

An alien may also be sued in a foreign court in an action *in personam* when jurisdiction can be obtained by constructive service of process and the attachment or impounding of property, the relief granted in such cases being limited to the application of the attached property in satisfaction of plaintiff's demand, and such judgment as may be rendered for plaintiff having no effect beyond making such application.<sup>28</sup>

**C. REAL ACTION.**—An alien may be sued in a foreign court in an action brought to recover the possession of real property situated within the territorial jurisdiction of the forum, or to recover an estate or interest therein, or to enforce a lien against such property.<sup>29</sup>

**D. JURISDICTION, HOW OBTAINED.**—In suits against aliens jurisdiction is obtained by personal service of process upon defendant, or in case of a foreign corporation, upon its agent, within the territorial jurisdiction of the forum;<sup>30</sup> or by constructive service and attachment of property according to the law of the forum;<sup>31</sup> or by the voluntary appearance of the defendant.<sup>32</sup>

**Public Vessel.**—As to a state's jurisdiction over a public vessel in its waters, see *The Schooner Exchange v. McFaddon*, 7 Cranch (U. S.) 116, 3 L. ed. 287.

26. *United States v. Diekelman*, 92 U. S. 520, 23 L. ed. 742.

**Cannot Recover Damages for Legal Detention.**—If an officer commanding in an enemy's port has reasonable ground for believing that a foreign vessel in such port contains contraband of war, and on that ground detains her in such port, her owner cannot recover damages for such detention from such officer's government. *United States v. Diekelman*, *supra*.

27. **Contracts.**—An alien may be sued in a foreign court in an action based upon his non-performance of a contract. *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Field v. Adreon*, 7 Md. 209.

**Action to Recover Personal Property.** An alien may be sued in an action to recover the possession of personal property delivered to him by an insolvent. *Olcott v. McLean*, 73 N. Y. 223; *Taylor v. Cary*, 20 How. (U. S.) 583, 15 L. ed. 1028.

**Damages for Assault.**—*Barrow S. S. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. ed. 964.

**Abuse of Trust by Corporation.**—A

court of equity may prevent an abuse of trust by a foreign corporation. *Society v. New Haven*, 8 Wheat. (U. S.) 464, 5 L. ed. 662.

**Admiralty.**—A resident may file a libel against a foreign ship in a court of libellant's residence. *The Leon* (1881), 6 P. D. (Eng.) 148. In such case the court administers general admiralty law. *The Leon*, *supra*.

28. See the titles "Jurisdiction;" "Service of Papers and Process."

29. **Foreclosure.**—An alien may be made defendant in an action to foreclose a mortgage executed by him. *Waugh v. Riley*, 8 Met. (Mass.) 290.

**Specific Performance.**—An alien may be sued in a state court in an action for the specific performance of an agreement for the sale or purchase of real property. *Scott v. Thorpe*, 1 Edw. Ch. (N. Y.) 512.

30. **Personal Service.**—*Barrell v. Benjamin*, 15 Mass. 354.

**Corporation.**—Jurisdiction of foreign corporation is obtained by service of process upon its agent. *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. ed. 964.

31. See the titles "Attachment;" "Federal Courts;" "Service of Process and Papers."

32. *Olcott v. McLean*, 73 N. Y. 223.



**E. MAY DEFEND.** — An alien sued in a foreign court may defend to the same extent and by the same means as a citizen.<sup>83</sup>

**F. IN FEDERAL COURTS.** — 1. **Circuit Court.** — a. *In First Instance.* — An alien may be sued by a citizen in the United States Circuit Court.<sup>84</sup>

**Venue.** — A citizen of the United States may sue an alien in the circuit court of any district in which service can be had.<sup>85</sup>

**That State Statute Does Not Create Liability, no Defense.** — That the statutes of the state in which a foreign corporation has its local place of business do not create the liability sought to be enforced is not sufficient to defeat jurisdiction.<sup>86</sup>

**Mandamus Lies to Compel Jurisdiction.** — It is the duty of a United States circuit court to take jurisdiction of a suit of a citizen against an alien, and mandamus will issue to compel it to do so.<sup>87</sup>

**33. May Employ Attorney and Defend.** — U. S. — *McVeigh v. United States*, 11 Wall. (U. S.) 259, 20 L. ed. 80. Fla. — *Russ v. Mitchell*, 11 Fla. 80. Minn. — *McNair v. Toler*, 21 Minn. 175.

"Whether the legal *status* of the plaintiff in error was or was not that of an alien enemy, is a point not necessary to be considered; because, apart from the views we have expressed, conceding the fact to be so, the consequences assumed would by no means follow. Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country (*Clarke v. Morey*, 10 Johns. 69; *Russell v. Skipwith*, 6 Binn. 241), it is clear that he is liable to be sued, and this carried with it the right to use all the means and appliances of defense. In *Bacon's Abr.*, title *Alien, D.*, it is said: 'For as an alien may be sued at law, and may have process to compel the appearance of his witnesses, so he may have the benefit of a discovery.' See also, *Story, Eq. Pl.*, sec. 53; *Albrecht v. Sussmann*, 2 Ves. & B. 323; *Dorsey v. Kyle*, 30 Md. Rep. 512-522." *McVeigh v. United States*, 11 Wall. (U. S.) 259, 20 L. ed. 80.

Alien enemy may appear, be represented by an attorney, and make defense. *McNair v. Toler*, 21 Minn. 175.

**34. Sec. 1 Judiciary Act of March 3, 1875, as amended by Acts of March 3, 1888, and August 13, 1888, 25 St. at L., p. 434.**

**Suit Against Foreign Consul.** — A United States circuit court has jurisdiction of an action against a foreign consul who is an alien. *Bors v. Preston*, 111 U. S. 252, 4 Sup. Ct. 407, 28 L. ed. 419; *St. Luke's Hospital v. Barclay*,

3 Blatch. 259, 21 Fed. Cas. No. 12,241; *Graham v. Stucken*, 4 Blatchf. 50, 10 Fed. Cas. No. 5,677.

**Jurisdiction Not Conferred by Defendant's Character as Consul.** — The fact that a defendant is a consul of a foreign state is not sufficient to confer jurisdiction on the circuit court. *Pooley v. Luco*, 72 Fed. 561. In this case it was held that the circuit court had no jurisdiction, because both plaintiff and defendant were aliens, defendant's character as consul not being sufficient to confer jurisdiction.

**No Jurisdiction Unless Consul Is Alleged To Be Alien.** — The circuit court has no jurisdiction of an action against a consul unless it affirmatively appears that he is an alien. *Bors v. Preston*, 111 U. S. 252, 4 Sup. Ct. 407, 28 L. ed. 419.

**Alienage Not Presumed From Consulship.** — The fact that a person is a consul of a foreign state does not create a presumption that he is an alien. *Bors v. Preston, supra*.

**35. Galveston, etc. R. Co. v. Gonzales**, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. ed. 248; *In re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. ed. 1211.

Suit may be brought against a non-resident alien in the circuit court for a district other than that of plaintiff's residence. *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. ed. 964; *Merchants' Mfg. Co. v. Grand Trunk R. Co.*, 63 How. Pr. (N. Y.) 459.

**36. Barrow S. S. Co. v. Kane**, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. ed. 964.

**37. In re Hohorst**, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. ed. 1211; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853.

**Facts Regarding Alienage Must Be Alleged.**—In actions in United States courts by and against aliens, the facts showing alienage must be alleged positively, in order that the court may determine the question of jurisdiction.<sup>38</sup>

b. *Removed Cause.*—United States circuit courts also have jurisdiction over causes removed thereto from state courts by alien defendants.<sup>39</sup>

**Resident Alien Cannot Remove Cause Filed in District of Residence.**—A resident alien cannot remove to the United States circuit court an action begun against him by a resident in a state court of the district in which defendant resides.<sup>40</sup>

**2. District Court**—a. *Admiralty.*—United States district courts sitting in admiralty have jurisdiction of libels filed by United States citizens against foreign vessels.<sup>41</sup>

38. *Capron v. VanNoorden*, 2 Cranch (U. S.) 126, 2 L. ed. 229; *Mossman v. Higginson*, 4 Dall. (U. S.) 12, 1 L. ed. 720; *Bingham v. Cabot*, 3 Dall. (U. S.) 382, 1 L. ed. 646; *Rateau v. Bernard*, 3 Blatchf. 244, 20 Fed. Cas. No. 11,579.

An allegation that a party is "a citizen or resident" of a certain state is insufficient (*Brown v. Keene*, 8 Pet. (U. S.) 112, 8 L. ed. 885); as is also an allegation that plaintiff is a "citizen of London, England" (*Stuart v. Easton*, 156 U. S. 46, 15 Sup. Ct. 268, 39 L. ed. 341); or that defendant is a "citizen of British Columbia," British Columbia not being a sovereign state (*Bishop v. Averill*, 76 Fed. 386).

A plea of alienage is not favored in law. *Anustasakas v. Int. Contract Co.*, 51 Wash. 119, 98 Pac. 93, 130 Am. St. Rep. 1089.

See the title "Abatement, Pleas of."

39. See the title "Removal of Causes."

**Circuit Court of District in Which Suit Filed Has Jurisdiction.**—*Purell v. British Land & Mortgage Co.*, 42 Fed. 465; *Cooley v. McArthur*, 35 Fed. 372.

It has been held that since the amendment of the judiciary act of March 3, 1875, by the acts of March 3, 1887, and Aug. 13, 1888, a non-resident alien cannot remove to a federal court an action commenced against him by a United States citizen in a state court. *O'Connor v. Texas*, 202 U. S. 501, 26 Sup. Ct. 726, 50 L. ed. 1120. Although not so stated in the opinion, it may be that this decision is limited to suits between a state and a non-resident alien.

40. *Walker v. O'Neill*, 38 Fed. 374; *Cudahy v. McGeoch*, 37 Fed. 1; *Rooker*

*v. Crinkley*, 113 N. C. 73, 18 S. E. 56, so held in affirming order of lower court denying motion to remove cause.

**Foreign Corporation.**—A foreign corporation does not, by transacting business in a state, become a resident of that state to the extent that it has no right to remove to the United States Circuit Court an action commenced against it in a court of such state. *Purell v. British Land & Mtg. Co.*, 42 Fed. 465.

**Effect of Removal—Waiver.**—Defendant, by removing a suit brought against him in a state court to the United States court for the district in which suit was filed, waives his right to the benefit of that provision of the judiciary act to the effect that a person shall not be sued in any other district than that of which he is an inhabitant. *Cooley v. McArthur*, 35 Fed. 372.

41. *Patterson v. The Eudora*, 190 U. S. 169, 24 Sup. Ct. 860, 47 L. ed. 1002, reversing 110 Fed. 430; *Kenney v. Blake*, 125 Fed. 672, 60 C. C. A. 362, affirming *The Troop*, 117 Fed. 557; *The Neck*, 138 Fed. 144; *The Alnwick*, 132 Fed. 117; *The Falls of Keltie*, 114 Fed. 357; *Bolden v. Jensen*, 70 Fed. 505, affirming 69 Fed. 745. See the title "Admiralty."

**Libel for Damages.**—Such courts have jurisdiction of libel filed by a United States citizen against the owner and master of a foreign vessel to recover damages for personal injuries inflicted upon libellant by her master when a member of the crew of such vessel. *Boeden v. Jensen*, 70 Fed. 505.

**Arrest of Defendant.**—In such case the master of the ship in question may

**Jurisdiction Not Affected by Treaty.** — A United States district court has such jurisdiction notwithstanding a treaty provision conferring jurisdiction over the crews of vessels of the signatories upon their respective consuls, in a case where libellant signed shipping articles which were void as being contrary to a certain statute, as libellant never became a member of the crew of the vessel upon which he shipped.<sup>42</sup>

**No Jurisdiction Over Public Vessel.** — But the courts of the United States have no civil jurisdiction over the public vessels of a foreign country.<sup>43</sup>

**b. Suits Against Consuls.** — A United States district court also has jurisdiction of actions by citizens against consuls of foreign countries.<sup>44</sup>

**G. IN STATE COURT. — 1. Generally.** — An alien may be sued by a citizen, or by another alien, in a state court, and unless such action be removed to the proper Federal court, the court in which it was filed has complete jurisdiction. The general principles applicable to

be arrested under an admiralty rule promulgated by the Supreme Court of the United States; and he is not exempted from arrest by a statute abolishing imprisonment for debt on process issued from federal courts, nor by an admiralty rule to the same effect, as such statute and rule are not applicable to cases involving unliquidated damages. The word "debt" as used in the statute does not include such demands. *Bolden v. Jensen*, 69 Fed. 745.

**Damages for Collision.** — A United States district court also has jurisdiction of a libel filed by a citizen against an alien vessel to recover damages sustained from a collision on the high seas. *Chubb v. Hamburg-American Packet Co.*, 39 Fed. 431. See the title "Collision."

**Libel for Wages.** — Jurisdiction also lies over libel by a United States citizen against a foreign vessel to recover wages due libellant as seaman on such vessel. *Patterson v. The Eudora*, 190 U. S. 169, 26 Sup. Ct. 726, 47 L. ed. 1002; *Kenney v. Blake*, 125 Fed. 672, 60 C. C. A. 362, *affirming* *The Troop*, 117 Fed. 557; *The Falls of Keltie*, 114 Fed. 357; *The Neck*, 138 Fed. 144.

Such jurisdiction was entertained in *Thompson v. The Catharina*, 1 Pet. Adm. 104, 23 Fed. Cas. No. 13,949, the report not showing whether libellant was a citizen or an alien.

42. *The Neck*, 138 Fed. 144. To the same effect, see *Kenney v. Blake*, 125 Fed. 672, 60 C. C. A. 362, *affirming* *The Troop*, 117 Fed. 557.

43. *The Schooner Exchange v. McFaddon*, 7 Cranch (U. S.) 116, 3 L. ed. 287. In this case libellant sued to recover the possession of a certain vessel duly armed and commissioned as a war vessel of the French navy, claiming that she was his property. It was held that the character of the ship as a public vessel precluded inquiry into her former ownership, and that the libel was properly dismissed.

**Character, How Established.** — The character of a public vessel as such is established by a commission to her commander duly signed by the public authorities of her state. *The Santissima Trinidad*, 7 Wheat. (U. S.) 283, 5 L. ed. 454.

**Exemption Does Not Extend to Prizes.** — This exemption of public vessels of a foreign state does not extend to their prizes, or captured property, and such prizes or captured property are subject to actions in the courts of a foreign state into whose ports they may be brought. *The Santissima Trinidad*, 7 Wheat. (U. S.) 283, 5 L. ed. 454.

44. U. S. Rev. St. § 563, subd. 17; 1 Comp. St., 1901, pp. 455, 459; *Bors v. Preston*, 111 U. S. 252, 4 Sup. Ct. 407, 28 L. ed. 419; *Davis v. Packard*, 7 Pet. (U. S.) 276, 8 L. ed. 684; *United States v. Ravara*, 2 Dall. (U. S.) 297, 1 L. ed. 388; *Froment v. Duclos*, 30 Fed. 385; *Lorway v. Lousada*, 1 Low. 77, 15 Fed. Cas. No. 8,517. See the title "Federal Courts."



suits against aliens in foreign courts control actions against them in state courts.<sup>45</sup>

**2. Exceptions.**—(I.) **Suit by Non-Resident Against Alien.**—A state court has no jurisdiction of an action brought therein by a non-resident against an alien, unless the cause of action arose in the state of the forum.<sup>46</sup>

(II.) **Suit Against Foreign Consul.**—A state court has no jurisdiction over an action against a consul of a foreign country.<sup>47</sup>

**III. QUESTION OF ALIENAGE, AND RIGHTS OR LIABILITY OF ALIEN, HOW RAISED.**—A. **DEMURRER TO BILL OR COMPLAINT.** The question of alienage and the application of jurisdictional principles dependent thereon may be raised by demurrer to the bill or complaint.<sup>48</sup>

45. In *Taylor v. Carryl*, 20 How. (U. S.) 583, 15 L. ed. 1028, the right of a state court to issue a writ of attachment against a foreign vessel is recognized. See *Mitchell v. Bunch*, 2 Paige Ch. (N. Y.) 606, 22 Am. Dec. 669.

An alien seaman may sue the alien master of a foreign vessel for wages. *Pugh v. Gillam*, 1 Cal. 485.

The master of a United States vessel may sue the alien master of a foreign vessel for damages sustained in a collision. *Percival v. Hickey*, 18 Johns. (N. Y.) 257, 9 Am. Dec. 210.

46. *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 636.

In *Mexican, etc. R. Co. v. Jackson*, 89 Tex. 107, 33 S. W. 857, 59 Am. St. Rep. 28, it is held that a state court may, in its discretion, refuse to take jurisdiction of an action by a resident against a foreign corporation for damages upon a cause of action arising in a foreign state.

47. *Davis v. Packard*, 7 Pet. (U. S.) 276, 8 L. ed. 684. See the title "Federal Courts."

48. *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. ed. 964; *Airhart v. Massieu*, 98 U. S. 491, 25 L. ed. 213; *Lohmann v. Helmer*, 104 Fed. 178; *Jennes v. Landes*, 84 Fed. 73.

**Jurisdictional Averments, Sufficiency.** When federal jurisdiction is invoked upon the sole ground that plaintiff is an alien, and it appears from the bill that plaintiff was an American citizen by birth and became a subject of a foreign country by marriage to a subject of such country, the bill is insufficient unless it plead a law of such foreign state conferring citizenship upon women of other states who marry its

citizens. An allegation that plaintiff, by marriage, became a subject of such foreign state presents a mere conclusion of law. *Jennes v. Landes*, 84 Fed. 73.

**Law of Province.**—When bill alleges that plaintiff, an American citizen by birth, became a subject of the Queen of Great Britain by marriage to a British subject residing in British Columbia, and pleads a statute of British Columbia conferring citizenship upon foreign-born women who marry its citizens, and pleads no statute of Great Britain, the bill fails to show plaintiff's alienage, as it does not appear from the bill that a statute of British Columbia has the effect of creating British citizenship. *Jennes v. Landes*, 84 Fed. 73. To the same effect, see *Bishop v. Averill*, 76 Fed. 386. See also *Stuart v. City of Easton*, 156 U. S. 46, 15 Sup. Ct. 268, 39 L. ed. 341, where plaintiff was described as "a citizen of London, England," which was held insufficient.

But it has been held that an averment in a bill that complainant is "a citizen of the Province of Ontario, in the Dominion of Canada," is sufficient to show complainant's status as a subject of a foreign state, as the court will take judicial notice of the relation between the Dominion of Canada and Great Britain to the extent that it will recognize citizens of the former as subjects of a foreign state, without regard to distinctions between residents of the United Kingdom and residents of its provinces. *Lumley v. Wabash R. Co.*, 71 Fed. 21.

**Special Appearance and Demurrer.**—In *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. ed. 964, defendant filed an "appearance and de-

**B. MOTION TO DISMISS.** — The question may be raised by motion to dismiss on the ground that the court has no jurisdiction of the person of the defendant, or of the subject-matter of the action,<sup>49</sup> or by a motion made at the close of the evidence to dismiss the action on the ground that plaintiff has not proved the jurisdictional averments of his bill or complaint.<sup>50</sup>

**C. PLEA TO JURISDICTION.** — Or this question may be raised by a plea to the jurisdiction of the court.<sup>51</sup>

**Issue, How Made.** — Issue on such plea is made by replication, and each party may sustain his allegations by evidence.<sup>52</sup>

**Burden of Proof on Trial of Plea.** — When upon trial of issue raised by plea to the jurisdiction it appears that plaintiff was born under the dominion of a foreign state, the burden of proof is upon defendant to show a change of allegiance.<sup>53</sup>

murrer" in the following form: "The defendant above named, appearing specially by Henry T. Wing and Harrington Putnam as its attorneys, specially, only for the purposes hereof, as stated in its special appearance noted herein, demurs to the complaint herein, for the special purpose, and no other, until the questions herein raised have been decided, of objecting to the jurisdiction of this court, demurring and excepting to the complaint, because it appears upon the face thereof that the court has not jurisdiction of the person of the defendant, nor of the subject-matter of the action, for the reason that neither the defendant nor the plaintiff is an inhabitant or resident of the Southern District of New York, and the action therefore cannot be maintained therein, and that the defendant is a foreign corporation, and the cause of action did not arise within the State of New York. Wherefore defendant prays judgment whether this court has jurisdiction, and asks that the complaint be dismissed, with costs; but should the court overrule this demurrer and exception, the defendant then asks time and leave to answer to the merits, though excepting to the action of the court in overruling said demurrer."

49. *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. ed. 964; *Fribourg v. Pullman Co.*, 176 Fed. 981; *City of Minneapolis v. Reum*, 56 Fed. 576.

50. *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. ed. 964.

51. *Jones v. McMasters*, 20 How. (U. S.) 8, 15 L. ed. 805; *Breedlove v. Nicolet*, 7 Pet. (U. S.) 413, 8 L. ed. 731; *Pooley v. Luco*, 72 Fed. 561; *Comitis v.*

*Parkerson*, 56 Fed. 556; *Charles Green's Son v. Salas*, 31 Fed. 106; *Lorway v. Lousada*, 1 Low. 76, 15 Fed. Cas. No. 8,517.

**Special Plea to Jurisdiction.** — In *Bishop v. Averill*, 76 Fed. 386, after the cause had been removed to the circuit court and plaintiff had entered his appearance, he filed a special plea to the jurisdiction of the court, controverting the allegations of the petition for removal as to the citizenship of the defendants. The case was tried upon this issue.

52. *Urtetiqui v. D'Arcy*, 9 Pet. (U. S.) 692, 9 L. ed. 276.

**Evidence.** — *Passport* issued to plaintiff by Secretary of State of the United States, stating plaintiff to be a citizen of the United States, is not admissible to show plaintiff's citizenship. *Urtetiqui v. D'Arcy*, *supra*.

53. *Jones v. McMasters*, 20 How. (U. S.) 8, 15 L. ed. 805.

See 3 *ENCYCLOPAEDIA OF EVIDENCE*, title "Citizens and Aliens."

**Citizenship, Question of Fact.** — Whether or not a certain person is or was a citizen, is a question of fact. *Golden Fleece Co. v. Cable Con. Co.*, 12 Nev. 312.

**Expatriation a Question of Fact.** — Whether or not a certain person became expatriated, is a question of fact, dependent upon his conduct and intention. *Alsberry v. Hawkins*, 9 Dana (Ky.) 177, 33 Am. Dec. 546. For a discussion of the doctrine of expatriation, see *Ludlam v. Ludlam*, 26 N. Y. 356, in which the court states its inability to concur in the conclusion in *Alsberry v. Hawkins*, *supra*, that a person may renounce his allegiance at pleasure.

When, in action to recover real property on the ground of alienage of all the persons through whom defendant claimed to inherit, the petition alleges that all such persons "were foreigners by birth, and aliens at the time of his (decendent in question) death," and defendant denies nothing except that such persons were aliens at the time of decendent's death, he admits the allegation of foreign birth, and it devolves upon him to show that the persons referred to, or some of them, became citizens by naturalization. *White v. White*, 2 Met. (Ky.) 185.

**Citizenship Presumed From Residence.**—A person is presumed to be a citizen of the country in which he lives, and to the sovereign of which he owes local allegiance. *Doe ex dem. Governor's Heirs v. Robertson*, 11 Wheat. (U. S.) 332, 9 L. ed. 488.

But it has been held that the fact that a certain person has resided in a foreign country for many years is not sufficient to justify a jury in finding him to be an alien to the United States. *Gilman v. Thompson*, 11 Vt. 643, 34 Am. Dec. 714. "He now resides in this state, and is *prima facie* a citizen." *Munro v. Merchant*, 28 N. Y. 9, 40.

Renunciation of old and acquisition of new allegiance is not presumed from change of domicile alone, especially where such change was made during minority. *Ludlam v. Ludlam*, 26 N. Y. 356.

In the case of a person born an alien, when a state statute requires that state citizenship can only be acquired by taking an oath of fidelity in a court of record, and no record of such oath is produced, and no circumstances proven from which the fact that it was taken could be inferred, it cannot be presumed that such person became a citizen. *Blight's Lessee v. Rochester*, 7 Wheat. (U. S.) 535; 5 L. ed. 516. In this case the court cites as a circumstance from which the taking of such oath might be inferred, the holding of a public office which could be held by such persons only as having taken the statutory oath. In the same case the court says that a presumption of citizenship does not arise from the facts that a claimant of land, citizenship being essential to his holding it, has been a long time in the country where the land is situated, that considerable time has elapsed since he acquired it, that during such period no proceedings were

instituted by the state to divest his title under the laws of forfeiture and escheat, when it appears that claimant has never been in possession of such lands.

But in *Cowan v. Prowse*, 93 Ky. 156, 19 S. W. 407, where it was claimed that a certain person had voted illegally, and no order admitting him to citizenship was shown, but it appeared that he had taken an oath of abjuration and allegiance, referred to as a declaration of intention, but had filed no certificate of honorable discharge from the army (the ground on which he had sought admission), the court said, "but after such long and undisputed exercise of the right of a citizen, and in view of his compliance with every other requirement of the statute, a reasonable presumption arises that competent and satisfactory proof of that fact was made in court."

But it has been held that naturalization of a certain person will be presumed when such presumption is necessary to support the presumption that such person was not guilty of a crime. *Dorsey v. Brigham*, 177 Ill. 250, 52 N. E. 303, 69 Am. St. Rep. 228. In this case an election was contested on the ground that a person had been elected by illegal votes, it being charged that certain alien-born women who had not become citizens by naturalization of themselves or their husbands had voted. The court said that as that allegation involved a charge of crime, and as the women in question were presumed innocent of crime, it must be presumed that they have become naturalized. The presumption of innocence imposes upon the person claiming illegal voting, the burden of proving that the person whose vote is questioned was not naturalized. *Dorsey v. Brigham, supra*; *Rexroth v. Schein*, 206 Ill. 80, 69 N. E. 240.

**Citizenship Presumed From Nativity.** Every person is presumed to be a citizen of the country of his nativity. *Hauenstein v. Lynham*, 100 U. S. 383, 25 L. ed. 628; *City of Minneapolis v. Reum*, 56 Fed. 576.

**Citizenship Conclusive, When.**—This presumption is conclusive when both parents of a certain person are citizens of the state in which such person is born. *City of Minneapolis v. Reum, supra*.

**Such Citizenship Presumed To Continue.**—Relation of citizenship im-



**D. PLEA IN ABATEMENT.**—The question may also be raised by a plea in abatement.<sup>54</sup>

**E. TRAVERSE OF PETITION FOR REMOVAL.**—The question may be raised by plaintiff's traverse of the allegations of defendant's petition to remove a cause from a state to a federal court.<sup>55</sup>

**F. MOTION TO REMAND.**—Or the question may be made by motion to remand a removed cause from a United States circuit court to the state court from which it was transferred, evidence being presented in affidavits.<sup>56</sup>

posed by birth is presumed to continue until a change of allegiance is proven. *City of Minneapolis v. Reum*, 56 Fed. 516; *Charles Green's Son v. Salas*, 31 Fed. 106.

**Citizenship Presumed To Continue.**—The status of a certain person as a citizen being shown to have existed at a given time, it will be presumed to have continued until a renunciation of citizenship, or facts from which such renunciation may be implied, be shown. *Trimbles v. Harrison*, 1 B. Mon. (Ky.) 140. To same general effect, see *Ludlam v. Ludlam*, 26 N. Y. 356.

**Election of Native Allegiance Presumed.**—If a person is competent, while a minor, to elect to which of two governments he will owe allegiance, it will be presumed that he exercised his election in favor of the country under whose dominion he was born and within whose territory he has resided since early infancy. *Jones v. McMasters*, 20 How. (U. S.) 8, 15 L. ed. 805. In this case plaintiff was born in Texas prior to its separation from Mexico. During infancy she was taken by her parents to Mexico, and always lived there. Under the treaty of Guadalupe Hidalgo she had the right to become a citizen of the United States. In her action in a United States court defendant pleaded to the jurisdiction that plaintiff was a citizen of the United States. There was no evidence to the effect that plaintiff had indicated an intention to become a citizen of the United States.

When plaintiff's allegation of his own alienage is not denied, it will not be presumed that he is a citizen of the United States. *Breedlove v. Nicolet*, 7 Pet. (U. S.) 413, 8 L. ed. 731.

**Naturalization in Foreign State Presumed.**—The fact that a person entered a foreign state with the intention of becoming a citizen thereof, creates a presumption that he did whatever was necessary to accomplish his pur-

pose. *Alsberry v. Hawkins*, 9 Dana (Ky.) 177, 33 Am. Dec. 546.

**Not Presumed From Consulship.**—The fact that a party to an action is a consul of a foreign state does not create a presumption that he is an alien. *Bors v. Preston*, 111 U. S. 252, 4 Sup. Ct. 407, 28 L. ed. 419.

**Foreign Naturalization Papers Presumed Regularly Issued.**—When upon defendant's plea to jurisdiction of United States circuit court alleging defendant's United States citizenship, plaintiff introduces letters of naturalization, issued to defendant by a foreign state, it will be presumed that the officials who issued such papers acted with authority and upon sufficient evidence. *Charles Green's Son v. Salas*, 31 Fed. 106.

See generally 3 ENCYCLOPAEDIA OF EVIDENCE, title "Citizens and Aliens."

54. *Urtetiqui v. D'Arcy*, 9 Pet. (U. S.) 692; 9 L. ed. 276.

55. *Bishop v. Averill*, 76 Fed. 386. In this case the court held that the petition for removal was insufficient to show jurisdiction. The petition alleged that defendants "were and still are citizens of the province of British Columbia," etc. The court held that as the province of British Columbia was not a sovereign state, the petition did not show that defendant was a citizen of a foreign state. As to the proof, the only testimony offered was that of defendant, who testified that he had been a citizen of Montana, but about fifteen months prior to the institution of the action, he had gone to Canada, had become permanently domiciled there, and intended to become a citizen of that country. The court held that this proof showed that, while defendant had lost his citizenship in Montana, he had not acquired foreign citizenship, and that a showing of such citizenship was necessary.

56. *Walker v. O'Neill*, 38 Fed. 374;

G. NOT RAISED BY MOTION FOR INJUNCTION. — But it has been held that the question of the alienage of a party will not be disposed of upon the hearing of a motion for an injunction.<sup>57</sup>

H. ALIENAGE OF GRAND JUROR. — A grand juror may be challenged on the ground of alienage, and if the challenge is disallowed the question may be presented by motion in arrest of judgment.<sup>58</sup>

I. ALIENAGE OF A TRIAL JUROR. — This question may be raised by challenge before the jury is sworn.<sup>59</sup>

*Cudahy v. McGeoch*, 37 Fed. 1; *Maloy v. Duden*, 25 Fed. 673.

**Motion Made on Affidavits.** — *Purcell v. British L. & Mtg. Co.*, 42 Fed. 465.

**Aliens Must Be Actual Parties To Justify Order Remanding.** — Under the rule that the citizenship of all the parties on one side of a controversy must be different from that of all the parties on the other side, an action removed to a circuit court on the ground of plaintiffs' alienage, must be remanded, if it appear that certain defendants are also aliens. But to justify such remand it must appear that the defendants in question are actually before the court. It is not sufficient that they are simply named as parties. Where such defendants were attempted to be brought into the state court by extraterritorial service of process which was void and did not confer jurisdiction, their joinder in name was held not to destroy diversity of citizenship, and not to necessitate an order remanding the cause. *McHenry v. New York P. & O. R. Co.*, 25 Fed. 65.

57. *Rateau v. Bernard*, 3 Blatchf. 244, 20 Fed. Cas. No. 11,579; *Prentiss v. Brennan*, 2 Blatchf. 162, 19 Fed. Cas. No. 11,385.

58. *Ia.* — *State v. Haynes*, 54 Iowa 109, 6 N. W. 156. *Mont.* — *Territory v. Clayton*, 8 Mont. 1, 19 Pac. 293. *Va.* — *Com. v. Towles*, 5 Leigh 743.

**Grand Juror Naturalized After Challenge.** — If after challenge disallowed and exception taken, the grand juror in question be naturalized by the court having jurisdiction of such grand jury, and such grand juror was a full citizen when indictment was found, his disability is removed, and the indictment good. *Territory v. Clayton*, 8 Mont. 1, 19 Pac. 293.

**Must Show No Declaration of Intention.** — Record on appeal on this ground must show not only foreign birth, but that the grand juror in question has not made a declaration of intention.

*Territory v. Harding*, 6 Mont. 323, 12 Pac. 750.

59. *U. S.* — *Hollingsworth v. Duane*, 4 Dall. 353, 1 L. ed. 864. *Fla.* — *Keech v. State*, 15 Fla. 591, 604; *O'Connor v. State*, 9 Fla. 215. *Ill.* — *Chase v. People*, 40 Ill. 352, *overruling* *Guykowski v. People*, 2 Ill. 476; *Greenup v. Stoker*, 8 Ill. 202. *Minn.* — *State v. Barrett*, 40 Minn. 65, 41 N. W. 459. *S. C.* — *State v. Quarrel*, 2 Bay 150, 1 Am. Dec. 637.

**Must Be Made Before Juror Sworn.** This objection must be made before the juror in question is sworn. It cannot be made after judgment by motion for new trial or motion in arrest of judgment. *U. S.* — *Hollingsworth v. Duane*, 4 Dall. 353, 1 L. ed. 864. *Ill.* — *Greenup v. Stoker*, 8 Ill. 202. *Ky.* — *Presbury v. Com.*, 9 Dana 203.

This rule applies in criminal cases. *Ill.* — *Chase v. People*, 40 Ill. 352, *overruling* *Guykowski v. People*, 2 Ill. 476. *Ky.* — *Presbury v. Com.*, 9 Dana 203. *La.* — *State v. Hardin*, 25 La. Ann. 369. *Mont.* — *Territory v. Hart*, 7 Mont. 42, 58, 14 Pac. 768, s. c. 7 Mont. 489, 497, 17 Pac. 718. *Pa.* — *Com. v. Penrose*, 27 Pa. Super. 101, 111. *S. C.* — *State v. Quarrel*, 2 Bay 150, 1 Am. Dec. 637.

But in *O'Connor v. State*, 9 Fla. 215, it is said that if the fact that a juror is an alien is discovered after he is sworn, but before any evidence is taken, such juror may be withdrawn.

In *Hill v. People*, 16 Mich. 351, it was held that where defendant did not discover the fact of a juror's alienage until after verdict, his objection would be considered upon motion for a new trial. In that case the court held that the alienage of the juror in question made it necessary to treat defendant as having been tried by only eleven men, and as he could not waive his right to be tried by twelve jurors, judgment of conviction must be reversed.

In *People v. Scott*, 56 Mich. 154, 22 N. W. 274, the question of alienage of a trial juror in a criminal prosecution

**IV. LIABILITY TO PUNISHMENT FOR CRIME.**—A. **GENERALLY.**—A state may punish an alien for a crime committed within its territorial jurisdiction.<sup>60</sup>

B. **WHAT COURTS HAVE JURISDICTION.**—An alien offender may be tried in a court which would have jurisdiction over similar charges against citizens.<sup>61</sup>

**Federal Courts.**—The United States circuit court and district courts have exclusive jurisdiction over offenses, by aliens or others, against the laws of the United States.<sup>62</sup>

again came before the supreme court of Michigan, upon appeal from judgment of conviction and order denying a new trial. The court distinguished the case from *Hill v. People*, *supra*, as follows: 1. The statute fixing qualifications of jurors required them to have the qualifications of electors. It did not appear that the juror in question was not qualified. The record showed him to be of foreign birth, but he might have made a declaration of intention, thereby becoming qualified as an elector. Error will not be presumed, but must be affirmatively shown. (On this question see also *Territory v. Harding*, 6 Mont. 323, 12 Pac. 750. 2. The record does not show that defendant did not know of the disqualifying circumstance prior to swearing the jury. In civil cases the rule in Michigan is the same as that in the states above referred to. *Johr v. People*, 26 Mich. 424, an action for debt upon an official bond.

**Declaration of Intention, or Copy, as Evidence.**—In such case the original declaration of intention, or a duly certified copy thereof, of the juror in question is competent on the question of his qualifications. *State v. Barrett*, 40 Minn. 65, 41 N. W. 459.

**Juror Naturalized During Trial.**—If pending a trial an alien juror becomes naturalized, his disability is removed, and the verdict is not invalidated. *Territory v. Hart*, 7 Mont. 489, 17 Pac. 718.

**Cannot Be Raised on Habeas Corpus.** Objection that trial juror was an alien cannot be raised upon application for *habeas corpus*. A judgment of conviction based upon the verdict of such juror is not void. Such judgment might be subject to reversal on this ground, but cannot be treated as a nullity. *Foreman v. Hunter*, 59 Iowa 550, 13 N. W. 659.

60. *Vattel*, Law of Nations, Bk. II, c. VII, p. 174, § 108. And see: U. S.

*Mali v. Keeper of the Common Jail*, 120 U. S. 1, 7 Sup. Ct. 385, 30 L. ed. 565; *Carlisle v. United States*, 16 Wall. 147, 21 L. ed. 426; *Kempe v. Kennedy*, 5 Cranch 173, 3 L. ed. 70. Mo.—*State v. Niebekier*, 184 Mo. 211, 83 S. W. 523. N. Y.—*People v. McLeod*, 1 Hill 377, 25 Wend. 483, 37 Am. Dec. 328. Wis.—*McDonald v. State*, 80 Wis. 407, 50 N. W. 185. Eng.—*Rex v. Esop*, 7 C. P. 456, 32 E. C. L. 705.

**Crime Committed by Alien on Ship of His Home State in Foreign Waters.** See *Mali v. Keeper of the Common Jail*, *supra*.

**Offense of Master of Foreign Vessel.** Statute making it an offense to make certain advance payments of wages to American seamen, applies to American seamen who ship on foreign private vessels, and the master of a foreign vessel who makes an advance payment of wages to an American seaman contrary to such statute is subject to indictment and punishment. *United States v. Nelson*, 100 Fed. 125.

61. This is implied in the proposition that a state may punish alien offenders according to its own laws. See *Vattel*, Law of Nations, Bk. II, c. VIII, § 101; *Taylor*, Public International Law, p. 242, § 193; *McDonald v. State*, 80 Wis. 407, 50 N. W. 185.

62. § 340, c. 14 of "An Act to codify, revise and amend the penal laws of the United States," approved March 4, 1909, being c. 321, 35 St. at L., p. 1088, provides as follows: "The crimes and offenses defined in this title shall be cognizable in the circuit and district courts of the United States, as prescribed in sections 563 and 629 of the Revised Statutes."

Rev. St., § 563, provides that the district courts shall have jurisdiction of all crimes and offenses cognizable under the authority of the United States (making one minor exception).

Rev. St., § 629, provides, "The circuit



**State Courts.**—Except as to jurisdiction reserved by the constitution and statutes of the United States to federal courts, a state court may punish an alien for a crime committed in such state.<sup>63</sup>

**C. NOT ENTITLED TO JURY DE MEDIATATE LINGUA.**—In his trial in a criminal prosecution an alien is not entitled to a jury *de mediatate lingua*.<sup>64</sup>

**D. MILITARY SERVICE AND ORDERS, NO DEFENSE.**—The fact that the crime committed in a foreign state was committed by a soldier who, in obedience to orders from his own state, was pursuing a criminal into foreign territory, does not constitute a defense.<sup>65</sup>

**V. SUITS RELATING TO REAL PROPERTY.**—**A. MAY PROTECT TITLE UNTIL THE STATE ACTS.**—An alien may protect his title and rights in real property which he has acquired by purchase, by bringing or defending actions concerning the same, until his title is divested by proceedings taken by the state for that purpose.<sup>66</sup> This rule

court shall have original jurisdiction as follows: Twentieth. Exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where it is or may be otherwise provided by law, and concurrent jurisdiction with the district courts of crimes and offenses cognizable therein."

See the title "Federal Courts."

63. *State v. Niebekier*, 184 Mo. 211, 83 S. W. 523; *People v. McLeod*, 1 Hill (N. Y.) 377, 37 Am. Dec. 328, 25 Wend. 483.

**May Prescribe Method of Prosecution.**—A state may, by constitution or statute, provide for the punishment of aliens in proceedings commenced by information, as well as by indictment. *State v. Niebekier*, 184 Mo. 211, 83 S. W. 523; *McDonald v. State*, 80 Wis. 407, 50 N. W. 185.

64. *People v. Chin Mook Sow*, 51 Cal. 597; *State v. Antonio*, 11 N. C. 200.

65. *People v. McLeod*, 1 Hill (N. Y.) 377, 37 Am. Dec. 328, 25 Wend. 483.

66. **U. S.**—*Phillips v. Moore*, 100 U. S. 208, 25 L. ed. 603; *Airhart v. Massieu*, 98 U. S. 491, 25 L. ed. 213; *Osterman v. Baldwin*, 6 Wall. 116, 18 L. ed. 730; *Cross v. DeValle*, 1 Wall. 5, 17 L. ed. 515; *Jones v. McMasters*, 20 How. 8, 15 L. ed. 805; *Doe ex dem. Gouverneur's Heirs v. Robertson*, 11 Wheat. 332, 6 L. ed. 488; *Craig v. Radford*, 3 Wheat. 594, 4 L. ed. 467; *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch 603, 3 L. ed. 453; *Lohmann v. Helmer*, 104 Fed. 178; *Billings v. Aspen M. & S. Co.*, 53 Fed. 561; *Hammekin v. Clayton*, 2 Woods 336, 11 Fed. Cas. No. 5,996. Cal.—*Racouillat v. Sansevain*, 32 Cal.

376, 386; *Morris v. Hoyt*, 18 Cal. 217; *People v. Folsom*, 5 Cal. 373; *Ramires v. Kent*, 2 Cal. 558. **Kan.**—*Investment Co. v. Trust Co.*, 65 Kan. 50, 68 Pac. 1089. **Ky.**—*Dudley v. Grayson*, 6 T. B. Mon. 259. **Md.**—*McCreery's Lessee v. Allender*, 4 H. & McH. 409. **Mass.**—*Waugh v. Riley*, 8 Met. 290; *Scanlan v. Wright*, 13 Pick. 523. **N. Y.**—*Stamm v. Bostwick*, 122 N. Y. 48, 25 N. E. 233, 9 L. R. A. 597; *Munro v. Merchant*, 28 N. Y. 9, 40; *Wadsworth v. Wadsworth*, 12 N. Y. 376 (title of alien devisee held good as against heir, no action by state appearing). **N. C.**—*Rouche v. Williamson*, 25 N. C. 144; *Barges v. Hogg*, 2 N. C. 485.

**Applies to Mining Claim.**—This rule applies to mining ground located by an alien or held by him under conveyance from the locator. *McKinley Creek Min. Co. v. Alaska United Min. Co.*, 183 U. S. 563, 22 Sup. Ct. 84, 46 L. ed. 331; *Mannuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. 651, 38 L. ed. 532; *Lohmann v. Helmer*, 104 Fed. 178. But not as against one who connects himself with the government title. *Golden Fleece Co. v. Cable Con. Co.*, 12 Nev. 312.

**Other Public Land.**—The rule also applies to an alien's possessory right in other public land of the United States. *Courtney v. Turner*, 12 Nev. 345.

But it has been held that if an alien during the course of an attempt to acquire public land of the United States execute a conveyance of such land, and then, by reason of alienage, fail to acquire title, his subsequent naturalization will not, by relation, make his vendee's title good. *Call v. Los Angeles Pac. Co.*, 162 Fed. 926, 936.

does not apply in case of an alien who claims land by descent.<sup>67</sup>

**Plea of Alienage Must Show State Action.**—In ejectment a plea of plaintiff's alienage is insufficient unless it shows that action has been taken by the state to divest plaintiff's title.<sup>68</sup>

**Alienage of Ancestor no Bar.**—In some jurisdictions a plea alleging

If a qualified locator convey his possessory interest to an alien, and, pending a contest over application for a patent the grantee becomes naturalized, his disability is removed and his title cannot be questioned. *Manuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. 651, 38 L. ed. 532.

**May Hold Title After Division of Empire.**—An alien who acquired land in Texas prior to its annexation, and held the same without any proceedings being taken by that state to divest his title, was entitled to hold such land after it became a part of United States territory. *Osterman v. Baldwin*, 6 Wall. (U. S.) 116, 18 L. ed. 730.

In an action for rent of real property by an alien landlord, the defendant cannot plead plaintiff's alienage. *Ramires v. Kent*, 2 Cal. 558.

**Rescission of Contract.**—Alienage of vendee in a contract for sale of real property is not sufficient to entitle vendor to a decree rescinding such contract. *Hepburn & Dundas' Heirs v. Dunlap & Co.*, 1 Wheat. (U. S.) 179, 4 L. ed. 65.

**Rule Applies to Alien Enemy.**—The rule stated in the text applies in favor of an alien enemy. *Craig v. Radford*, 3 Wheat. (U. S.) 594, 4 L. ed. 467; *Fairfax' Devisee v. Hunter's Lessee*, 7 Cranch (U. S.) 603, 3 L. ed. 453.

67. *Ky.*—*Trustees of Louisville v. Gray*, 1 Litt. 146; *Fry v. Smith*, 2 Dana 38. *Mass.*—*Slater v. Nason*, 15 Pick. 345. *Mo.*—*Farrar v. Dean*, 24 Mo. 16.

This rule has been changed or modified by statute in a number of states. According to *Dembitz on Land Titles*, restrictions upon aliens' right of inheritance have been wholly or partially removed in Alabama, Arizona, Arkansas, California, Colorado, the Dakotas, Florida, Georgia, Idaho, Indiana, Iowa, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada (except as to Chinese subjects), New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Virginia, Washington, West Virginia and Wisconsin.

**May Bring Partition Suit.**—An alien heir may within the statutory period bring an action for the partition of the property in question (*Scharpf v. Schmidt*, 172 Ill. 255, 50 N. E. 182), or for sale and a division of proceeds. *Schultze v. Schultze*, 144 Ill. 290, 33 N. E. 201, 36 Am. St. Rep. 432. When right to dispose of devised property is given by treaty which after fixing a period for such disposition provides: "which term may be reasonably prolonged according to circumstances," an alien heir need do no act toward prolonging such term, and his bill for a partition, filed after the expiration of the legal term, which shows that during such term complainant was unable to ascertain, for sufficient reasons there stated, the names of all persons interested in the property in question, or the nature and extent of their interests therein, states a cause of action. It was not necessary to allege that the term fixed by law was prolonged by the signatories, or by the legislation of either. *Scharpf v. Schmidt*, 172 Ill. 255, 50 N. E. 182.

Treaties between the United States and various foreign countries have obtained for subjects of the signatories the right of inheritance in their respective states. See list of treaties in *Dembitz on Land Titles*, § 43, p. 309.

**Same Rule Applies to Dower.**—The rule in regard to property claimed by descent applies to an alien widow claiming dower; as she claims by operation of law, being in this respect in the same situation as one claiming by inheritance. *Buchanan v. Deshon*, 1 H. & G. (Md.) 280, 289.

**Claim Not Strengthened by Assignment From Heir.**—A widow's claim is not strengthened by an assignment of the property claimed made to her by the heir of her deceased husband, the law considering the heir merely as the instrument for attempting to create in her an estate to which she is not entitled. *Paul v. Ward*, 15 N. C. 247.

68. *Jones v. McMasters*, 20 How. (U. S.) 8, 15 L. ed. 805.

that plaintiff derives title through ancestors who were aliens is insufficient.<sup>69</sup>

**Allegation of Alienage Alone Does not Make Declaration Bad.**—A declaration in a real action in a jurisdiction where aliens are not permitted to own real property is not bad, when considered upon motion in arrest of judgment, if it shows that plaintiff was an alien at one time, if it also shows that such alienage did not exist when he acquired title to the land in question.<sup>70</sup>

**B. PROCEEDINGS BY STATE TO DEVEST TITLE.**—**1. In General.**—Proceedings to divest an alien title to real property which he attempts to hold contrary to law are regulated by statute.<sup>71</sup>

**2. Suit To Enforce Trust.**—If an alien attempt to hold land which he cannot hold in his own name, by causing the same to be held in trust for him, the state may, by bill in equity, cause such trust to be enforced for its benefit.<sup>72</sup>

**C. QUESTION OF ALIEN'S RIGHT, HOW RAISED.**—**1. Demurrer to Bill or Complaint of Alien.**—The question of an alien's right in regard to real property may be raised by demurrer to a bill or complaint filed by such alien asserting a right or title to such real property,<sup>73</sup> or by demurrer to answer which alleges plaintiff's alienage as

69. *Hanrick v. Patrick*, 119 U. S. 156, 169, 7 Sup. Ct. 147, 30 L. ed. 396; *Airhart v. Massieu*, 98 U. S. 491, 25 L. ed. 213; *Jackson v. Sanders*, 2 Leigh (Va.) 109. To same effect, see *Murray v. Kelley*, 27 Ind. 42.

*Contra.*—*Meier v. Lee*, 106 Iowa 303, 76 N. W. 712; *Furenes v. Mickelson*, 86 Iowa 508, 53 N. W. 416; *Smith v. Lynch*, 61 Kan. 609, 60 Pac. 329.

It is immaterial that the ancestor through whom claimant makes out his claim died prior to enactment of law against alien inheritance. "The disqualification is not alone of the living, but it is, as it were, of the dead as well." *Smith v. Lynch*, 61 Kan. 609, 60 Pac. 329.

In New York a statute providing that alienism of ancestor does not preclude inheritance, has been held to protect an inheritance whether claimant derives title through lineal or collateral ancestors, or both. *McCarthy v. Marsh*, 5 N. Y. 263. To same effect, see *Jackson v. Sanders*, 2 Leigh (Va.) 109.

For cases involving the distinction between mediate and immediate inheritance, see *Willeke v. Willeke*, 102 Iowa 173, 71 N. W. 201; *State v. Ellis*, 72 Kan. 285, 83 Pac. 1045; and reference in *Slater v. Nason*, 15 Pick. (Mass.) 345; *McGregor v. Comstock*, 3 N. Y. 408.

70. *Apthorp v. Backus*, Kirby (Conn.) 407, 1 Am. Dec. 26. To the same effect is *Lohmann v. Helmer*, 104 Fed. 178, where it was held that as the government alone could question complainant's right to the mining ground there in dispute, and, as against private persons, complainant had the right to hold such ground, his bill was not rendered bad by alleging that complainant was an alien.

71. See the title "Escheat."

**Action by State's Assignee.**—A citizen who has, by location, acquired title to mining ground in possession of an alien may, as assignee of the United States, bring an action against such alien to recover the land in question on the ground that defendant was by reason of alienage not qualified to acquire it. *De Laveaga v. Williams*, 5 Sawy. 573, 7 Fed. Cas. No. 3,759.

**Action by Injunction.**—In such case plaintiff is entitled to an injunction to protect his right. *De Laveaga v. Williams*, *supra*.

72. Principle recognized in *Atkins v. Kron*, 40 N. C. 207; *Hubbard v. Goodwin*, 3 Leigh (Va.) 492.

In such cases equity follows the law in relation to escheats. *Hubbard v. Goodwin*, 3 Leigh (Va.) 492.

73. **U. S.**—*Orr v. Hodgson*, 4 Wheat. 453, 4 L. ed. 613; *Brigham v. Kenyon*, 76 Fed. 30. **D. C.**—*Geofroy*



a reason why it should not be allowed to maintain the action.<sup>74</sup>

**2. Motion To Dismiss Action.**—The question of alienage may be raised by motion to dismiss the action in which the plaintiff asserts his right to inherit.<sup>75</sup>

**3. Plea.**—So the question may be raised by a plea setting up the fact of alienage.<sup>76</sup>

**Alienage Waived, if Not Pleaded in Abatement.**—Defense of alien friend or alien enemy goes only in abatement showing plaintiff's disability to sue, and cannot be allowed on the merits. If not pleaded in abatement, plaintiff's right to sue is admitted.<sup>77</sup>

*v. Riggs*, 7 Mackey 331; *s. c.*, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. ed. 642. Cal.—*Farrell v. Enright*, 12 Cal. 450. Ia.—*Rheim v. Robbins*, 20 Iowa 45. N. C.—*Kane v. McCarthy*, 63 N. C. 299.

**74.** In *Investment Co. v. Trust Co.*, 65 Kan. 50, 68 Pac. 1089, plaintiff, a foreign corporation, sued to recover land from defendant. Defendant pleaded plaintiff's status. A statute of Kansas prohibited the holding of real property by foreign corporations. Plaintiff's demurrer to the answer was sustained and judgment thereon affirmed, the court holding that the state alone could question plaintiff's title.

**75.** *Purenes v. Mickelson*, 86 Iowa 508, 53 N. W. 416.

**76.** *Jones v. McMasters*, 20 How. (U. S.) 8, 15 L. ed. 805. See the title, "Abatement, Pleas of."

**Form of Plea of Alien Enemy.**— "And now the said William comes and defends, etc., when, etc., and prays judgment of the defendant's writ and declaration aforesaid, that the same may be quashed; because he says that, since the last continuance of said cause, war has been declared, by the administration of the government of the United States of America, to exist, and does now in fact exist, between the said United States and the king of the united kingdom of Great Britain and Ireland, and between the citizens of the said states and the subjects of the said united kingdom; and the said William further says, that the demandant is now an alien enemy, and a natural born subject of the king of the said united kingdom, and has always remained, and now is, a subject of the said king, owing him allegiance; and now living in said kingdom, to wit, at London; and this he is ready to verify." *Hutchinson v. Brock*, 11 Mass. 118.

"The plaintiff is an alien born (that

is to say), born in the Empire of Russia, and that the plaintiff is an enemy of our Lady the Queen, born of alien father and alien mother, and was not nor is a subject of our Lady the Queen by naturalization, denization, or otherwise. And that the plaintiff is residing in this Kingdom without the license, safe conduct, or permission of our Lady the Queen. And the defendant further says that the plaintiff has become such enemy as aforesaid since the last pleading in this action." *Alcinous v. Nigreu*, 4 El. & Bl. 216, 82 E. C. L. 216. **77.** *Martin v. Woods*, 9 Mass. 377; *Sewell v. Lee*, 9 Mass. 363.

**Alien Enemy.**—The objection that plaintiff is an alien enemy is waived unless pleaded in abatement. *M'Nair v. Toler*, 21 Minn. 175, 184.

Plea of alien enemy goes to the disability of plaintiff to sue; its purpose is not to abate the action or defeat the process, but to obtain the judgment of the court whether plaintiff should be further answered; and the judgment entered upon it in case it be confessed or maintained is, at common law, that the writ remain without day, or, under modern procedure, that the action be continued, until the restoration of peace. *Hutchinson v. Brock*, 11 Mass. 119.

Such plea goes to the disability of plaintiff alone, and defendant cannot plead his own alien-enemy character as a defense in abatement. See *Dorsey v. Kyle*, 30 Md. 512, 96 Am. Dec. 617.

**Cannot Be Raised on Motion in Arrest of Judgment.**—This question must be raised by plea in abatement, or in some other manner prior to verdict. It cannot be raised on motion in arrest of judgment. Ark.—*Fenalty v. State*, 12 Ark. 630. La.—*State v. Griffin*, 38 La. Ann. 502; *State v. McGee*, 36 La. Ann. 206, overruling 21 La. Ann. 251. Mont.—

**Answer Must Allege Facts Showing Incapacity.**—An answer presenting alienage as a defense must state facts showing that plaintiff has not the capacity to take or hold the land in question.<sup>78</sup>

**Plea Must State Facts.**—A plea of alien friend must allege that plaintiff, or the person through whom he claims, was born without the allegiance of the country of the former, and should contain a direct averment that such person is an alien.<sup>79</sup>

**Alienage Existing by Virtue of Statute, Must Be Specially Plead.**—If defendant relies upon alienage created by any special statute, such alienage must be specially pleaded.<sup>80</sup>

**Replication to Plea of Alien Friend.**—To plea of alien friend plaintiff may reply naturalization.<sup>81</sup>

**4. Cannot Be Raised After Issue Joined.**—The question cannot be raised after issue joined.<sup>82</sup>

**VI. MISCELLANEOUS ACTIONS.**—A. ACTIONS INVOLVING RIGHT TO OFFICE AND TO VOTE.—The question of alienage may be raised in an action brought to prevent defendant from taking possession of, or to remove him from, an elective office,<sup>83</sup> or it may

*Territory v. Harding*, 6 Mont. 323, 12 Pac. 750.

**Motion To Set Aside Indictment.**—Nor can the question be raised upon motion to set aside indictment; it should have been raised before the grand juror in question was sworn. *State v. Gibbs*, 39 Iowa 318.

78. *Investment Co. v. Trust Co.*, 65 Kan. 50, 68 Pac. 1089. In this case an allegation in an answer "that plaintiff is not competent or qualified, under the laws of the state of Kansas, to acquire, hold or own real estate in said state" presents a mere conclusion of law.

79. *Ainslie v. Martin*, 9 Mass. 454.

**Direct Averment of Alienage Required.**—*Coxe v. Gulick*, 10 N. J. L. 328.

80. *Ainslie v. Martin*, 9 Mass. 454.

Examples of such statutes are found in the "Conspirator's" and "Absentee" acts passed by several states during and immediately after the revolution, relating to American-born persons who assisted Great Britain or abandoned their homes. See *Ainslie v. Martin*, *supra*.

81. *Ainslie v. Martin*, 9 Mass. 454.

82. *Scanlan v. Wright*, 13 Pick. (Mass.) 523, 25 Am. Dec. 344, where the reason given is that alienage of plaintiff is matter in abatement. See *Dawson's Lessee v. Godfrey*, 3 Cranch (U. S.) 321, 2 L. ed. 634.

But in *Furenes v. Mickelson*, 86 Iowa 108, 53 N. W. 416, motion to dismiss on ground of plaintiff's alienage was made after answer filed and judgment of dis-

missal was affirmed. Motion was made upon depositions.

83. **Actions by the State.**—*Quo Warranto*.—Question is raised by a proceeding instituted by a state upon the relation of a citizen in which relator alleges that defendant was declared elected to an office, took the official oath and proceeded to act as such officer, but that defendant is an alien and, therefore, not qualified to hold such office. *Boyd v. State*, 143 U. S. 135, 12 Sup. Ct. 495, 36 L. ed. 103, reversing 31 Neb. 682, 48 N. W. 739, 51 N. W. 602. This case was decided upon demurrer to bill, upon the ground that defendant was a citizen of the United States, the bill showing the facts relating to the naturalization of defendant's father and that defendant was a minor at the time of such naturalization.

*Haywood v. Marshall*, 53 Neb. 220, 73 N. W. 449, made a decision similar to that reversed by *Boyd v. State*.

Other cases by states to obtain removal from office on the ground of alienage of incumbent are: *Ark.*—*State v. Penney*, 10 Ark. 621. *Ia.*—*State v. Van Beek*, 87 Iowa 569, 54 N. W. 525, 19 L. R. A. 622. *Mass.*—*Attorney General v. McCabe*, 172 Mass. 417, 52 N. E. 527. *Minn.*—*State v. Strenkens*, 60 Minn. 325; 62 N. W. 259; *State v. McDonald*, 24 Minn. 48. *Ohio.* *State v. Collister*, 27 Ohio C. C. 529.

In *State v. Van Beek*, *supra*, action was brought to restrain defendant from taking the office of sheriff, to which he had been elected. After filing a demurrer

be raised in an action which involves the right to vote.<sup>84</sup>

**B. OTHER CONTROVERSIES.** — Other cases in which the question of alienage has been raised, and rights and liabilities of aliens have been adjudicated are referred to in the notes.<sup>85</sup>

to the petition, defendant filed a motion for permission to be naturalized, which motion was, upon his proof of qualifications, granted. Defendant then answered, setting forth his naturalization. The court held that defendant was entitled to the office, if qualified at the time of entering upon its duties, and dismissed the petition.

But in *State v. Collister*, 27 Ohio C. C. 529, it was held that defendant's naturalization, after he was elected and entered upon the duties of the office in question, did not remove his disqualification. So in *quo warranto* on the ground that defendant was elected to a state office by the votes of persons who were not legally qualified to vote. *Com. v. Woelper*, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628.

84. *Stewart v. Foster*, 2 Binn. (Pa.) 110.

*Rexroth v. Schein*, 206 Ill. 80, 69 N. E. 240; *Collier v. Anlicker*, 189 Ill. 34, 59 N. E. 615. See *Kreitz v. Behrensmeyer*, 125 Ill. 141, 17 N. E. 232, s. c. 135 Ill. 591, 26 N. E. 704, 8 Am. St. Rep. 349; *Dale v. Irwin*, 78 Ill. 170, 186.

*McCarthy v. Froelke*, 63 Ind. 507, involved the right to hold office of a person who was a qualified elector of the state, although not a United States citizen. *McDonel v. State*, 90 Ind. 320, holds that under the Indiana statute a person is qualified for jury service if he is a citizen of the state, and that United States citizenship is not essential. If in such case it be alleged that persons whose votes are in question were naturalized citizens, the plaintiff may reply that the court or courts admitting them were without jurisdiction to entertain naturalization proceedings. *People v. McGowan*, 77 Ill. 644.

**Withholding Right To Vote.**—Action for damages against election-officers for refusing plaintiff the right to vote. Ill. *Mills v. McCabe*, 44 Ill. 194. Ky.—*Morgan v. Dudley*, 18 B. Mon. 693, 68 Am. Dec. 735. Mass.—*Kilham v. Ward*, 2 Mass. 236.

**Defense.**—In such case defendants may plead lack of jurisdiction in the court by which plaintiff claims to have been admitted to citizenship. *Mills v.*

*McCabe*, 44 Ill. 194. If it appear that the judgment of naturalization relied upon by plaintiff was void for lack of jurisdiction, plaintiff is not damaged. *Mills v. McCabe*, 44 Ill. 194.

**Suit to impeach returns by bill in equity.** Ill.—*City of Beardstown v. City of Virginia*, 81 Ill. 541; *Knox County v. Davis*, 63 Ill. 405. Ky.—*Cowan v. Prowse*, 93 Ky. 159, 19 S. W. 407. N. J.—*State v. Deshler*, 25 N. J. L. 177.

85. **To Invalidate Conveyance.**—Actions by a state against a foreign corporation to declare void a conveyance of real property executed by defendant. *State v. Hudson Land Co.*, 19 Wash. 85, 52 Pac. 85, 40 L. R. A. 430. See the title "Escheat."

**Action To Test Police Regulation.**—Also in an action brought to test the validity of a tax upon alien passengers upon incoming vessels imposed by a state in the exercise of its police power. *Norris v. City of Boston*, 4 Met. (Mass.) 282.

**Application for Admission to the Bar.** The right of an applicant for a license to practice law may be questioned on the ground that he is an alien. In *the Matter of O'Neill*, 90 N. Y. 584; *Ex parte Thompson*, 10 N. C. 355. See also *In re Yamashita*, 30 Wash. 234, 70 Pac. 482, 94 Am. St. Rep. 860, 59 L. R. A. 671.

**Actions To Recover for Support of Pauper.**—In an action brought to recover the cost of support of paupers under a state statute requiring towns to support such persons, it may be alleged in defense that the persons in question were aliens and not entitled to be supported by the state or a town. In such cases alienage is an issue. The reports show a number of such cases in which this question was raised, but their citation is not considered necessary. For example, see *Inhab. of Dennis v. Inhab. of Brewster*, 7 Gray (Mass.) 351.

**Habeas Corpus.**—The question may be raised by petition for writ of *habeas corpus* by a soldier who has been arrested as a deserter, the alleged ground for discharge being the fact that petitioner was an alien and not liable to



military service. *United States v. Cottingham*, 1 Rob. (Va.) 649, 40 Am. Dec. 710.

**Defense—Evidence.**—If plaintiff, a Japanese, introduce a record of a judgment admitting him to citizenship, such record shows invalidity upon its face, as no court has power to admit a Japanese to citizenship. *In re Yamashita*, 30 Wash. 234, 70 Pac. 482, 94 Am. St. Rep. 860, 59 L. R. A. 671.

**Action To Quiet Title.**—*Wuester v. Polin*, 60 Kan. 334, 56 Pac. 490.

**Partition Suit.**—Question may be raised in an action by or against an alien for the partition of real property. Ill.—*Scharpf v. Schmidt*, 172 Ill. 255, 50 N. E. 182; *Schultze v. Schultze*, 144 Ill. 290, 33 N. E. 201, 36 Am. St. Rep. 432; 19 L. R. A. 20; *Wunderle v. Wunderle*, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84. Ia.—*Meier v. Lee*, 106 Iowa 303, 76 N. W. 712; *Doehrel v. Hiltner*, 102 Iowa 169, 71 N. W. 204; *Easton v. Huott*, 95 Iowa 473, 64 N. W. 408, 31 L. R. A. 177; *Krogan v. Kinney*, 15 Iowa 242; *Stemple v. Herminghouser*, 3 G. Gr. 408. Kan.—*Smith v. Lynch*, 61 Kan. 609, 60 Pac. 329. Mo.—*Wacker v. Wacker*, 26 Mo. 426. N. Y.—*Haley v. Sheridan*, 190 N. Y. 331, 83 N. E. 296 affirming 100 N. Y. Supp. 1119. N. C. *Kane v. McCarthy*, 63 N. C. 299.

**Trespass on Land, Damages for.**—*Rheim v. Robbins*, 20 Iowa 45, was an action by a person claiming land as the heir of a deceased alien; demurrer, that plaintiffs being non-resident aliens could not inherit; judgment for defendant.

Defendant, an alien, justifying the act in question under a license which a statute forbids being given to an alien. *Boies v. Blake*, 13 Me. 381.

Alien may sue for damages *quare clausum fregit*, until his title to the land in question has been divested by the state. *Barges v. Hogg*, 2 N. C. 485.

**Suit or Application for Dower.**—The question of alienage of a deceased person or of his widow is raised when a widow brings suit to recover her dower, or makes application therefor in a proceeding for the settlement of his estate. Ia.—*In re Estate of Gill*, 79 Iowa 296, 44 N. W. 553, 9 L. R. A. 126 (where claim was made by cross-complaint filed by a widow to petition for an order to sell real property, presented by her husband's administrator.) Ky.—*Alsberry v. Hawkins*, 9 Dana 177, 33 Am. Dec. 546. Md.—*Buchanan v. Deshon*, 1 H.

& G. 280. N. J.—*Coxe v. Gulick*, 10 N. J. L. 328.

To a claim for dower defendant may plead alienage of plaintiff (*Alsberry v. Hawkins*, 9 Dana [Ky.] 177, 33 Am. Dec. 546); or alienage of her husband (*Yeo v. Mercereau*, 18 N. J. L. 387; *Coxe v. Gulick*, 10 N. J. L. 328).

When alienage is a bar to dower, an assignment of dower to the widow made by her husband's citizen-heir is ineffective and void, at least as against the heir's creditors, the heir being considered as the instrument for creating for her a right to which she is not entitled. *Paul v. Ward*, 15 N. C. 247.

**Ejectment.**—See Cal.—*Siemssen v. Bofer*, 6 Cal. 250. Ind.—*Huddleston v. Lazenby*, Smith 203; *Eldon v. Doe*, 6 Blackf. 341. Ky.—*Elmondorff v. Carmichael*, 3 Litt. 472, 14 Am. Dec. 86. N. Y.—*Duke of Cumberland v. Graves*, 7 N. Y. 305, holding that a devise to alien trustees vested the legal estate in the trustees. The same title was before the court again in *People v. Snyder*, 41 N. Y. 397, and *Howard v. Moot*, 64 N. Y. 262.

An alien holding real property by purchase may bring ejectment concerning the same until inquest of office be had. *Rouche v. Williamson*, 25 N. C. 141.

**Action for Damages Caused to Real Property by Public Improvement.**—*State v. Beackmo*, 6 Blackf. (Ind.) 488.

**Action to recover land sold on execution against alien, title being in his wife.** It was held that as an alien would acquire no interest in his wife's land, the execution sale passed no title, and the purchaser at such sale had no right of entry. *Mussey v. Pierre*, 24 Me. 559; *Reese v. Waters*, 4 Watts & S. (Pa.) 145.

**Vendee of wife and alien husband may recover in ejectment from defendant who claims the land under execution sale against the husband, it appearing that the land belonged to the wife.** *Copeland v. Sauls*, 46 N. C. 70.

**Claim of Homestead Exemption.**—When, in ejectment suit in a jurisdiction in which aliens are not permitted to hold real property, defendant pleads that he is entitled to the land in question under a homestead-exemption law, plaintiff may allege in reply that defendant is an alien, and upon proof of that fact defendant will be held not entitled to such exemption. *McKenzie v. Murphy*, 24 Ark. 155.

**Application for Letters Testamentary**

or of Administration. — *Headman v. Rose*, 63 Ga. 458; *Miller v. Reinhart*, 18 Ga. 239.

**Letters Issued to Alien Conclusive on Collateral Attack.** — When letters testamentary in due form have been issued to an alien, and he attempts, in another jurisdiction, to bring an action as executor, defendant cannot raise the question of plaintiff's alienage, such letters being, upon collateral attack, conclusive of their holder's qualifications. *Berney v. Drexel*, 12 Fed. 333. In this case an alien executrix brought suit in a federal court. It was held that in such suit the validity of her appointment could not be questioned upon demurrer to complaint.

**Action or Proceeding To Set Aside Will.** — *Jele v. Lemburger*, 163 Ill. 338, 45 N. E. 279.

**Action for Settlement and Distribution of Estate of Deceased Person.** — *Eustache v. Rodaquest*, 11 Bush (Ky.) 42.

**Action To Vacate Devise.** — *Bennett v. Hibbert*, 88 Iowa 44, 55 N. W. 33. In this case an action was brought, "First, to set aside the will entire, because the testator had not testamentary capacity; and, second, to vacate it in so far as it devised real estate to H., because he was and is an alien and disqualified to accept such provisions of the will in his favor."

**Action for Distributive Share of Decedent's Estate.** — *Greenfield v. Morrison*, 21 Iowa 538. Case decided on demurrer to complaint, on the ground that the Iowa statute as to aliens' disability did not apply to personalty, which was involved in that case.

**Action Between Administrator and Executor.** — Question may be raised in an action between an administrator appointed in one jurisdiction and an executor appointed in another to determine which is entitled to possession of the estate of a certain person. *Newcomb v. Newcomb*, 108 Ky. 582, 57 S. W. 2, 51 L. E. A. 19.

**Proceedings for Payment of Inheritance Tax Against Aliens.** — Question is raised by administrator's report showing payment of a state tax imposed upon property inherited by or bequeathed to non-resident aliens, and by contests by heirs and state authorities concerning the fact or amount of such payment. *Succession of Mager*, 12 Reub. (La.) 584.

**Action To Determine Possessory**

**Right to Mining Claim.** — *Golden Fleece Co. v. Cable Con. Co.*, 12 Nev. 312.

**Public land, or other public land of the United States.** *Courtney v. Turner*, 12 Nev. 345.

**Contest of Application for Patent to Mining Claim.** — *Manuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. 651, 38 L. ed. 532.

**Acquisition of Public Land.** — In such case claimant's affidavit that he was duly naturalized is admissible. *North Noonday Min. Co. v. Orient Min. Co.*, 1 Fed. 522.

**Must Show Citizenship.** — On application for patent of public land applicant must present evidence of his citizenship. The United States is a party to such proceedings, and may question applicant's right to acquire public land, and must insist that he possess the statutory qualification. *Lohmann v. Helmer*, 104 Fed. 178.

**Suit To Compel Conveyance of Real Property.** — In an action by a person claiming the land in question as heir of a deceased person, and praying that said land be conveyed to him, defendant may plead that plaintiff was a non-resident alien, and, therefore, under a state statute, prohibited to own real property, and that, by reason of such disability, defendant succeeded as sole heir. *Harney v. Donahue*, 97 Mo. 141, 10 S. W. 191.

**Suit to Rescind Contract for Exchange of Real Property.** — An alien sued to obtain a decree rescinding an agreement for exchange of real property made by him with a citizen, alleging that at the time of such exchange both parties were unaware that the law prohibited an alien's holding real property, that upon being advised as to the law plaintiff believed his holding was illegal, and consequently failed to perform his part of the agreement, the result being that the other party, by foreclosure, obtained possession of the land conveyed to plaintiff. The court held that plaintiff was entitled to acquire real property by purchase, also that plaintiff could, by becoming naturalized, have perfected his title and if he preferred to abandon his contract rather than become a citizen, his abandonment must be considered voluntary. *Pembroke v. Huston*, 180 Mo. 627, 79 S. W. 470.

**Action for Breach of Contract to Purchase Real Property.** — In an action where plaintiff sued for breach of agreement to purchase land, defendant pleaded that plaintiff could not make

title. It appeared that plaintiff claimed the land as sole heir of his deceased wife, and that his wife left her surviving a sister who was a non-resident alien. It was held that under the controlling statutes an alien could take land by descent, that decedent's sister was her heir and plaintiff could not make good title. *Lumb v. Jenkins*, 100 Mass. 527.

**Action To Recover Money Paid on Contract for Sale of Home.** — Defendant suing to recover purchase-price paid, on the ground that defendant, a married woman, had not tendered a deed joined in by her husband, an alien. The court held that the husband's alienage was a fact in issue in the action. *Riel v. Press*, 70 N. H. 334, 47 Atl. 608.

Married woman's action for damages for personal injuries, it being claimed that her husband should be joined as a plaintiff, the law permitting a married

woman to sue alone, in case her husband be an alien. *Emerson v. Shaw*, 57 N. H. 223.

**Grand Juror's Alienage Pleaded to Indictment.** — Defendant in criminal prosecution may plead to the indictment the fact that a grand juror was an alien. *State v. Primrose*, 3 Ala. 546.

**Alienage of grand juror did not render indictment defective under statute of Indiana in force in 1846.** *State v. Taylor*, 8 Blackf. (Ind.) 178. Otherwise under law in force in 1894; see 1 Ann. Rev. Ind. St. Rev. of 1894, p. 561, § 1725, subd. 2.

**Motion To Quash Indictment — Grand Juror Competent Witness.** — Alienage of a grand juror may be raised by motion to quash the indictment, and upon hearing of such motion the grand juror in question is a competent witness to prove the facts of foreign birth and non-naturalization. *Rayanthall v. Com.*, 14 Bush (Ky.) 457.



# ALTERATION OF INSTRUMENTS

By A. P. RITTENHOUSE,

Sometime Judge of the Eighth Judicial District of Colorado.

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**I. DEFINITION AND EFFECT.** — A. **DEFINITION OF MATERIAL ALTERATION.** — A material alteration of a written instrument is an intentional act done upon it after it has been fully executed, by one of the parties thereto, without the consent of the other, which changes

the legal effect of the instrument in any respect. It is the effect of the act upon the instrument and not the particular manner in which it is done, which is material; whether it be by interlineation, addition, substitution, change of words, detaching material memoranda therefrom, erasure, or by cancellation of some material provision thereof. The drawing of cross lines over a written instrument, or any part thereof, is a common mode of expressing an intent to erase or cancel it.<sup>1</sup>

**Illustrations.**—The rule is illustrated by many cases where it has been held to be a material alteration either to erase the name of a joint maker of a note,<sup>2</sup> to change the name of the maker of a note,<sup>3</sup> to

1. *Ala.*—*Payne v. Long*, 121 Ala. 385, 25 So. 780; *Montgomery v. Crossthwait*, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140. *Minn.*—*Bull Remedy Co. v. Boyer*, 124 N. W. 20. *Eng.*—*Master v. Miller*, 2 H. Bl. 141, 1 Sm. Lead. Cas. (8th ed.) 1115.

Any alteration is material which changes the effect and operation of the contract on the face of the paper, either by modifying original stipulations or by adding new ones express or implied. *White Sewing M. Co. v. Saxon*, 121 Ala. 399, 410, 25 So. 784.

**Test of Materiality.**—The true test as to whether an alteration in a written instrument is material, is this: Does the alteration make the instrument speak a language different in legal effect from that which it originally spoke, which carries with it some change in the rights, interests or obligations of the parties? If so the alteration is material, otherwise it is not. *Benton v. Clemmons*, 157 Ala. 658, 47 So. 582.

See further on this point, *Burgess v. Blake*, 128 Ala. 105, 28 So. 963, 86 Am. St. Rep. 78, and note.

The leading case is *Pigot's Case*, 11 Co. 26 b. That case laid down a sweeping rule whose harsh results the courts have been sedulous to avoid. See the following cases: *Ark.*—*Andrews v. Calloway*, 50 Ark. 358, 7 S. W. 449. *Miss.*—*Foote v. Hambrick*, 70 Miss. 157, 11 So. 567, 35 Am. St. Rep. 631. *N. Y.*—*Gleason v. Hamilton*, 138 N. Y. 353, 34 N. E. 283. *Pa.*—*Kountz v. Kennedy*, 63 Pa. 190.

In *Foote v. Hambrick*, *supra*, Woods, J., thus referred to the modern trend of judicial opinion: "The sturdy ad-

herence of courts in England and America to the rule in theory is in bewildering contrast with the practical nullification of it in concrete application to innocent but mistaken offenders, by the same courts. This rule, as announced in *Pigot's case*, 11 Coke, 26 b, is as follows: 'When any deed is altered, in a point material, by the plaintiff himself or by any stranger, without the privity of the obligee, be it by interlineation, addition, erasing, or by drawing of a pen through a line or through the middle of any material word, that the deed thereby becomes void.' And while the long subsequent English cases, as well as the American cases which follow and are founded upon the authority of this ruling by Coke, all point to *Pigot's case*, 11 Coke, 26 b, as the source of their inspiration that half of the ruling relating to alterations made by strangers is not now given credit by any court in the United States, and as to the other half of the rule relating to alterations by the obligee, the courts of both countries are industrious to and successful in finding some exception or modification or limitation by which to save the unwary who have mistakenly, but not fraudulently, undertaken to correct admitted mistakes in the contract as originally drawn."

2. *Coke Litt.* 232; *Gillett v. Sweat*, 6 Ill. 475; *Citizens' Sav. Bank v. Halstead*, 42 Ind. App. 79, 84 N. E. 1098.

3. *Montgomery v. Crossthwait*, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140, where "& Co." was added to the maker's name and this was held to release the indorser.



procure the names of additional signatures to note or bond,<sup>4</sup> to substitute in a promissory note the name of a different payee,<sup>5</sup> to insert the name of a payee where there was no blank in a note,<sup>6</sup> to add or erase the names of witnesses,<sup>7</sup> or sureties,<sup>8</sup> to increase the amount of a note,<sup>9</sup> to change the date of an instrument,<sup>10</sup> or the rate of interest,<sup>11</sup> or the place of payment or performance,<sup>12</sup> to extend the time of payment,<sup>13</sup> to detach a memorandum qualifying the terms of the instrument,<sup>14</sup> or a promissory note written below an application

4. *Brown v. Johnson*, 127 Ala. 292, 28 So. 579, 85 Am. St. Rep. 134, 51 L. R. A. 403; *Nicholson v. Combs*, 90 Ind. 515, 46 Am. Rep. 229; *Bowers v. Briggs*, 20 Ind. 139; *Henry v. Coats*, 17 Ind. 161.

5. *Simmons v. Atkinson & L. Co.*, 69 Miss. 862, 12 So. 263, 23 L. R. A. 599 (adding "or bearer"); *Erickson v. First Nat. Bk.*, 44 Neb. 622, 62 N. W. 1078, 28 L. R. A. 577; *Walton Plow Co. v. Campbell*, 35 Neb. 173, 52 N. W. 883, 16 L. R. A. 468 (adding the word "bearer").

6. *Smith v. Willing*, 123 Wis. 377, 101 N. W. 692, 68 L. R. A. 940.

7. *Shiffer v. Mosier* (Pa.), 74 Atl. 426.

8. *State v. McGonigle*, 101 Mo. 353, 13 S. W. 758, 20 Am. St. Rep. 609, 8 L. R. A. 735; *Girdner v. Gibbons*, 91 Mo. App. 412; *State v. Paxton*, 65 Neb. 110, 90 N. W. 983.

9. Ill.—*Smith v. Dazey*, 124 Ill. App. 399, 401. Ia.—*Maguire v. Eichmeier*, 109 Iowa 301, 80 N. W. 395. Kan.—*Herington v. Wangerin*, 65 Kan. 423, 70 Pac. 330, 59 L. R. A. 717. Md.—*Burrows v. Klunk*, 70 Md. 451, 17 Atl. 378, 3 L. R. A. 576.

10. U. S.—*Wood v. Steele*, 6 Wall. 80, 18 L. ed. 725. Kan.—*McCormick Harv. Mach. Co. v. Lauber*, 7 Kan. App. 730, 52 Pac. 577. Md.—*Merchant's Bank v. Steamboat Co.*, 102 Md. 573, 580, 63 Atl. 108. Ohio.—*Newman v. King*, 54 Ohio St. 273, 43 N. E. 683, 35 L. R. A. 471.

11. Ill.—*Yost v. M. Har. Works*, 41 Ill. App. 556. Ind.—*Palmer v. Poor*, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469. Ia.—*Robertson v. Vasey*, 125 Iowa 526, 101 N. W. 271; *Phillips v. Crips*, 108 Iowa 605, 79 N. W. 373; *Conger v. Crabtree*, 88 Iowa 536, 55 N. W. 335; *First Natl. Bank v. Hall*, 83 Iowa 645, 50 N. W. 944; *Woodworth v. Anderson*, 63 Iowa 503, 19 N. W. 296; *Eckert v. Pickel*, 59 Iowa 545, 13 N. W. 708; *Murray v. Graham*, 29 Iowa 520. Kan.—*New York L. Ins. Co. v.*

*Martindale*, 75 Kan. 142, 88 Pac. 559, 21 L. R. A. (N. S.) 1045 (inserting a lower rate); *Sheley v. Sampson*, 5 Kan. App. 465, 46 Pac. 994. Me.—*Waterman v. Vose*, 43 Me. 504. Mo.—*Britton v. Dierker*, 46 Mo. 591, 2 Am. Rep. 553. Mich.—*Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661. N. M.—*Ruby v. Talbot*, 5 N. M. 251, 21 Pac. 72, 3 L. R. A. 274. N. Y.—*McGrath v. Clark*, 56 N. Y. 34, 15 Am. Rep. 372; *Dewey v. Reed*, 40 Barb. 16; *Clute v. Small*, 17 Wend. 238. Ohio.—*Harsh v. Klepper*, 28 Ohio St. 200. Pa.—*Fulmer v. Seitz*, 68 Pa. 237, 8 Am. Rep. 172. S. C.—*Sanders v. Bagwell*, 32 S. C. 238, 10 S. E. 946, 7 L. R. A. 743.

Changes in a negotiable promissory note after delivery, as to rate of interest and date when it is due, are material alterations, and though apparently of benefit to the maker subject the instrument in the hands of a purchaser before maturity to all defenses between him and the payee. *Commercial Bank v. Maguire*, 89 Minn. 394, 95 N. W. 212.

12. *McKinney v. Cabell*, 24 Ind. App. 676, 57 N. E. 598; *Pope v. Branch County Bank*, 23 Ind. App. 210, 54 N. E. 835; *Mitchell v. Reed's Exrs.*, 32 Ky. L. Rep. 683, 106 S. W. 833.

Changing a note payable generally so as to make it payable at a certain bank is a material alteration. *Young v. Baker*, 29 Ind. App. 130, 64 N. E. 54.

13. Ky.—*First Nat. Bank v. Payne*, 19 Ky. L. Rep. 839, 42 S. W. 736. Mass.—*Davis v. Jenney*, 1 Met. 221. Miss.—*Henderson v. Wilson*, 6 How. 65.

14. *Payne v. Long*, 121 Ala. 385, 25 So. 780; *Bothell v. Schweitzer*, 84 Neb. 271, 120 N. W. 1129, 22 L. R. A. (N. S.) 263; *Davis v. Henry*, 13 Neb. 497, 14 N. W. 523.

Where a written instrument is altered by detaching therefrom a memorandum or clause qualifying it, so as to convert it into a negotiable promissory note, by a party entitled to a benefit thereunder, without the consent of

for insurance and separated therefrom by a perforated line,<sup>15</sup> or to change the terms of a memorandum written on the back of a promissory note and intended to be a part of the contract,<sup>16</sup> or to substitute in an instrument the name of another for one designated therein to execute it.<sup>17</sup>

**Alteration Distinguished From Spoliation.**—An alteration of an instrument by a stranger to it is a mere spoliation and does not vitiate the instrument, nor extinguish the contract.<sup>18</sup> This is also true when

other parties to the instrument, it is void even in the hands of a *bona fide* holder. *Porter v. Hardy*, 10 N. D. 551, 555, 88 N. W. 458.

Detaching a memorandum written under a promissory note or contract qualifying its obligations, vitiates the instrument, even in the hands of a *bona fide* holder having no knowledge of the alteration. *First Nat. Bank v. Carter*, 138 Mich. 421, 426, 101 N. W. 585.

**Contra.**—Detaching a memorandum written below a promissory note, qualifying the same, does not constitute a material alteration of the note. *Mater v. American Natl. Bank*, 8 Colo. App. 325, 46 Pac. 221.

15. *Rochford v. McGee*, 16 S. D. 606, 94 Md. 695, 61 L. R. A. 335.

16. *Kurth v. Farmers' & M. State Bank*, 77 Kan. 475, 94 Pac. 798, 15 L. R. A. (N. S.) 612.

17. *Bryan v. Carter (Ala.)*, 51 So. 999.

18. Ill.—*Camp v. Shaw*, 52 Ill. App. 241. Ind.—*Ballard v. Franklin Life Ins. Co.*, 81 Ind. 239. Ia.—*Shenckberg Co. v. Porter*, 137 Iowa 245, 114 N. W. 890. Ky.—*Blakey v. Johnson*, 13 Bush 197, 26 Am. Rep. 254. Md.—*Schwartz v. Wilmer*, 90 Md. 136, 44 Atl. 1059. Mass.—*Jeffrey v. Rosenfeld*, 179 Mass. 506, 61 N. E. 49; *Drum v. Drum*, 133 Mass. 566. Mich.—*Young v. Young*, 157 Mich. 80, 121 N. W. 264. Minn.—*Spreng v. Juni*, 109 Minn. 85, 122 N. W. 1015; *Ames v. Brown*, 22 Minn. 257. Miss.—*Bridges v. Winters*, 42 Miss. 135, 2 Am. Rep. 598. Mo.—*Powell v. Banks*, 146 Mo. 620, 48 S. W. 664; *Paul v. Leeper*, 98 Mo. App. 515, 72 S. W. 715. Neb.—*In re Diener's Est.*, 113 N. W. 149; *Schlageck v. Widhalm*, 59 Neb. 541, 81 N. W. 448. N. Y.—*Gleason v. Hamilton*, 138 N. Y. 353, 34 N. E. 283, 21 L. R. A. 210; *Waldorf v. Simpson*, 15 App. Div. 297, 44 N. Y. Supp. 921; *People v. Kuhne*, 57 Misc. 30, 107 N. Y. Supp. 1020. Ohio.—*Carlile v. Lamb*, 16 Ohio C. C. 578; *Tarbill v.*

*Richmond City M. Works*, 2 Ohio C. C. 564. S. C.—*White v. Harris*, 69 S. C. 65, 48 S. E. 41, 104 Am. St. Rep. 791. S. D.—*Port Huron E. & T. Co. v. Sherman*, 14 S. D. 461, 85 N. W. 1008. Tenn.—*Deering Harv. Co. v. White*, 110 Tenn. 132, 72 S. W. 962. Vt.—*Equitable Mfg. Co. v. Allen*, 76 Vt. 22, 56 Atl. 87, 104 Am. St. Rep. 915. Wash.—*Murray v. Peterson*, 6 Wash. 418, 33 Pac. 969. W. Va.—*Yeager v. Musgrave*, 28 W. Va. 90.

Where the alteration of a written instrument is made by a stranger to the contract without the privity of the grantee or obligee, it does not avoid the contract in its entirety, even though it be without the knowledge or consent of the party to be bound, but amounts to a spoliation merely, which will not prevent a recovery upon the contract in accordance with its original terms, where those terms can be ascertained. *Walsh v. Hunt*, 120 Cal. 46, 53, 52 Pac. 115, 39 L. R. A. 697. And see *Kingman & Co. v. Silvers*, 13 Ind. App. 80, 37 N. E. 413.

In *Fullerton v. Sturges*, 4 Ohio St. 530, 536, the court said: "The rule of the English courts, that a material alteration, made by a stranger, avoids the instrument, has been universally repudiated in this country. To have that effect, the alteration must be material and intentional, not by accident or mistake; and by a party entitled to a benefit under the instrument, and not by a stranger, or one adversely interested."

**Contra.**—A written instrument signed by one party with the intention that the other shall later sign it, which is changed in any manner altering its legal effect, and by that other signed in its altered condition, does not become binding on the former unless he learns of and ratifies the change, and this is so although the alteration be made by a stranger. *Hershman v. Stafford*, 58 W. Va. 459, 52 S. E. 533.

the alteration is made by the agent of a party not authorized to make it.<sup>19</sup>

**Immaterial Alteration.**—An alteration in an instrument which does not make it speak a language different in legal effect from that which it originally spoke, and which carries with it no change in the rights, interests or obligations of the parties is immaterial, and has no legal effect upon it.<sup>20</sup>

**B. EFFECT OF MATERIAL ALTERATION ON INSTRUMENT.—1. General Rule.**—*Vitiates the Instrument.*—Any material alteration made in a written instrument by a party having an interest in its performance, or made with his assent, and without consent of the other party to the instrument, will avoid it, and will discharge the party not agreeing to the alteration from its performance.<sup>21</sup>

19. Ill.—Lanum v. Patterson, 143 Ill. App. 244, 250; Paterson v. Higgins, 58 Ill. App. 268, 271. Ind.—Ballard v. Franklin Life Ins. Co., 81 Ind. 239. Ia.—Shenkberg Co. v. Porter, 137 Iowa 245, 114 N. W. 890. Mass.—Tulane University v. O'Connor, 192 Mass. 428, 78 N. W. 494. Mich.—White Sew. Mach. Co. v. Dakin, 86 Mich. 581, 49 N. W. 583, 13 L. R. A. 313. Mo.—Taylor v. Sartorius, 130 Mo. App. 23, 108 S. W. 1089. N. Y.—Waldorf v. Simpson, 15 App. Div. 297, 44 N. Y. Supp. 921. Tenn.—Deering Harv. Co. v. White, 110 Tenn. 132, 72 S. W. 962. Vt.—Equitable Mfg. Co. v. Allen, 76 Vt. 22, 56 Atl. 87, 104 Am. St. Rep. 915.
20. Colo.—Hill v. Fruit M. Co., 42 Colo. 491, 94 Pac. 354, 126 Am. St. Rep. 172. Del.—Wardner, B. & G. Co. v. Stewart, 2 Marv. 275, 36 Atl. 88. Ind.—Crowe v. Beem, 36 Ind. App. 207, 75 N. E. 302. Kan.—Bank v. Nordstrom, 70 Kan. 485, 78 Pac. 804. Ky.—Tranter v. Hibbard, 108 Ky. 265, 56 S. W. 169; Stanley v. Davis, 32 Ky. L. Rep. 1135, 107 S. W. 773. La.—Provenzano v. Glaesser, 122 La. 378, 47 So. 688. Mass.—Graham v. Middleby, 185 Mass. 349, 70 N. E. 416; James v. Tilton, 183 Mass. 275, 67 N. E. 326. Mich.—Prudden v. Nester, 103 Mich. 540, 61 N. W. 777; Weaver v. Bromley, 65 Mich. 212, 31 N. W. 839. Mo.—McCormick Harv. Mach. Co. v. Blair (Mo. App.), 124 S. W. 49; Bailey v. Gilman Bank, 99 Mo. App. 571, 74 S. W. 874. Mont.—Chicago T. & T. Co. v. O'Marr, 18 Mont. 568, 46 Pac. 809, 47 Pac. 4. Neb.—Thompson v. Baldwin, 62 Neb. 530, 87 N. W. 307. N. H.—Burnham v. Ayer, 35 N. H. 351. N. Y.—*In re Darrow's Est.*, 64 Misc. 224, 178 N. Y. Supp. 1082, 1085; People v. Kuhne, 57 Misc. 30, 107 N. Y. Supp. 1020. N. D.—Canfield v. Orange, 13 N. D. 622, 102 N. W. 313. Ohio.—Carlile v. Lamb, 16 Ohio C. C. 578. Ore.—Brown v. Feldwert, 46 Ore. 363, 80 Pac. 414. S. C.—Gunter v. ... 178, 36 S. E. 553. Tex.—Marx v. Luling Co. Op. Assn., 17 Tex. Civ. App. 408, 43 S. W. 596. Va.—Bashaw v. Wallace, 101 Va. 733, 45 S. E. 290. Wash.—Young v. Borzone, 26 Wash. 4, 66 Pac. 135, 421. Ind. Ter.—Taylor v. Acom, 1 Ind. Ter. 436, 45 S. W. 130.
21. U. S.—Angle v. North Western Mut. Life Ins. Co., 92 U. S. 330, 23 L. ed. 556; Wood v. Steele, 6 Wall. 80, 18 L. ed. 725; Keen M. Co. v. Barratt, 100 Fed. 590, 595, 40 C. C. A. 571. Ala.—Houston v. Davis, 49 So. 869; Benton v. Clemmons, 157 Ala. 658, 47 So. 582; Payne v. Long, 121 Ala. 385, 25 So. 780. Cal.—Woodard v. Grover, 105 Pac. 736; Walsh v. Hunt, 120 Cal. 46, 52 Pac. 115, 39 L. R. A. 697; Union Oil Co. v. Mercantile Refin. Co., 8 Cal. App. 768, 97 Pac. 919. Del.—Wardner B. & G. Co. v. Stewart, 2 Marv. 275, 36 Atl. 88. D. C.—Ofenstein v. Bryan, 20 App. Cas. 1, 22. Ga.—Bedgood-Howell Co. v. Moore, 123 Ga. 336, 51 S. E. 420; Burch v. Pope, 114 Ga. 334, 40 S. E. 227; Hotel Lanier Co. v. Johnson, 103 Ga. 604, 30 S. E. 558. Idaho.—Mulkey v. Long, 5 Idaho 213, 47 Pac. 949. Ill.—Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211; Merritt v. Boyden, 191 Ill. 136, 142, 60 N. E. 907, 85 Am. St. Rep. 246; Babcock v. Henkle, 117 Ill. App. 640, 642; Hayes v. Wagner, 89 Ill. App. 390. Ind.—Nicholson v. Combs, 90 Ind. 515, 46 Am. Rep. 229; Ballard v. Franklin Life Ins. Co. 81 Ind. 239; Bowman v. Mitchell, 79 Ind. 84; Owen Creek Pres.



- Church v. Taggart (Ind. App.), 89 N. E. 406; Citizens' Sav. Bank v. Halstead, 42 Ind. App. 79, 84 N. E. 1098; Young v. Baker, 29 Ind. App. 130, 64 N. E. 54. **Ia.**—Maguire v. Eichmeier, 109 Iowa 301, 80 N. W. 395. **Kan.**—Hocknell v. Sheley, 66 Kan. 357, 71 Pac. 539; Herington v. Wangerin, 65 Kan. 423, 70 Pac. 330, 59 L. E. A. 717; Davis v. Eppler, 38 Kan. 629, 16 Pac. 793. **Ky.** Tranter v. Hibbard, 108 Ky. 265, 56 S. W. 169; Northern Bank v. Farmers' Bank, 18 B. Mon. 506; Phoenix Ins. Co. v. McKernan, 18 Ky. L. Rep. 617, 37 S. W. 490. **Md.**—Merchants' Bank v. Steamboat Co., 102 Md. 573, 63 Atl. 108; Burrows v. Klunk, 70 Md. 451, 17 Atl. 378, 14 Am. St. Rep. 371, 3 L. R. A. 576. **Mass.**—Graham v. Middleby, 185 Mass. 349, 70 N. E. 416; Jeffrey v. Rosenfeld, 179 Mass. 506, 61 N. E. 49. **Minn.**—Commercial Bank v. Maguire, 89 Minn. 394, 95 N. W. 212; Warder v. Willyard, 46 Minn. 531, 49 N. W. 300, 24 Am. St. Rep. 250. **Miss.**—Henderson v. Wilson, 6 How. 65, 89. **Mo.**—Koons v. St. L. Car Co., 203 Mo. 227, 101 S. W. 49; Harrison v. Lakenan, 189 Mo. 581, 604, 88 S. W. 53; St. Louis G. Adv. Co. v. Baptiste, 135 Mo. App. 503, 116 S. W. 438; Taylor v. Sartorius, 130 Mo. App. 23, 36, 108 S. W. 1089; Standard Mfg. Co. v. Hudson, 113 Mo. App. 344, 88 S. W. 137. **Neb.**—Ball v. Beaumont, 66 Neb. 56, 92 N. W. 170; McGavock v. Morton, 57 Neb. 385, 77 N. W. 785; Erickson v. Bank, 44 Neb. 622, 62 N. W. 1078, 48 Am. St. Rep. 753, 28 L. R. A. 577. **N. H.**—Burnham v. Ayer, 35 N. H. 351, 354. **N. J.**—Smith v. Holzhauer, 67 N. J. L. 202, 50 Atl. 683; Hunt v. Gray, 35 N. J. L. 227, 10 Am. Rep. 232. **N. Y.**—Webster Realty Co. v. Thomas, 107 App. Div. 612, 94 N. Y. Supp. 916. **Ohio.**—Newman v. King, 54 Ohio St. 273, 43 N. E. 683; Wallace v. Jewell, 21 Ohio St. 163, 8 Am. Rep. 48; Tucker v. Hendricks, 25 Ohio C. C. 426, 430. **Okla.** Farmers' Nat. Bank v. McCall, 106 Pac. 886. **Ore.**—Savage v. Savage, 36 Ore. 268, 59 Pac. 461; Wallace v. Tice, 32 Ore. 283, 287, 51 Pac. 733. **Pa.**—Shiffer v. Mosier, 74 Atl. 426; Flitercraft v. Com. Title Ins. Co., 211 Pa. 114, 60 Atl. 557. **S. C.**—Edwards v. Sartor, 69 S. C. 540, 48 S. E. 537; White v. Harris, 69 S. C. 65, 48 S. E. 41, 104 Am. St. Rep. 791; Sanders v. Bagwell, 32 S. C. 238, 10 S. E. 946, 7 L. R. A. 743. **S. D.** Port Huron E. & T. Co. v. Sherman, 14 S. D. 461, 85 N. W. 1003. **Tenn.**—Deering Harv. Co. v. White, 110 Tenn. 132, 72 S. W. 962; Moss v. Maddux, 108 Tenn. 405, 67 S. W. 855; McDaniel v. Whitsett, 96 Tenn. 10, 33 S. W. 567. **Tex.**—American Copying Co. v. Thompson (Tex. Civ. App.), 110 S. W. 777; Adams v. Faircloth (Tex. Civ. App.), 97 S. W. 507. **Utah.**—Belleville P. & S. Works v. Samuelson, 16 Utah 234, 52 Pac. 282; McClure v. Little, 15 Utah 379, 385, 46 Pac. 298, 62 Am. St. Rep. 938. **Vt.**—Holden v. Rutland R. Co., 73 Vt. 317, 50 Atl. 1096. **Va.**—Consumers' Ice Co. v. Jennings, 100 Va. 719, 724, 42 S. E. 879; Hoffman v. Planters' Natl. Bank, 99 Va. 480, 39 S. E. 134; Virginia & Tenn. C. & I. Co. v. Fields, 94 Va. 102, 26 S. E. 426. **W. Va.** Hershman v. Stafford, 58 W. Va. 459, 52 S. E. 533; Philip Carey Mfg. Co. v. Watson, 58 W. Va. 189, 52 S. E. 515. **Wis.**—Hecht v. Shenners, 126 Wis. 27, 105 N. W. 309; Sherwood v. Merritt, 83 Wis. 233, 53 N. W. 512. **Eng.**—Pigot's Case, 11 Co. Rep. 26.
- In Walsh v. Hunt, 120 Cal. 46, 50, 52 Pac. 115, 39 L. R. A. 697, the court said: "Any unauthorized change in a material respect destroys the integrity of the instrument as the contract which the maker has executed; it ceases to be his contract and is avoided; even in the hands of an innocent holder for value. These principles are thoroughly well settled, not only as to deeds and other sealed instruments but as to commercial paper as well."
- A material alteration of a completed note by the principal obligor after it has been signed by his surety and without his knowledge or consent before its delivery to the payee, renders it void as to the surety. Blakey v. Johnson, 13 Bush (Ky.) 197, 26 Am. Rep. 254.
- The unauthorized alteration of a note which was complete upon its face, and which had not been intrusted by the defendant to any one for the purpose of being filled up or added to relieves the maker from liability in an action upon the note in its altered form. Cape Ann. Nat. Bank v. Burns, 129 Mass. 596.
- An alteration made by a vendee in a memorandum of sale, after it has been signed, by which, if valid, its scope as evidence against the vendors would be enlarged, is a material alteration and annuls the instrument as a contract and as evidence in favor of the vendee.

**2. Innocent Alteration To Correct Mistake.**—While a material alteration made by a party to an instrument will release all other parties not consenting thereto, it is held in some jurisdictions, that where an alteration is made to correct an instrument so as to make it conform to what all of the parties agreed or intended it should have been and in such manner as to clearly negative any fraud on the part of the party making the alteration, it will not destroy the legal effect of the instrument.<sup>22</sup>

**Exception.**—In Missouri it is held that a material alteration of an instrument by one of the parties to it will release the other parties, even though the alteration is made in good faith, and in order to make the instrument conform to the real agreement of the parties.<sup>23</sup>

**Recovery on Original Consideration.**—While a material and unauthor-

Schmidt v. Quinzel, 55 N. J. Eq. 792, 38 Atl. 665.

A written instrument which is materially altered after execution and delivered by a party entitled to a benefit thereunder or with his consent extinguishes all the executory obligations in his favor as against all parties who do not consent to the alteration. Porter v. Hardy, 10 N. D. 551, 555, 88 N. W. 458.

In Richardson v. Fellner, 9 Okla. 513, 520, 60 Pac. 270, the court said: "It is the policy of the law to allow no tampering with written instruments, and any alteration which varies the legal effect of the instrument, changes the operation of the contract, or the rights or liabilities of the parties, though no fraud actually results, is a material alteration, and vitiates the instrument. The true test is, whether it is the same contract."

**22. Ga.**—Jackson v. Johnson, 67 Ga. 167. **Ill.**—Elliott v. Blair, 47 Ill. 342; Vogle v. Ripper, 34 Ill. 100, 85 Am. Dec. 298. **Ind.**—Osborn v. Hall, 160 Ind. 153, 161, 66 N. E. 457. **Ia.**—Clough v. Seay, 49 Iowa 111. **Ky.**—Duker v. Franz, 7 Bush 273, 3 Am. Rep. 314. **Me.**—Hervey v. Harvey, 15 Me. 357. **Mass.**—Jeffrey v. Rosenfeld, 179 Mass. 506, 61 N. E. 49; Ames v. Colburn, 11 Gray 390, 71 Am. Dec. 723. **Miss.**—Foote v. Hambrick, 70 Miss. 157, 11 So. 567, 35 Am. St. Rep. 631; McRaven v. Crisler, 53 Miss. 542. **N. Y.**—Gillette v. Smith, 18 Hun 10; Clute v. Small, 17 Wend. 238. **N. C.**—Cheek v. Nall, 112 N. C. 370, 17 S. E. 80. **Ore.**—Wallace v. Tice, 32 Ore. 283, 51 Pac. 733. **S. C.**—Heath v. Blake, 28 S. C. 406, 416, 5 S. E. 842. **Tenn.**—Williamson v. Smith, 1 Coldw. 1, 78 Am. Dec. 478. **Tex.**—Chamberlain v. Wright (Tex. Civ. App.),

35 S. W. 707. **Vt.**—Derby v. Thrall, 44 Vt. 413, 8 Am. Rep. 389. **Wash.**—Lombardo v. Lombardini, 106 Pac. 907.

Where a material alteration in an instrument appears to have been made with a view to carry out the intention of the party who signed the paper, or under circumstances showing an implied authority from the other party to make the correction, and no one's rights are injuriously affected, the alteration does not render the instrument invalid. Lee v. Butler, 167 Mass. 426, 431, 46 N. E. 52, 57 Am. St. Rep. 466.

In Booth v. Powers, 56 N. Y. 22, the court said: "Sometimes an alteration in a note, seemingly material, and such as may *prima facie* render it void, is innocent and does not vitiate the instrument. So it is, when it is done to correct a mistake in penning the note, or to make it express the real bargain of the parties, or to give the proper legal form to their contract. In such case the payee has a right to enforce it."

Where the alteration of an instrument has been innocently made for the purpose of making it conform to the agreement of the parties, without any fraudulent intent, and no one is injured thereby. A court of equity will reform the instrument and restore it to its original condition and decree an enforcement of it. McClure v. Little, 15 Utah 379, 386, 46 Pac. 298, 62 Am. St. Rep. 938.

**23. Koons v. St. Louis Car Co.**, 203 Mo. 227, 259, 101 S. W. 49; **Iron Mt. Bank v. Murdock**, 62 Mo. 70; **Capital Bank v. Armstrong**, 62 Mo. 59; **Evans v. Foreman**, 60 Mo. 449.

An alteration may be a fraud in law though not a fraud in fact. Whitsett v. People's Nat. Bank, 138 Mo. App. 81, 119 S. W. 999.

ized alteration of an instrument innocently and honestly made, without any fraudulent or improper motives, avoids the instrument, an action will nevertheless lie upon the original consideration, if it is independent of the instrument, and has not been discharged by its execution.<sup>24</sup>

**3. Restoration of Altered Instrument.**—The restoration of an instrument to its original form by one of the parties, after an unauthorized material alteration, will not avail to give it force.<sup>25</sup>

**4. Recovery by Holder in Due Course.**—In some jurisdictions it is held that when an instrument has been materially altered, and is in the hands of a holder in due course, not a party to the alteration, it may be enforced by him according to its original tenor.<sup>26</sup>

**5. Alteration of Deeds.**—Unlike writings which evidence executory contracts, a deed, in so far as it operates as a conveyance, is not avoided by alteration. Having accomplished transmission of title,

24. **U. S.**—*Espy v. First Nat. Bank*, 18 Wall. 604, 21 L. ed. 947. **Ill.**—*Vogle v. Ripper*, 34 Ill. 100, 85 Am. Dec. 238. **Ind.**—*Parke v. Roser*, 67 Ind. 500, 33 Am. Rep. 102. **Kan.**—*Fraker v. Little*, 24 Kan. 598, 36 Am. Rep. 262. **Me.**—*Croswell v. Labree*, 81 Me. 44, 16 Atl. 331, 10 Am. St. Rep. 238; *Milbery v. Storer*, 75 Me. 69, 46 Am. Rep. 361. **Mass.**—*Jeffrey v. Rosenfeld*, 179 Mass. 506, 61 N. E. 49; *Lee v. Butler*, 167 Mass. 426, 46 N. E. 52, 57 Am. St. Rep. 466; *Nickerson v. Swett*, 135 Mass. 514; *Adams v. Frye*, 3 Met. 103; *Smith v. Dunham*, 8 Pick. 246. **Mo.**—*McCormick Harv. Co. v. Blair* (Mo. App.), 124 S. W. 49, 52. **Neb.**—*Kime v. Jesse*, 52 Neb. 606, 613, 72 N. W. 1050. **Ohio.** *Tucker v. Hendricks*, 25 Ohio C. C. 426, 430. **Ore.**—*Wallace v. Tice*, 32 Ore. 283, 287, 51 Pac. 733. **N. J.**—*Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232; *Lewis v. Schemek*, 18 N. J. Eq. 459, 90 Am. Dec. 631. **N. Y.**—*White v. Continental Nat. Bank*, 64 N. Y. 316, 21 Am. Rep. 612, citing earlier cases; *Booth v. Powers*, 56 N. Y. 22; *National Bank of Commerce v. National Mech. Bkg. Assn.*, 55 N. Y. 211, 14 Am. Rep. 232. **Eng.**—*Kelly v. Solan*, 9 M. & W. 54.

Where a note secured by chattel mortgage has been materially altered in its terms by the payee innocently, the mortgagee may enforce his mortgage, if the debt still exists and can be proved independently of the altered note. *Simpson v. Sheley*, 9 Kan. App. 512, 60 Pac. 1098.

**Amendment.**—In a suit upon a note which has been materially altered under

an honest mistake of right, and not fraudulently with a view to obtain an improper advantage, it is the duty of the court upon payment of costs to permit the plaintiff to amend his petition setting up the original consideration. *State Sav. Bank v. Schaffer*, 9 Neb. 1, 6, 1 N. W. 980, 31 Am. Rep. 394.

25. **U. S.**—*Wood v. Steele*, 6 Wall. 80, 18 L. ed. 725. **Ill.**—*Hayes v. Wagner*, 89 Ill. App. 390, 401. **Ky.**—*Locknane v. Emmerson*, 11 Bush 69; *Cotton v. Edwards*, 2 Dana 106; *Phoenix Ins. Co. v. McKernan*, 18 Ky. L. Rep. 617, 37 S. W. 490. **Mass.**—*Citizens' Nat. Bank v. Richmond*, 121 Mass. 110. **Pa.** *Schiffer v. Mosier*, 74 Atl. 426. **Tenn.**—*Deering Harv. Co. v. White*, 110 Tenn. 132, 72 S. W. 962. **Va.**—*Newell v. Mayberry*, 3 Leigh 250, 23 Am. Dec. 261.

26. **Md.**—*Merchants' Bank v. Steamboat Co.*, 102 Md. 573, 63 Atl. 108; *Schwartz v. Wilmer*, 90 Md. 136, 44 Atl. 1059; *Public Gen. Laws of Md.*, § 143. **Mass.**—*Massachusetts Nat. Bank v. Snow*, 187 Mass. 159, 72 N. E. 959; *Rev. Laws, Mass.*, § 141. **Neb.**—*Bothell v. Schweitzer*, 84 Neb. 271, 120 N. W. 1129, 22 L. R. A. (N. S.) 263; *Cobbey's Ann. St., Neb.*, 1907, § 9322. **N. Y.**—*Usef v. Herzenstein*, 65 Misc. 45, 119 N. Y. Supp. 290; *Con. Laws N. Y.*, vol. 3, p. 2654. **Pa.**—*Colonial Tr. Co. v. Getz*, 28 Pa. Super. Ct. 619, 632, Pa. Laws 194. **Va.**—*Hoffman v. Planters' Nat. Bank*, 99 Va. 480, 483, 39 S. E. 134. *Acts Va. 1897-8*, p. 910, *Pollard's Sup.* 302. **Wis.**—*Hecht v. Shenners*, 126 Wis. 27, 105 N. W. 309; *Wis. Laws 1899*.



the grantee is not divested of title by alteration of the deed, however its covenants may be affected.<sup>27</sup>

**II. PLEADINGS OF PLAINTIFF.**—A. IN GENERAL.—1. **Complaint Upon Original Instrument.**—In an action to enforce an instrument altered after its execution, or to recover upon the original consideration, the instrument must be pleaded according to its original terms, with explanation of the alteration, and not according to its terms as altered.<sup>28</sup>

27. **U. S.**—United States *v.* Spalding, 2 Mason 478, 27 Fed. Cas. No. 16, 365. **Ala.**—Burgess *v.* Blake, 128 Ala. 105, 109, 28 So. 963, 86 Am. St. Rep. 78. **Cal.**—Galland *v.* Jackson, 26 Cal. 80, 86. **Ill.**—Bledsoe *v.* Graves, 4 Ill. 383. **Ia.**—Slattery *v.* Slattery, 120 Iowa 717, 95 N. W. 201. **Ky.**—Hunt *v.* Nance, 28 Ky. L. Rep. 1188, 92 S. W. 6. **Mo.**—Lumber Co. *v.* Moss Tie Co., 89 Mo. App. 556, 561. **Tenn.**—Bryant *v.* Bank, 107 Tenn. 560, 566, 64 S. W. 895.

28. **U. S.**—United States *v.* Spalding, 2 Mason 478, 27 Fed. Cas. No. 16,365. **Cal.**—Union Oil Co. *v.* Mercantile Refin. Co., 8 Cal. App. 768, 97 Pac. 919. **Mo.**—McCormick Harv. Mach. Co. *v.* Blair (Mo. App.), 124 S. W. 49, 52; Allen *v.* Dornan, 57 Mo. App. 288. **Neb.**—Perkins Co. *v.* Tillman, 55 Neb. 652, 75 N. W. 1098; Kime *v.* Jesse, 52 Neb. 606, 613, 72 N. W. 1050. **Ohio.**—Tucker *v.* Hendricks, 25 Ohio C. C. 426, 430. **Ore.**—Wallace *v.* Tice, 32 Ore. 283, 287, 51 Pac. 733.

**Specific Explanation.**—In Lee *v.* Alexander, 9 B. Mon. (Ky.) 25, 48 Am. Dec. 412, the first count in the plaintiff's amended declaration averred, "That the defendants, on the 3rd of January, 1840, executed and delivered to the plaintiff their certain writing obligatory, signed with their hands, and now here shown, the date thereof being destroyed and mutilated without the knowledge, privity or consent of the plaintiff, and which is in substance as follows: Louisville 3rd of January, 1841. We or either of us, promise to pay," etc., setting out the note, and failure and refusal to pay. The defendants having cravedoyer, and demurred, the demurrer was improperly sustained. The appellate court, however, said that the allegations in regard to the mutilation or alteration of the covenant should have been made more specific.

**Spoilation No Variance.**—Where

there is spoilation of a note, the note remains a valid note according to its original tenor, and if the tenor of the note as originally written is apparent upon its face it is sufficient to declare upon it in the usual way, and upon showing that the changes in the note are mere spoiliations, there is no variance between the allegation and the proof. Drum *v.* Drum, 133 Mass. 566.

In Colby *v.* Foxworthy, 72 Neb. 378, 100 N. W. 798, the amended petition of the plaintiff alleged the existence of facts tending to show a spoilation of the note and mortgage sued on, by an intermeddler without the knowledge or consent of either plaintiff or defendant. The defendant's answer pleaded a fraudulent alteration by plaintiff or her assignor. This was denied by the reply, and the amended petition was held to state a good cause of action.

**Bill To Restrain Enforcement of Altered Instrument.**—Jeffrey *v.* Rosenfeld, 179 Mass. 506, 61 N. E. 49, was a bill in equity to restrain the foreclosure of a mortgage on the ground, that after the delivery of the mortgage and note there was a material alteration of the note without the plaintiff's assent. The nature of the alteration, or by whom it was made, was not set out, nor was it alleged that the alteration was fraudulent. Demurrer to the bill was sustained, the court saying: "There is no allegation of fraud in the bill, or of fault on the part of the mortgagee. For aught that appears the alteration in the note may have been made by a stranger, or may have been innocently made by the holder for the purpose of rectifying what he supposed to be a mistake occurring under such circumstances that he would be entitled in equity to a reformation of the note and mortgage. There is no allegation that the note or the debt which the mortgage was given to secure has been paid and there is no tender of payment."

**Amendment Setting Up Original Consideration.**—When a complaint upon a promissory note shows that the holder altered it without dishonest or fraudulent intent, there can be no recovery, but the complaint may be amended to set up the original consideration.<sup>29</sup>

**Negating Fraud in Alteration.**—A complaint upon the original debt represented by an altered instrument should allege that the alteration was made without fraudulent intent.<sup>30</sup>

**2. Adoption of Alteration.**—When an action is brought upon a written instrument in its altered form, the plaintiff adopts the alteration, and makes it his own.<sup>31</sup>

**B. REPLY AVOIDING EFFECT OF ALTERATION.—1. Ratification.**—A reply to the defense of material alteration, which alleges that after the delivery of the instrument, and with full knowledge of the altera-

29. *Neb.*—*State Savings Bank v. Shaffer*, 9 Neb. 1, 1 N. W. 980, 31 Am. Rep. 394. *Ore.*—*Savage v. Savage*, 36 Ore. 268, 276, 59 Pac. 461. *S. D.*—*Wyckoff v. Johnson*, 2 S. D. 91, 98, 48 N. W. 837.

30. **Defect Cured by Answer and Reply.**—In *Savage v. Savage*, 36 Ore. 268, 59 Pac. 461, the complaint was on the original debt, and alleged the delivery of a note for the same, and that plaintiff afterwards materially altered the note in the presence of one of the makers, but without the knowledge of the other maker, and then surrendered such note, but failed to allege that the alteration was not made with a fraudulent intent. Held that this was defective, but inasmuch as the answer and reply raised the question of fraudulent intent, a verdict for the plaintiff cured the defect in the complaint.

31. *Kelley v. Thuely*, 143 Mo. 422, 45 S. W. 300; *Paul v. Leeper*, 98 Mo. App. 515, 72 S. W. 715.

**Amendment at Trial.**—The holder of a note had notice that it had been altered by changing the amount, and with such notice sued upon it in its altered condition. He thereby ratified the act of alteration, and the court did not err in refusing to permit him, after trial, to amend by counting on the note as originally made. *Perkins Co. v. Tillman*, 55 Neb. 652, 75 N. W. 1098. To the same effect is *Fulmer v. Seitz*, 68 Pa. 237, 8 Am. Rep. 172, where the court, by Mr. Justice Agnew, said: "One who makes a voluntary and unauthorized alteration of a written contract, and insists upon it by going to trial to recover upon the altered state of the instrument, has no *locus poenitentiae*, which, on his failure to es-

tablish his right to recover, will enable him to undo the wrong at the trial, and to stand as one who has made an innocent mistake, and never has insisted upon his right to enforce it."

But where the instrument was altered by a stranger, though it should be declared on as originally written, yet if by mistake it is declared on as altered, the complaint may be amended at the trial to correspond with the facts. *Union Nat. Bank v. Roberts*, 45 Wis. 373.

**Insufficient Petition.**—*Allen v. Doran*, 57 Mo. App. 288, 291, was an action on a promissory note made by the defendants and one L. M. Allen since deceased to W. J. Bond. It is alleged in the petition that the plaintiff is the son of said L. M. Allen deceased, and succeeded to his estate as heir; that the said Bond assigned said note to the bank of Versailles; and that long after it was past due, at the request of said bank, he signed said note as evidence of his good faith and intention to pay out of the assets of said decedent's estate the portion of said note for which the said deceased was liable. The petition further alleged that the plaintiff had purchased said note and was the legal holder thereof, also that there was in fact no consideration for the signing of said note by the plaintiff. The petition was held insufficient, the court saying: "If all the allegations of the petition were true, which we must assume was the case, it is obvious that their legal effect was *prima facie* to discharge the defendants from their liability on the note. The effect of this however could have been avoided had the petition further alleged that the plaintiff signed the

tion charged, the defendant confirmed and ratified it, and promised to pay, is a good reply.<sup>82</sup>

**New Consideration.**—Where ratification of an alteration is pleaded against an endorser or surety, no new consideration need be set up to support such ratification.<sup>83</sup> But it is otherwise held in Kentucky and Minnesota.<sup>84</sup>

**2. Negligence in Leaving Blank Space.**—A reply alleging that the plaintiff is an innocent holder for value, of the instrument, and that when he purchased it, there was nothing on it to excite his suspicion, and that the alteration charged was made without his knowledge, and in a blank space negligently left therein by the maker, is

note by or with the consent of the defendants.”

**32. Alteration of Instruction.**—*Mattingly v. Riley*, 20 Ky. L. Rep. 1621, 49 S. W. 799, an action on a note against sureties who alleged that an alteration made interest payable from “date” instead of from “maturity.”

To a plea by an endorser setting up a material alteration of the note sued on, a replication stating that the endorser with full knowledge of such alteration afterwards waived protest and notice by an endorsement on the note and promised to pay it, is a good replication, as it constitutes a waiver of the discharge operated by the alteration, and as a ratification thereof. *Montgomery v. Crossthwait*, 90 Ala. 553, 572, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140.

**33. Ala.**—*Montgomery v. Crossthwait*, 90 Ala. 553, 572, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140. **Ill.**—*Goodspeed v. Cutler*, 75 Ill. 534. **Ia.**—*Pelton v. Prescott*, 13 Iowa 567. **Mass.**—*Prouty v. Wilson*, 123 Mass. 297. **Mo.**—*Bank of Trenton v. Gay*, 63 Mo. 39; *King v. Hunt*, 13 Mo. 97. **N. Y.**—*Bank v. Warren*, 15 N. Y. 577.

**34. Warren v. Fant**, 79 Ky. 1; *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. 467.

#### Form.—Replication.

(Adapted from *Montgomery v. Crossthwait*, *supra*.)

Title of action and court.

Plaintiff for replication to defendants’ plea in this action says that on the — day of —, 1910, the said defendant with full knowledge of all the facts set forth in his said plea endorsed on the written instrument mentioned in plaintiffs’ complaint the following words: “I hereby waive protest and notice of protest on the within note,”

and signed the same with his name —, and that said defendant at divers times both before and after the maturity of said instrument, ratified the signature signed thereto, and the supposed alteration of said instrument by said — and promised to pay it; and plaintiff avers that defendant has waived any right he may have had to aver and plead the supposed alteration of said instrument and by reason of his said waiver and ratification, is now estopped to deny that he is bound by his said endorsement.

Form of reply taken from *Collins v. Makepeace*, 13 Ind. 448, 452:

“Plaintiff for reply to the answer of the defendant, avers that said note was not made payable on the 20th day of August, 1853, as alleged in the second paragraph of said answer, but was made payable on the 22nd day of August by the draughtsman, one John H. Swaar, through inadvertence,—it being at the time of making the note expressly understood between the parties that a judgment should be taken at the term of the court then in session, upon the note. And upon discovering that owing to the time he, Swaar, had made the note payable, such judgment could not then be taken, and still having the same note in his possession, he struck out the word August without the knowledge or consent of the plaintiff, of which he immediately notified the defendant, who objected to such alteration being made, whereupon he, Swaar, at the request of the defendant, then and there struck out the word ‘March,’ and restored the word ‘August,’ as written at the time the note was executed, with which the defendant then and there expressed himself satisfied, and agreed to the note being then as it originally stood.”



a good reply to an answer alleging material alteration of the instrument as a defense.<sup>36</sup>

3. **Spoliation.**—Where a reply admits the alteration alleged in the answer, but avers that the alteration was not made by the plaintiff, or by his authority, it is equivalent to pleading spoliation by a stranger.<sup>38</sup>

**III. PLEADINGS OF DEFENDANT.—A. DENIAL.—NON EST FACTUM.**—The defense of material alteration of the instrument sued

35. In *Holmes v. Bank of Ft. Gaines*, 120 Ala. 493, 499, 24 So. 959, the defendant entered a plea of *non est factum* to the note sued on. The plaintiff replied thereto averring that the defendant executed the note, and that defendant's said plea was based upon an alleged material alteration in the note, and for the purpose of avoiding the legal effect of the alteration plaintiff averred that said note was payable in money at the Bank of Ft. Gaines, Ga., and was purchased by plaintiff in the usual course of business for a valuable consideration without notice of any alteration, defect or infirmity in said note, or defense thereto; that no material alteration was made by plaintiff in said note, or any one authorized by him, and there was nothing on the face of the note reasonably calculated to excite suspicion of a careful man; and that the maker had left room in said note for an alteration to be made therein without defacing it. This was held a good replication.

*Winter v. Pool*, 104 Ala. 580, 16 So. 543, was an action upon a promissory note executed by the defendant and purchased by the plaintiffs. The defendant filed a verified special plea of *non est factum*, setting forth a material alteration of the note, to which plaintiffs replied that the note sued on was a printed blank filled out in writing, the blank containing the words in print "payable at the bank of," followed by a blank space of sufficient length to permit the insertion of a designated place of payment, and that said blank space was not marked by defendant or drawn across with a pen; but said note was signed by the defendant, and put in circulation with this blank space open, and that this was negligence on the part of defendant, and by reason of such negligence some person to the plaintiffs unknown, and without the knowledge, consent or connivance of plaintiffs, inserted in said blank the words "*Montgomery, Ala.*"; that there

is a Bank of Montgomery, doing business in the city of Montgomery, Ala., and was when plaintiffs purchased the note; that plaintiffs purchased the note before maturity for value and in due course of trade, and without knowledge or notice that said note had been so altered, and claim to hold the note as innocent holders, and the same is due and unpaid. This was held a good replication.

**Non Negotiable Instrument.—Blank Space.**—In *Smith v. Holzhauer*, 67 N. J. L. 202, 50 Atl. 683, it was held that the defense of fraudulent alteration of a non negotiable instrument was available against an assignee without notice, even though the signer may have been negligent in leaving blank spaces in the instrument, whereby such alteration was made easy.

Where an answer in an action on a promissory note alleges that the note has been materially altered since its execution and delivery, and these allegations are merely denied by the reply, the plaintiff cannot show that the note was so negligently drawn that the alleged alteration could have been made without exciting the suspicions of an ordinarily prudent business man, as such an issue is not raised by the pleadings. *Bank of Commerce v. Haldeman*, 109 Ky. 222, 58 S. W. 587.

36. Where a promissory note has been changed by altering the provision for an attorney's fee from five to fifteen per cent, and a complaint is founded upon the note as originally executed, to which defendants' answer alleging the change in the note to have been made without their knowledge or consent, a reply which admits the change as alleged, but avers that the note was not changed by the plaintiff or by his authority, knowledge or consent, is equivalent to pleading spoliation of the instrument by a stranger. *Murray v. Peterson*, 6 Wash. 418, 33 Pac. 969.

Where defendant in a suit on a note,  
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on is not new matter and generally is available under a plea of the general issue, or general denial.<sup>87</sup> But in a few jurisdictions, by

pleads a material alteration thereof as a defense, and the plaintiff contends that such alteration was authorized by statute, he need not file a reply pleading such statute in order to rely thereon. *Johnston v. Hoover*, 139 Iowa 143, 148, 117 N. W. 277.

37. U. S. — *Wood v. Steele*, 6 Wall. 80, 18 L. ed. 625; *Speaks v. United States*, 9 Cranch 28, 37, 3 L. ed. 645. Conn. — *Mahaiwe Bank v. Douglass*, 31 Conn. 170. Del. — *Herdman v. Bratten*, 2 Harr. 396. Ill. — *Benjamin v. McConnell*, 9 Ill. 536, 46 Am. Dec. 474; *Conkling v. Olmstead*, 63 Ill. App. 649; *Soaps v. Eichberg*, 42 Ill. App. 375, 380. Ind. — *Palmer v. Poor*, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; *Coburn v. Webb*, 56 Ind. 96, 26 Am. Rep. 15; *Conner v. Sharpe*, 27 Ind. 41; *Pope v. B. County Sav. Bank*, 23 Ind. App. 210, 54 N. E. 835; *Jones v. Pincheon*, 6 Ind. App. 460, 32 N. E. 577. Md. — *Edelin v. Sanders*, 8 Md. 118. Mass. — *Cape Ann Nat. Bank v. Burns*, 129 Mass. 596; *Lincoln v. Lincoln*, 12 Gray 45. Mo. — *Whitmer v. Frye*, 10 Mo. 348. Neb. — *Barber v. Stromberg-C. Tel. Mfg. Co.*, 81 Neb. 517, 116 N. W. 157, 129 Am. St. Rep. 703, 18 L. R. A. (N. S.) 680; *Ball v. Beaumont*, 66 Neb. 56, 92 N. W. 170; *Walton Plow Co. v. Campbell*, 35 Neb. 173, 52 N. W. 883, 16 L. R. A. 468. N. Y. — *Schwartz v. Oppold*, 74 N. Y. 307; *Boomer v. Koon*, 6 Hun 645; *Farmers Loan & Tr. Co. v. Siefke*, 63 N. Y. St. 662; *Tompkins v. Corwin*, 9 Cow. 255. Ohio. — *Citizens Bank v. Closson*, 29 Ohio St. 78; *Bery v. M. P. & C. R. Co.*, 26 Ohio St. 673. Okla. — *Richardson v. Fellnor*, 9 Okla. 513, 520, 60 Pac. 270. Pa. — *Burgwin v. Bishop*, 91 Pa. 336; *Zeigler v. Sprengle*, 7 Watts & S. 175. Tenn. — *McVey v. Ely*, 5 Lea 438, 440. Tex. — *Bogarth v. Breedlove*, 39 Tex. 561; *Davis v. Crawford* (Tex. Civ. App.), 53 S. W. 384. But see *Gragg v. State*, 18 Tex. App. 295. Va. — *Rocky Mt. L. & T. Co. v. Price*, 103 Va. 298, 49 S. E. 73. Wis. — *Schwalm v. McIntyre*, 17 Wis. 240. Eng. — *Mason v. Bradley*, 12 L. J. 425; *Parry v. Nicholson*, 13 M. & W. 778; *Davidson v. Cooper*, 11 M. & W. 778.

A plea of *non assumpsit* or *non acceptavit*, raises the question of alteration. *Cock v. Coxwell*, 2 C. M. & R. 291, 4 D. P. C. 187, 1 Gale 177, 5 Tyr.

1077, 4 L. J. Ex. 307; *Hirschman v. Budd*, L. R. 8 Exch. 171; *Calvert v. Baker*, 4 M. & W. 417; *Knight v. Clement*, 8 Ad. & El. 215, 35 E. C. L. 377; *Meredith v. Culver* 5 U. C. Q. B. 218. See *Hemming v. Trenery*, 9 Ad. & El. 926, 36 E. C. L. 324, where it was held, that the alteration of an executed instrument must be specially pleaded by way of confession and avoidance.

In a suit on an instrument a plea of *non est factum* will authorize the party interposing it to prove that after the execution of the instrument in question, it was altered without his consent. *Fudge v. Marquell*, 164 Ind. 447, 453, 72 N. E. 565, 73 N. E. 895.

A material alteration of a note constitutes a complete defense to an action on the note, and is properly set up by a plea of general issue verified. *Smith v. Dazey*, 124 Ill. App. 399-401. And see *Case T. M. Co. v. Peterson*, 51 Kan. 713, 33 Pac. 470.

In an action on a note an answer by the defendant denying that he made the note, and denying that he signed the same, permits the defendant to show that the note was fraudulently altered after it was made. *Cape Ann Nat. Bank v. Burns*, 129 Mass. 596.

In an action on an indorsement of a promissory note where the answer denies an unqualified indorsement as alleged in the complaint, and alleges that it was without recourse, the defendant may prove that an attempted alteration by drawing pen and ink through the words "without recourse" was made after the endorsement was made. *Howlett v. Bell*, 52 Minn. 257, 53 N. W. 1154.

**Plea Not Verified.**—In an action upon a promissory note, alterations may be shown in discharge of a party who was ignorant of such alterations, under a plea of *non assumpsit*, although such plea is not verified. *Henderson v. Wilson*, 6 How. (Miss.) 65, 89.

**Without Notice.**—The defense of material alteration, in an instrument sued on, may be made under a plea of the general issue, and without previous notice. *Mundy v. Stevens*, 61 Fed. 77, 9 C. C. A. 366; *Mahaiwe Bank v. Douglass*, 31 Conn. 170.

*Walton Plow Co. v. Campbell*, 35 Neb. 173, 52 N. W. 883, was an action to foreclose a mortgage on real estate. The pe-



statute or rule of court, the alteration must be specially pleaded.\*\*

**B. SPECIAL PLEA OR ANSWER.—1. Description of Alteration.**—Where an alteration in an instrument sued on is specially pleaded as a defense to the action, which may always be done, the plea or answer should set forth in what respect the instrument has been altered, so that it may appear whether or not the alteration is material.<sup>89</sup>

tition alleged the execution and delivery of the note secured by the mortgage, and set it out in the body of the pleading. The answer denied each and every allegation of the petition. It was held that the defense that the note had been materially altered was available to defendants under said answer, and that it was not necessary to allege the alteration therein.

38. *Tedder v. Fraleigh* L. S. Co., 55 Fla. 496, 46 So. 419. See *Provenzano v. Glaesser*, 122 La. 378, 47 So. 638.

**Alteration After Delivery.**—Material alterations made in a note after it is signed but before its delivery are well pleaded by a general denial; but alterations made after delivery must be specially pleaded in order to be available as a defense. *Paris Nat. Bank v. Nickell*, 34 Mo. App. 295, 299.

**Joint Answer.**—A joint answer by two defendants alleging a material alteration of the note sued on, which is verified by only one of them, is sufficient to put the plaintiff to proof of the execution of the note as to that defendant, but not as to the other, and a reply that the latter had ratified the note after the alleged alteration was known to him, is a good reply. *Feeney v. Mazalin*, 87 Ind. 226.

39. Ind.—*Collier v. Waugh*, 64 Ind. 456. Ia.—*Black v. De Camp*, 75 Iowa, 105, 39 N. W. 215. Ky.—*Brown v. Warnock*, 5 Dana 492, 494. Mont.—*Sweetzer v. Diehl*, 14 Mont. 498, 37 Pac. 10. Wash.—*Kleeb v. Bard*, 12 Wash. 140, 145, 40 Pac. 733.

*Bowman v. Mitchell*, 79 Ind. 84, was a suit on notes and mortgage securing the same. The appellant Mary Bowman answered separately that she executed the mortgage to secure said notes, and that one of them was paid, and that the other two after the delivery thereof to the payee were unlawfully, and without her knowledge or consent, fraudulently altered by inserting in the body thereof, "at ten per cent interest." The answer was duly verified, and was held to be a good answer.

In *Maguire v. Eichmeier*, 109 Iowa

301, 80 N. W. 895, the plaintiff's petition alleged that the note sued on had in some manner unknown to the plaintiff been mutilated, but that it was not done with the knowledge or consent of the plaintiff, nor with any intent to defraud the defendant or any other person. The answer admitted the alteration of the note, and averred "that the same was materially altered by plaintiff, or while in his possession, . . . and that by reason of said alteration of said note is null and void." In the absence of attack this answer was sufficient to present the claim of the defendants that there was a material alteration of the note, after it was made, for a fraudulent purpose.

In an action on a promissory note by the endorsee, a special plea of *non est factum* averring that the note was drawn and delivered to the payee, without the words "or order," in it, and that afterwards the payee without the knowledge or consent of the defendant, but at the instance of the plaintiff altered it by interlining those words, and that before such interlineation, the note was not negotiable, constitutes a *prima facie* bar to the action. *Johnson v. Bank*, U. S. 2 B. Mon. (Ky.) 310.

In an action on a promissory note, the answer admitted the making of the note for the amount, and payable at the time of the note set forth in the complaint, but averred that said note after its delivery to plaintiff was materially altered by him without defendant's knowledge or consent, by changing the date thereof from April 1st, 1872, to April 1st, 1873. The answer was struck out on motion as sham and frivolous, and this was held error. *Rogers v. Vosburgh*, 87 N. Y. 228.

In *Com. v. Beary*, 9 Pa. Super Ct. 246, the affidavit of defense alleged that the bond given in interpleader proceedings was void because of interlineations, but did not allege that the bond was not executed in its present form nor that there was any deception or misconception in connection with its execution, nor that the alteration was made



2. **By Party Claiming Benefit.** — In a special plea or answer setting up the alteration of an instrument as a defense, it must be alleged that such alteration was made by, or with the knowledge, or by the authority of a party claiming a benefit under the instrument.<sup>40</sup> But, an allegation of fraud is neither material nor necessary, as a general rule.<sup>41</sup>

3. **After Execution of Instrument.** — Such a plea or answer must also allege that the alteration was made after the execution of the instrument.<sup>42</sup>

to the advantage of the plaintiff. The affidavit was insufficient on account of these omissions.

In *McVey v. Ely*, 5 Lea (Tenn.) 438, 440, it was held that an averment in an answer that the note sued on had been changed so as to make it bear interest from date, by some one without defendant's knowledge or consent, after he had signed it. Held a sufficient averment of alteration, the court saying: "The argument is that *alteration*, in the legal sense, means a fraudulent change in the note by the payee, or by his direction, and as the answer does not aver by whom the change was made, it does not aver an alteration, but only a *spoliation*. The answer, however, does aver an *alteration*, and the word has a legal signification."

An allegation that a note which plaintiff had signed as surety for another, was after its execution fraudulently altered so as to make it a note for a larger specified sum, either by the administrator to whom it was executed, or by the principal in the note, and that this was done without the knowledge of the surety, was held sufficiently specific. *Hamblen v. Knight*, 60 Tex. 36.

**Immaterial Alteration no Defense.** — In an action on a promissory note, the defendant answered that shortly after the making of said note, and while it was in the possession of the payee, he wrongfully and without the consent of the defendant, altered the same by writing on the face thereof, "The time of payment of this note is hereby extended to July 1st, 1885," for the purpose of prolonging the negotiability thereof, so as to enable him to wrongfully negotiate the same. This was insufficient as a defense to the action. *Drexler v. Smith*, 30 Fed. 754.

40. **U. S.** — *United States v. Linn*, 1 How. (U. S.) 104, 114, 11 L. ed. 64. Cal. — *Sherman v. Rollberg*, 11 Cal. 38, 41; *Humphreys v. Crane*, 5 Cal. 173, 175. Ga. — *Shirley v. Swafford*, 119 Ga. 43,

45 S. E. 722; *Miller v. Slade & Farish*, 116 Ga. 772, 43 S. E. 69; *Burch v. Pope*, 114 Ga. 334, 40 S. E. 227; *Gwin v. Anderson*, 91 Ga. 827, 18 S. E. 43. Ind. — *Emmons v. Meeker*, 55 Ind. 321. Miss. *Bridges v. Winters*, 42 Miss. 135. Ohio. — *Tarbill v. Richmond City M. Works*, 2 Ohio C. C. 564.

**Assignee, Without Notice.** — A plea that the blank date of a note sued on was fraudulently filled by the payee with an improper date is good as against the payee, but not against his assignee for value before maturity, without an averment of notice to such assignee. *Overton v. Matthews*, 35 Ark. 146, 37 Am. Rep. 9.

**Contra.** — In an action upon a written instrument, a plea averring that after the same was executed by the defendant it was materially changed or altered without the knowledge or consent of the defendant, stating the particular alterations alleged to have been made, is sufficient, without an averment that the alterations were made after delivery of the instrument to the plaintiff, or that they were made by him, or by his knowledge or consent. *Hill v. Nelms*, 86 Ala. 442, 446, 5 So. 796.

41. *Eckert v. Pickel*, 59 Iowa 545, 13 N. W. 708, holding that a verdict and judgment for the defendant did not bar a subsequent action on the original consideration for which the note was given.

In Georgia, however, by statute, one who relies upon an alteration to vitiate the instrument sued upon and altogether avoid liability thereon, must allege that the alteration was made by a party claiming a benefit under the paper, with intent to defraud. *Thomason v. Wilson*, 127 Ga. 141, 56 S. E. 302; *Gwin v. Anderson*, 91 Ga. 827 18 S. E. 43.

42. **Cal.** — *Sherman v. Rollberg*, 11 Cal. 38, 41. **Ind.** — *Emmons v. Meeker*,

4. Ratification of Alteration. — A special plea or answer setting up a material alteration of an instrument sued on need not negative ratification of the alteration, as to do so would anticipate the matter upon which the plaintiff would rely to nullify the plea.<sup>43</sup> But a

55 Ind. 321. Neb. — *Hodge v. Scott*, 1 Neb. (Unof.) 619, 95 N. W. 837.

After Acceptance. — *Langton v. Lazarus*, 5 M. & W. (Eng.) 629, was an action against the acceptor of a bill of exchange by the endorsee. The defendant pleaded that before the bill became due, and whilst it was in full force and effect, the date of it was altered by the drawer whereby it became void. The plea was bad because it did not allege the alteration to have been made after acceptance.

In *Bowen v. Woodfield*, 33 Ind. App. 687, 72 N. E. 162, the appellee's third paragraph in his answer, "admits that he signed the note sued on, but says that thereafter, and without the knowledge or consent of the defendant, said note was materially altered, in this: that the following words appearing in said note, to wit, 'First National Bank, Lafayette, Ind.,' were written on the face of said note after defendant had signed the same; wherefore," etc. This was held insufficient, the court saying: "All this paragraph of answer undertakes to do is to allege that the alteration was made after appellee had signed the note. This is not equivalent to an allegation that the alteration was made after the note was executed, which includes both the signing and the delivery. The alteration may have been made after he signed it, without his knowledge or consent, but when the note was delivered he may have known the alteration had been made, and consented that it might stand in that form, as the signing and delivery of the note were separate and distinct acts."

*Farmers L. & Tr. Co. v. Siefke*, 144 N. Y. 354, 359, 39 N. E. 358, was a suit on a sealed promissory note. The answer aside from a general denial, alleged that the seal was affixed after execution without the consent or privity of the defendant. Upon the trial, the plaintiff introduced the instrument in evidence and rested. Defendant gave evidence tending to sustain the said allegations in the answer, which was met by evidence on behalf of the plaintiff, that the seal was attached before execution. The court charged in substance that after testimony had been

given showing that the seal was attached after the inception of the note, the burden rested upon the plaintiff to establish by a preponderance of evidence, that the seal was not so attached. It was held that as the pleadings stood, the fact alleged in the complaint that the defendant executed a sealed instrument was issuable, and having been put in issue, plaintiff was bound to establish it as a part of his case; that while the instrument itself, with proof that defendant signed it, made out a *prima facie* case, defendant was not concluded thereby, nor was the burden of proof shifted, and he having given evidence to the effect that the seal was not then attached, there was no error in the charge.

43. *Whitesides v. Northern Bank of Kentucky*, 10 Bush (Ky.) 501, 504, 19 Am. Rep. 74, was an action upon the following instrument:

\$1,569.

Office of Collier, Taylor & Co. }  
Franklin, Ky., June 10, 1873. }

Thirty days after date pay to the order of J. W. Whitesides fifteen hundred and sixty-nine dollars, and charge to account. Yours respectfully,

C. P. TAYLOR.

To Collier, Taylor & Co., Franklin, Ky.

Across the face of the paper is written: "Accepted, payable at First National Bank of Franklin, Ky." The bill was endorsed by Whitesides to the Northern Bank of Kentucky. After non payment and protest, said bank sued all the parties thereto. Whitesides in his answer averred, "that after he had indorsed the bill, and after it had been accepted by Collier, Taylor & Co., and had been delivered to the appellee and the contract thereby completed, the bank caused to be written over the names of the acceptors the words, 'Accepted, payable at the First National Bank of Franklin, Ky.,' and that this was done without the knowledge or consent of himself or of said acceptors, or of either of them." A demurrer was improperly sustained to this answer, because the answer presented a defense to the action, and it was not necessary for defendant to aver that neither he nor the acceptors of the bill ratified

defendant relying upon the ratification of an altered instrument must plead such ratification.<sup>44</sup>

**5. Forms of Answer Alleging Alteration will be found in the notes.<sup>45</sup>**

and confirmed the unauthorized alteration before the bill became due.

44. *Erickson v. First Nat. Bank*, 44 Neb. 622, 625, 62 N. W. 1078, 48 Am. St. Rep. 753, 28 L. R. A. 577, was an action to restrain the defendants from the negotiation of a certain promissory note, and for the cancellation of said note upon the ground that it had been materially altered and changed after its execution, by erasing the name of the original payee, and inserting in lieu thereof the name of the First Natl. Bank of Oakland, without the knowledge or consent of the plaintiff. The answer admitted that the defendant bank purchased the note and denied all other averments of the petition. Held that the defendants could not show upon the trial that plaintiff was estopped by ratification of the alteration, because such an issue was not raised by the pleadings, the court saying: "If the defendants desired to rely either upon an estoppel or ratification, they should have pleaded in the answer the facts upon which they base such defenses."

45. **Title of Action and Court.**—For answer to the plaintiff's complaint, the defendant says that he did not execute the note sued upon, in the form in which the same is declared upon, and copied in said complaint: that since he signed and delivered said note to the payee the same has been fraudulently altered by \_\_\_\_\_ in this respect, to wit, by inserting where they now appear in said note these words, "At First National Bank of Indianapolis." Wherefore, etc. See *Meikel v. State Sav. Inst. of Chicago*, 36 Ind. 355.

**Another Form.**—Adapted from *Draper v. Wood* 112 Mass. 313, 17 Am. Rep. 92.

The defendant for answer to the complaint of the plaintiff,

1. Denies that he made the note mentioned in said complaint.

2. Defendant says if it shall appear that the name signed to said note is in fact his signature, then after he signed his name to said note, and after its delivery, and before the commencement of this action, the plaintiff (or one acting by authority of the plaintiff)

fraudulently substituted the word "We" for "I" in the body of said note, and also, fraudulently added to the note as written at the time of the signing and delivery, the words, "at ten per cent.," and that said substitution and addition of words (or erasures as the case may be) were so made without the knowledge, authority or consent of the said defendant, whereby said note became void and of no effect against him. Wherefore plaintiff ought not to have or maintain his said action against him.

See also *Draper v. Wood*, 112 Mass. 313, 17 Am. Rep. 92.

In *Rogers v. Vosburgh*, 87 N. Y. 228, substantially the following form was approved:

Defendant for answer to the complaint of the plaintiff, admits the making of a note at the date, for the amount, and payable at the time specified in said complaint, but alleges that after the making and delivery of said note, and before the commencement of this action, the note so made by the defendant was fraudulently altered by the plaintiff, without the knowledge or consent of the defendant, by (here set out alteration), and that said note as so altered is the one upon which this action is based. Wherefore, etc.

**Form.**—Non est factum, and special plea, adapted from *Henderson v. Vermilyea & Gonsoles*, 27 U. C. Q. B. 544:

1st. The said defendant by his attorney \_\_\_\_\_ comes and defends the wrong and injury when, etc., and says that the supposed agreement mentioned in the declaration of the plaintiff is not his deed or act, and this he the said defendant is ready to verify.

2nd. And for a further plea in this behalf the said defendant says that the agreement set forth in the declaration of the plaintiff, was drawn up and prepared to be signed by defendant and one John Doe, whose names were inserted therein, and defendant signed the same and delivered it to one Richard Roe as an escrow to be kept by him, on the special condition that until said John Doe should sign, it should not be binding on the defendant: that afterwards said John Doe refused to execute and never did execute said



**IV. PRESUMPTIONS AND BURDEN OF PROOF.** — **A. PRESUMPTIONS.** — **1. General Rule.** — When nothing is shown to the contrary and the alteration itself does not appear suspicious, the presumption is that it was made prior to or contemporaneously with the execution of the instrument.<sup>45</sup>

agreement, and the plaintiff afterwards and without defendant's knowledge or consent, wrongfully erased the name of John Doe, and inserted the name of Henry Lowe the other defendant herein, who then was, and is an insolvent person, and the defendant never ratified or confirmed said agreement, and the same is wholly void as against him, and this the defendant is ready to verify.

**Form of Cross-Bill.** — *Waldron v. Waller*, 65 W. Va. 605, 64 S. E. 964, was an action to set aside a deed on account of material alteration thereof as to the description of the property, made by one Gaujot a surveyor who surveyed the land mentioned in the deed, and to reinvest title in the grantors. The defendant answered asking that her answer be treated as a cross-bill, and therein alleged, "That the strip of land purchased by her and her husband was not correctly described in the deed as originally made; that the change or alteration made therein by Gaujot was necessary to make it conform to the contract of purchase; that the land covered by the deed as changed and altered is the exact lot of land which the plaintiffs sold to her and her husband; that the change was made in the deed with the knowledge and consent of the plaintiffs, and without any fraudulent purpose or intent on the part of the grantees; that since then she has placed on the property large and valuable improvements, costing many hundreds of dollars, and has been in the actual possession and occupancy of the property described with the full knowledge and acquiescence of the plaintiffs therein until the institution of this suit; and that they are now seeking, with fraudulent purposes and by means thereof, to obtain from her and her children, for the paltry sum of \$100, the original purchase money tendered, property worth thousands of dollars." These allegations were not controverted by the plaintiffs. The court held that the allegations must be taken as true, and constituted good grounds for relief, and that they enti-

tled the defendants to a specific execution of the original contract, and a correction of the deed in conformity thereto, and to be quieted in their right and title to the land.

**Joinder of Defenses.** — *Citizens Bank v. Clason*, 29 Ohio St. 78, was an action by an endorsee against the maker of a promissory note. The defendant's answer for a first defense denied the making of the note, and for a second defense alleged that if the signature to the note was genuine, it was obtained by a cunningly devised scheme or trick, and that there was no valid consideration for the note, of which facts the endorsee had full knowledge when he took the note. The defendant had a right to insist on both these defenses, and the court erred in requiring him to elect upon which ground of defense he would rely.

**46. Ala.** — *Harper v. Reaves*, 132 Ala. 625, 32 So. 721. **Ark.** — *Klein v. Ger. Nat. Bank*, 69 Ark. 140, 61 S. W. 572, 86 Am. St. Rep. 183. **Conn.** — *Bailey v. Taylor*, 11 Conn. 531, 29 Am. Dec. 321. **Fla.** — *Kendrick v. Latham*, 25 Fla. 819, 6 So. 871. **Kan.** — *Neil v. Case & Co.*, 25 Kan. 510, 37 Am. Rep. 259. **Mich.** — *Wilson v. Hotchkiss' Estate*, 81 Mich. 172, 45 N. W. 838. **Minn.** — *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. 467, 12 Am. St. Rep. 754, 4 L. R. A. 196. **Mo.** — *Stillwell v. Patton*, 108 Mo. 352, 18 S. W. 1075; *Paul v. Leeper*, 98 Mo. App. 515, 72 S. W. 715; *Land & Lumb. Co. v. Mass Tie Co.*, 87 Mo. App. 167. **Neb.** — *Barber v. Stromberg-C. Tel. Mfg. Co.*, 81 Neb. 517, 116 N. W. 157, 129 Am. St. Rep. 703, 18 L. R. A. (N. S.) 680; *Dorsey v. Conrad*, 49 Neb. 443, 68 N. W. 685. **N. D.** — *Cass County v. American Ex. State Bank*, 9 N. D. 263, 83 N. W. 12. **Ore.** — *Crossen v. Oliver*, 37 Ore. 514, 61 Pac. 885. **S. D.** — *Ernster v. Christianson*, 123 N. W. 711; *North Western Mtg. Tr. Co. v. Leatzow*, 122 N. W. 600; *Foley W. Imp. Co. v. Solomon*, 9 S. D. 511, 70 N. W. 639. **Tex.** — *Collins v. Ball*, 82 Tex. 259, 27 Am. St. Rep. 877; *McKenzie v. Barrett*, 43 Tex. Civ. App. 451, 98 S. W. 229; *Tutt's Heirs v. Mor-*

**2. Exceptions.**—In New Hampshire, every alteration of an instrument is presumed to have been made after its execution.<sup>47</sup>

gan, 18 Tex. Civ. App. 627, 46 S. W. 122. Wash.—Stockand v. Hall, 54 Wash. 106, 102 Pac. 1037; Blewett v. Bash, 22 Wash. 536, 61 Pac. 770; Kleebar. Bard, 12 Wash. 140, 40 Pac. 733.

In Cox v. Palmer, 1 McCrary (U. S.) 431, 3 Fed. 16, the court said: "If the interlineation is in itself suspicious, as, if it appears to be contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words; or if it is in a handwriting different from the body of the instrument, or appears to have been written with different ink,—in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution," and the onus would rest with the party offering the instrument to explain it. "On the other hand if the interlineation appears in the same handwriting with the original instrument, and bears no evidence on its face of having been made subsequent to the execution of the instrument, and especially if it only makes clear what was the evident intention of the parties, the law will presume that it was made in good faith, and before execution;" and in the latter cases the onus would be cast upon the party alleging an unauthorized alteration, to show that it was unauthorized in fact. See also City of Orlando v. Gooding, 34 Fla. 244, 15 So. 274; where the above quoted language was approved.

In Ward v. Cheney Tr., 117 Ala. 238, 22 So. 996, the court said that where alterations, erasures, or interlineations are "apparent on the face of a deed, and nothing appears to the contrary, the presumption is that they were made contemporaneously with the execution of the instrument. But, if any ground of suspicion is apparent upon the face of the instrument, the law presumes nothing; it leaves the question of the time, the agency, and the intent, with which they were made, as matters of fact to be determined by the jury." See also, Newland v. First Baptist Church, 137 Mich. 335, 100 N. W. 612; Rosenbloom v. Finch, 37 Misc. 818, 76 N. Y. Supp. 902.

In Kilpatrick v. Wiley, 197 Mo. 123, 163, 95 S. W. 213, the court said: "Erasures and interlineations are but or-

dinary incidents in the genesis of a contract. Of themselves, without other indicia of spoliation or fraudulent intent, they amount to nothing, and furthermore, in the absence of proof to the contrary, they are presumed to have been made prior to its execution."

Where it is admitted that the signatures to a written instrument are genuine, the presumption will be entertained that any and all alterations appearing over such signatures were made before signing, and the burden of proof in such case will be upon the one alleging that the alteration was made after the instrument was executed, and without the consent of the makers. Richardson v. Fellner, 9 Okla. 513, 521, 60 Pac. 270.

If there are suspicious circumstances apparent on the face of an instrument offered in evidence, the court may let in testimony to be weighed by the triers of the facts, as to when the alterations were made, and whether they were made by a party beneficially interested, subsequent to acknowledgment and delivery. Kalbach v. Mathis, 104 Mo. App. 300, 304, 78 S. W. 684.

**Public Record.**—Alterations or interlineations made or appearing in a public record are presumed to have been made in a proper manner by the person having the care and custody thereof, or by some one in his office having authority to do so. Hommel v. Devinney, 39 Mich. 522.

Parshall v. Clark (Tex. Civ. App.), 77 S. W. 437, was a suit in county court on appeal from Justice court. The appeal bond showed on its face that it had been materially altered, but did not show that such alteration was made after its execution, and there was no evidence to that effect. The county court on motion dismissed the appeal on account of said alteration. This was error.

**Same Pen and Ink.**—A material alteration made by interlineation on an instrument appearing to have been written with the same pen and ink as the body of the instrument is presumed to have been made before the execution of the instrument, otherwise no such presumption arises, and other evidence is required to explain it. Robinson v. Myers, 67 Pa. 9, 16.

47. Dow v. Jewell, 18 N. H. 340, 45

In Louisiana, following the old Civil law rule, erasures or interlineations in the substantial part of an instrument are presumed to be false and forged.<sup>48</sup>

In Missouri a material alteration of an instrument is *prima facie* fraudulent.<sup>49</sup>

And in Iowa an alteration in a note increasing the amount for which it is payable, is presumed to be fraudulent.<sup>50</sup>

In Arkansas and Illinois there is no presumption as to when an alteration was made.<sup>51</sup>

**B. BURDEN OF PROOF. — 1. General Rule. —** A plaintiff relying upon a written instrument as the basis of his recovery has the burden from first to last of establishing everything that is essential to uphold his case.<sup>52</sup> The "burden of proof," in this sense of the term, never shifts. But when the plaintiff adduces "some evidence to which the law assigns, *prima facie*, a certain degree of probative effect his adversary comes under the burden of meeting the presumption thus raised against him by evidence of greater weight."<sup>53</sup>

**2. When Alteration Is Apparent. —** When a written instrument clearly shows upon its face that it has been altered in some material part, such as its date, or the time or place of payment, or its amount, it is incumbent upon the party producing it, and claiming under it, to remove the suspicion thus raised, as to the genuineness of the instrument, by accounting for the alteration.<sup>54</sup>

Am. Dec. 371 (a deed); *Hills v. Barnes*, 11 N. H. 395 (a promissory note).

In *Burnham v. Ayer*, 35 N. H. 351, 354, the court said: "Although a different rule prevails in other jurisdictions, it has been holden, and may be regarded as settled in this State, that in the absence of evidence or circumstances from which an inference can legitimately be drawn as to the time when it was actually made, every alteration of an instrument will be presumed to have been made after its execution."

48. *Messi v. Frechede*, 113 La. 679, 687, 37 So. 600; *Wheadon v. Turregano*, 112 La. 931, 36 So. 808; *McMicken v. Beauchamp*, 2 La. 290; *Pipes v. Hardesty*, 9 La. Ann. 152, 61 Am. Dec. 202.

49. *McCormick Harv. Mach. Co. v. Blair* (Mo. App.), 124 S. W. 49, 52.

50. *Maguire v. Eichmeier*, 109 Iowa 301, 80 N. W. 395.

51. *Klein v. German Natl. Bank*, 69 Ark. 140, 144, 61 S. W. 572, 86 Am. St. Rep. 183; *Landt v. McCullough*, 206 Ill. 214, 69 N. E. 107; *Merritt v. Boyden*, 191 Ill. 136, 60 N. E. 907, 85 Am. St. Rep. 246; *Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 54 N. E. 214, 72 Am. St. Rep. 216; *Grand Lodge A. O. U. W. v. Young*, 123 Ill. App. 628.

52. "The question presented for decision as to whether the alterations were authorized or unauthorized was simply beclouded by an appeal to the rules respecting burden of proof as applicable to presumptions arising in the course of a trial. It was to be decided in view of all the circumstances before the court, and guided by no other rule as to the *onus probandi* than that which requires a plaintiff, where the defense is a denial, to prove his case." *Baxter v. Camp*, 71 Conn. 245, 41 Atl. 803, 71 Am. St. Rep. 169, 42 L. R. A. 514; *Bailey v. Taylor*, 11 Conn. 531, 29 Am. Dec. 321.

For a statement of the rules of evidence relating to this title see *ENCYCLOPEDIA OF EVIDENCE*, title "Alteration of instruments."

53. *Baldwin, J.*, in *Baxter v. Camp*, 71 Conn. 245, 41 Atl. 803, 71 Am. St. Rep. 169, 42 L. R. A. 514.

The alleged alteration of a written instrument sued on is a matter of defense, and the burden of proof is on the defendant. *Galloway v. Bartholomew*, 44 Ore. 75, 74 Pac. 467.

54. **U. S.** — *Rogers v. Page*, 140 Fed. 596, 602, 72 C. C. A. 164; *Cox v. Palmer*, 3 Fed. 16. **D. C.** — *Towles v. Tanner*, 21 App. Cas. 530, 543. **Idaho.** — *Mul-*



**3. When Alteration Is Not Apparent.**—If, upon the inspection of an instrument, it is not plainly certain that it has been altered since its execution, the burden is upon the party relying on such alteration, to prove it.<sup>55</sup>

key *v. Long*, 5 Idaho 213, 47 Pac. 949. Ill.—*Merritt v. Dewey*, 218 Ill. 559, 75 N. E. 1066, 109 Am. St. Rep. 302; *Pyle v. Oustatt*, 92 Ill. 209, 213; *Dewey v. Merritt*, 106 Ill. App. 156; *Landt v. McCullough*, 103 Ill. App. 668, 670. Kan.—*J. I. Case Threshing Mach. Co. v. Peterson*, 51 Kan. 713, 33 Pac. 470. Mich.—*Sanberg v. American Ex. Co.*, 136 Mich. 639, 99 N. W. 879. Mo.—*Stillwell v. Patton*, 108 Mo. 352, 360, 18 S. W. 1075; *Bank v. Manning*, 133 Mo. App. 294, 113 S. W. 251. N. H.—*Dow v. Jewell*, 18 N. H. 340, 45 Am. Dec. 371. N. C.—*Martin v. Buffalo*, 121 N. C. 34, 27 S. E. 995. N. D.—*Cass County v. American Ex. State Bank*, 9 N. D. 263, 83 N. W. 12. Pa.—*Franklin Trust Co. v. Philadelphia B. & W. R. Co.*, 222 Pa. 96, 70 Atl. 949, 22 L. R. A. (N. S.) 828; *Colonial Trust Co. v. Getz*, 28 Pa. Super. Ct. 619; *Sunday v. Dietrich*, 16 Pa. Super. Ct. 640; *German-Am. Bank v. Gage*, 4 Pa. Super. Ct. 505. Tenn.—*Riseden v. Harrison*, 42 S. W. 884. Tex.—*Davis v. Crawford*, (Tex. Civ. App.), 53 S. W. 384; *Kalteyer v. Mitchell*, 102 Tex. 390, 117 S. W. 792; *Pope v. Taliaferro* (Tex. Civ. App.), 115 S. W. 309, 312; *McKenzie v. Barrett*, 43 Tex. Civ. App. 451, 98 S. W. 229. Va.—*Bashaw v. Wallace*, 101 Va. 733, 45 S. E. 290; *Slater v. Moore*, 86 Va. 26, 9 S. E. 419. W. Va.—*Philip Carey Mfg. Co. v. Watson*, 58 W. Va. 189, 52 S. E. 515.

In *Baxter v. Camp*, 71 Conn. 245, 259, 41 Atl. 803, 71 Am. St. Rep. 169, 42 L. R. A. 514, the court, by Baldwin, J., said: "There was no sufficient ground for any presumption, either of law or fact, which could throw upon the defendant the burden to which he was thus subjected. The plaintiff's case rested on a document, the defendant's signature to which had plainly been the subject of erasure, alteration or cancellation. He was bound to prove that the defendant's signature was still upon it, or else that it was upon it when delivered to Mrs. Camp, and had not since been canceled with her consent. The document did not, alone, establish either fact. Proof that the defendant canceled his signature raised no presumption that it was canceled without his wife's consent. Fraud is

never presumed; and still less crime."

Under a plea of *non est factum*, to a bond sued on, where an alteration therein appears upon its face, the burden of proof is upon the plaintiff to show that defendants executed the identical bond sued on. *State ex rel. Jackson County v. Chick*, 146 Mo. 645, 657, 48 S. W. 829.

Where alterations appear in a written instrument, beneficial to the holder thereof, the presumption is against the party seeking to recover thereon; and he is required to explain such alteration before recovery is permitted. *In re Pinkerton's Estate*, 49 Misc. 363, 99 N. Y. Supp. 492.

In an action on a promissory note branded and condemned by blemishes or erasures on its face, the burden of proof is upon the plaintiff to show that it was in that form when executed and delivered by the maker, or was subsequently assented to by him. *Marshall v. Wilhite*, 4 Ohio C. C. 203.

55. U. S.—*Sturn v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. ed. 1093. Fla.—*Orlando v. Gooding*, 34 Fla. 244. Ill.—*Merritt v. Dewey*, 218 Ill. 559, 75 N. E. 1066, 109 Am. St. Rep. 302. Ind.—*Fudge v. Marquell*, 164 Ind. 447, 453, 72 N. E. 565, 73 N. E. 895; *North America Ins. Co. v. Brim*, 111 Ind. 281, 12 N. E. 315. Ia.—*Odell v. Gallup*, 62 Iowa 253, 17 N. W. 502. Ky.—*Marion Nat. Bank v. Russell*, 13 Ky. L. Rep. 332. Mass.—*Davis v. Jenney*, 1 Mete. 221. Mich.—*Sirrine v. Briggs*, 31 Mich. 443. Miss.—*Jackson v. Day*, 80 Miss. 800, 31 So. 536. Pa.—*Bank v. Gage*, 4 Pa. Super. Ct. 505. S. D.—*Cosgrove v. Fanebust*, 10 S. D. 213, 72 N. W. 469; *Foley-W.-Imp. Co. v. Solomon*, 9 S. D. 511, 70 N. W. 639. Wash.—*Slyfield v. Willard*, 43 Wash. 179, 86 Pac. 392.

*McClintock v. State Bank*, 52 Neb. 130, 71 N. W. 978, was a suit on a promissory note, and the defense was that the note had been materially altered after its execution and delivery. The court instructed the jury "that if the note in controversy on its face does not show any evidence of having been altered as charged by defendants in their answer, then the burden of proof

4. **When Alteration Is Pleaded.** — In some jurisdictions, the pleading of an alteration in an instrument casts the burden upon the holder to explain the alteration.<sup>56</sup>

5. **When Alteration Is Proved.** — When the fact of alteration is established, but the proof does not disclose how, by whom, or when it was done, the burden of proof is upon the party in possession of the paper, and who is attempting to enforce its performance, to show how the alteration occurred, and upon his failure to do so, no recovery can be had upon it.<sup>57</sup>

**V. QUESTIONS OF LAW AND FACT.** — **A. MATERIALITY OF ALTERATION.** — Where an alteration appears in an instrument sued upon, the materiality of such alteration is a question to be determined by the court in the first instance.<sup>58</sup>

is upon the defendants to show such alteration by a preponderance of the testimony." This was not error.

In an action for a commission for the sale of land, an instruction that if plaintiff changed the contract of sale without the knowledge or consent of the defendant "by striking out the rate of interest to be paid, it was a material alteration thereof, and that the sale was not made upon the terms authorized and would not bind the defendant, or entitle the plaintiff to his commission, unless it was shown that the defendant consented to such change before the execution and delivery of a deed of the land," was held to be correct and sufficiently explicit. *Robertson v. Vasey*, 125 Iowa 526, 101 N. W. 271.

56. *Cape Ann Nat. Bank v. Burns*, 129 Mass. 596; *Kelley v. Theuy*, 143 Mo. 422, 45 S. W. 300.

Where an instrument is the subject of an action and the defendant pleads *non est factum*, or alleges that the instrument was altered in a material part after execution by a party claiming a benefit under it, with intent to defraud, the burden of proof is upon the plaintiff to explain the alteration. *Winkles v. Guenther*, 98 Ga. 472, 25 S. E. 527.

*Brown v. Colquitt*, 73 Ga. 59, 54 Am. Rep. 867, was a *scire facias* to forfeit a criminal bond upon which plaintiff in error was surety. He answered that he signed the bond when there was no obligee or penalty set forth, and that the name of the obligee and the amount of the penalty were inserted therein in his absence. This was held not to be a general plea of *non est factum*, but special, and that he was bound to sustain it by proof.

In *Wreckoff v. Johnson*, 2 S. D. 91, 94, 48 N. W. 837, the subject of the action

was a promissory note for \$1,000, which had been altered to show that it was for \$1,060, but said note as described in the complaint was the note as originally made for \$1,000,—not as it was after alteration. The defendant's answer did not deny the making of this note as it was originally, but admitted the making of it, and then pleaded facts in avoidance of it, to wit, a material and unauthorized alteration, alleging that by reason of said alteration the note sued on was not his note and that he never made or delivered it to the payee, nor to any person whomsoever. This answer cast upon the defendant the burden of proving the new matter set up in it.

57. *Ia.* — *Maguire v. Eichmeier*, 109 Iowa 301, 80 N. W. 395. *Ky.* — *Mitchell v. Reed's Exr.*, 32 Ky. L. Rep. 683, 106 S. W. 833. *Wash.* — *Stockand v. Hall*, 54 Wash. 106, 102 Pac. 1037.

Where the plaintiff admits a material change of the contract sued on, the burden is on him to show that the alteration was not fraudulent. *Robertson v. Vasey*, 125 Iowa 526, 101 N. W. 271.

When a material alteration in an instrument made after its execution is made to appear, the party producing the instrument has the burden of explaining the alteration. He must show that the change was made under circumstances rendering it lawful, and unless he does so, it will be presumed to have been made by the party producing it, or with his privity, and fraudulently in so far as legal fraud attaches to a wilful change of an agreement by one of the parties thereto. *Philip Carey Mfg. Co. v. Watson*, 58 W. Va. 189, 52 S. E. 515, 517.

58. *U. S.* — *Steele v. Spencer*, 1 Pet.

**Directing Verdict.**—Where it clearly appears to the court that a material alteration has been made in the instrument sued on, after its execution, and such alteration is unexplained, the court is justified in directing a verdict for the defendant.<sup>59</sup>

**B. ALTERATION APPARENT, OR SUSPICIOUS.**—Whether or not an alleged alteration of instrument is apparent on the face of it, is for the court to determine.<sup>60</sup> Also, whether such alteration appears to be suspicious.<sup>61</sup>

**C. FACT OF ALTERATION, TIME, PLACE, PURPOSE, AND PERSON.**—The facts as to the time when an alleged alteration was made, the purpose for which it was made, and the person by whom it was made, are matters for the determination of the jury.<sup>62</sup>

552, 7 L. ed. 259. **Ala.**—Payne v. Long, 121 Ala. 385, 25 So. 780; Ward v. Cheney, 117 Ala. 238, 22 So. 996. **Colo.**—Huston v. Plato, 3 Colo. 402. **D. C.**—Ofenstein v. Bryan, 20 App. Cas. 1, 20. **Ga.**—Hill v. Cole Bros. L. R. Co., 66 S. E. 280; Bedgood-Howell Co. v. Moore, 123 Ga. 336, 51 S. E. 420; Heard v. Tappan & Merritt, 116 Ga. 930, 43 S. E. 375; Winkles v. Guenther, 98 Ga. 472, 25 S. E. 527. **Ky.**—Blades v. Robbins, 9 Ky. L. Rep. 197. **Md.**—Merchants' Bank v. Steamboat Co., 102 Md. 573, 580, 63 Atl. 108. **Mass.**—Ibrahim v. Middleby, 185 Mass. 349, 70 N. E. 416; Ely v. Ely, 6 Gray 439; Ives v. Farmers' Bank, 2 Allen 236. **Mo.**—State v. Dean, 40 Mo. 464. **Neb.**—Dorsey v. Conrad, 49 Neb. 443, 68 N. W. 645. **N. H.**—Burnham v. Ayer, 35 N. H. 351, 354; Bowers v. Jewell, 2 N. H. 543. **Va.**—Keen's Exr. v. Monroe, 75 Va. 424, 427. **W. Va.**—Philip Carey Mfg. Co. v. Watson, 58 W. Va. 189, 52 S. E. 515.

The materiality of an alleged alteration of an instrument is not a question for the jury, and an instruction referring such question to the jury is reversible error. *Payne v. Long*, 121 Ala. 385, 25 So. 780.

59. *Bowers v. Rineard*, 209 Pa. 545, 58 Atl. 912; *Williams Type W. Co. v. Cleaver*, 38 Pa. Super. Ct. 376, 381.

60. *Ward v. Cheney*, 117 Ala. 238, 22 So. 996; *Franklin Trust Co. v. Philadelphia B. & W. R. Co.*, 222 Pa. 96, 70 Atl. 949, 22 L. R. A. (N. S.) 828.

The proper practice when a note is offered in evidence which appears to have been altered, is for the court to determine upon inspection, and in view of the state of the evidence at the time, whether further proof in explanation of the alterations shall then be required before the instrument be admit-

ted. His action in this respect rests upon his sound discretion, to the exercise of which, no exception lies. *Wood v. Skelley*, 196 Mass. 114, 81 N. E. 872, 124 Am. St. Rep. 516.

*Contra.*—In an action against the endorser of a note alleged to have been altered, the question as to whether the note bore upon its face such evidence of alteration as to charge the holder with notice of its infirmity is for the jury to determine. *First Natl. Bank v. Girdley*, 112 App. Div. 398, 98 N. Y. Supp. 445.

61. *Stillwell v. Patton*, 108 Mo. 352, 360, 18 S. W. 1075.

62. **Ark.**—Klein v. German Nat. Bk., 69 Ark. 140, 144, 61 S. W. 572, 86 Am. St. Rep. 183. **Colo.**—Huston v. Plato, 3 Colo. 402. **D. C.**—Ofenstein v. Bryan, 20 App. Cas. 1, 22. **Ga.**—Bedgood-Howell Co. v. Moore, 123 Ga. 336, 51 S. E. 420; Heard v. Tappan & Merritt, 116 Ga. 930, 43 S. E. 375. **Kan.**—Neil v. J. I. Case & Co. 25 Kan. 510. **Md.**—Schwartz v. Wilmer, 90 Md. 136, 44 Atl. 1059. **Mass.**—Newman v. Wallace, 121 Mass. 323. **Minn.**—Bull Remedy Co. v. Boyer, 124 N. W. 20; Wilson v. Hayes, 40 Minn. 531, 42 N. W. 467, 12 Am. St. Rep. 754, 4 L. R. A. 196. **Mo.**—State to Use etc. v. Dean, 40 Mo. 464; McCormick Harv. Mach. Co. v. Blair (Mo. App.), 124 S. W. 49. **Neb.**—Dorsey v. Conrad, 49 Neb. 443, 68 N. W. 645; Stough v. Ogden, 49 Neb. 291, 68 N. W. 516. **Okla.**—Farmers Nat. Bank v. McCall, 106 Pac. 866. **N. Y.**—Booth v. Powers, 56 N. Y. 22; Mosher v. Davis, 41 App. Div. 622, 58 N. Y. Supp. 529. **Ohio.**—Coghlin v. Coghlin, 29 Ohio C. C. 251, 253. **S. D.**—Moddie v. Breiland, 9 S. D. 506, 70 N. W. 637. **Tex.**—McDonald v. Nalle, 41 Tex. Civ. App. 499, 91 S. W. 632. **Va.**—Keen's Exr. v. Monroe, 75 Va. 424, 427.



**D. RATIFICATION OF ALTERATION.**—The question as to whether or not the defendant ratified an alteration in the instrument sued on, should be submitted to the jury by instruction of the court.<sup>63</sup>

When the genuineness of an instrument is denied under oath, the time when, and the intention with which, a change in it was made, are questions of fact for the jury. *Winkles v. Guenther*, 98 Ga. 472, 25 S. E. 527.

In *Cote v. Hills*, 44 N. H. 227, 234, the court said: "The proper rule is, that the instrument, with all the circumstances of its nature, its history, the appearance of the alteration, the possible or probable motives to the alteration, or against it, on the part of all persons connected with it, or in whose possession it may have been, and the effect of the alteration upon the rights and obligations of the parties, respectively, ought to be submitted to the jury, who would find from all these whether the alteration was made before or after its execution, and if after, whether it was with the assent of the adverse party, and consequently whether it rendered the instrument invalid or not. Whether the handwriting of the alteration is the same with the body of the instrument, whether it is the same with that of the signature, whether the ink is the same or different, whether, from the appearance, the body of the instrument and the alteration were written at the same time or at different times, whether the party claiming or the party sought to be charged is to be benefited by it, whether the alteration was made before or after its execution, and if after, by whom, and for what purpose, are all questions of fact for the consideration of the jury."

In *Hill v. Cole Bros. L. R. Co. (Ga.)*, 66 S. E. 280, 281, the court said: "On an issue of *non est factum*, where the signer of a writing admits his signature thereto, but insists that a material alteration has been made therein, the materiality of the alteration is a question for the determination of the court in the first instance; but, where the alteration may be prejudicial in its effect upon the complaining party, the question as to whether an alteration was made after the instrument was signed should always be submitted to the jury, for, if the jury find that the alteration was made, the plaintiff is obliged to establish his contract by evi-

dence extrinsic, and for that reason the defendant becomes entitled to show, even by parol, what were the terms of the contract before the alteration was made, or that the alteration was such as to destroy the contract, or that without the alteration no contract would have been created."

*Gurley Bros. v. Bunch*, 130 Mo. App. 665, 108 S. W. 1109, was a suit in replevin for the possession of a horse, basing title on a chattel mortgage. The defense was that the mortgage had been altered since its execution. The court instructed the jury "that, if the mortgage had been changed since the beginning of this suit by plaintiffs or their authorized agents, they would find for the defendant; . . . and that if such change had been made, before the jury could find for the defendant, they must further find that the alteration was made by plaintiffs, or by some one authorized by them to do so." This was held to declare the law of the case.

63. *Bracken County Comrs. v. Daum*, 80 Ky. 388, was an action against sureties on a sheriff's bond. It appeared that ten persons, including appellees, signed a power of attorney authorizing the clerk of the county court to sign their names to the bond, and before the power of attorney was delivered to the clerk, the sheriff erased from it one or two names. The appellees alleged that said erasures were made without their knowledge or consent, etc., and that the county judge whose duty it was to take the bond and approve the sureties, erased or permitted one of the ten persons who signed the power to be erased from it on the day he accepted and approved the bond. Appellees denied knowledge of this action, or that they consented to or ratified it. Issue was joined on the plea of *non est factum*, and ratification. The court instructed the jury in substance, that if the names were erased from the power without the knowledge or assent of the sureties, and with the knowledge or by the direction of the county judge, they should find for the sureties, unless the sureties subsequently treated the bond as an existing obligation, and thus ratified it. This instruction was proper.

**E. GOOD FAITH OF PLAINTIFF.**—Where the defense to an action by the endorsee of a note, is alleged alteration thereof, it is error for the court to take from the jury by instructions the consideration of the plaintiff's good faith.<sup>64</sup>

**F. KNOWLEDGE OF DEFENDANT.**—An instruction submitting to the jury the question as to whether the defendant had knowledge of the alteration of the instrument sued on, is error unless such question is raised by the pleadings.<sup>65</sup>

**G. APPEARANCE OF INSTRUMENT.**—It has been held proper for the court to instruct the jury as to the apparent effect of an instrument bearing evidence of alteration.<sup>66</sup>

**H. CREDIBILITY OF WITNESS.**—It is error for the court to take from the jury by instructions the right to pass upon the credibility of a witness testifying about an alleged alteration of the instrument which is the subject of the action.<sup>67</sup>

**I. WILFUL SUPPRESSION OF INSTRUMENT.**—The court may properly instruct the jury that the wilful suppression of an alleged altered instrument is a circumstance unfavorable to the party in possession thereof.<sup>68</sup>

**J. USE OF MAGNIFYING GLASS.**—Where witnesses use a magnifying glass in connection with their testimony concerning an instrument

64. *Pope v. Branch County Sav. Bk.*, 23 Ind. App. 210, 54 N. E. 835.

65. *Capital Bank v. Armstrong*, 62 Mo. 59, 65, was an action against an endorser, upon two promissory notes. The answer admitted the genuineness of the endorsement, but alleged as special matters of defense, that the notes had been altered without his knowledge, authority or consent by inserting therein the words "with interest at 10 per cent per annum after maturity." This was denied in the reply of the plaintiff. Upon the trial the court submitted to the jury by instructions the question as to whether the interest clauses were inserted in said notes by the authority or with the knowledge or consent of the defendant. This was error, because this issue was not raised by the pleadings.

66. In *Lesser v. Scholze*, 93 Ala. 338, 9 So. 273, the note sued on was described in the complaint as dated April 25th, 1884, and issue was joined on a plea which alleged that the date was altered after the defendant signed the note. The note being offered in evidence appeared to bear the date named, but showed marks of alteration. The court instructed the jury that the apparent date of the note was as alleged

in the complaint without submitting that question to the jury. This was proper.

But see *Pope v. Branch County Sav. Bank*, 23 Ind. App. 210, 54 N. E. 835, where it was held that an instruction that the note sued on was regular upon its face, was erroneous, for the reason that it was the province of the jury to determine that question.

67. *Colonial Trust Co. v. Getz*, 28 Pa. Super. Ct. 619, 633, was an action against the indorser of a promissory note. The issue under the pleadings was, whether the note was altered in a material part after it was endorsed by the defendant. The court instructed the jury that under the evidence the question was, "whether there was any alteration in the particulars claimed by the defendant before the negotiation of the note and after it was endorsed by the defendant." This was put upon the ground that the testimony of the plaintiff's witness that it was not altered after it came into the plaintiff's hands was uncontradicted. This instruction was erroneous, as it took from the jury the right to pass upon the credibility of the witness.

68. *Hager v. Hager*, 38 Barb. (N. Y.) 92, 97.

alleged to have been altered, the court should permit the jury to use the same.<sup>69</sup>

K. EXCLUDING ALTERED INSTRUMENT FROM JURY. — The court may withdraw from the jury an altered instrument after it has been admitted in evidence,<sup>70</sup> and may refuse to allow the jury to inspect an instrument where the question of alteration is not raised by the pleadings.<sup>71</sup>

69. *Grand Lodge A. O. U. W. v. Young*, 123 Ill. App. 628.

70. *Brady v. Berwind-White Coal M. Co.*, 106 Fed. 824, 827, 45 C. C. A. 662.

71. In *Shelton v. Reynolds*, 111 N. C. 525, 16 S. E. 272, the defendant's counsel, while addressing the jury, handed

them the contract and asked them to look at it, and say whether it had been interlined and changed. The court stopped the counsel, and said there was no allegation in the answer of any interlining or alteration, and no evidence had been offered as to either, and that evidence should be offered to the ears of the jury, and not to their eyes.

Vol. I



# AMENDMENTS AND JEOPAILS

By CLARK ROSS MAHAN

Author of *Attachment, Corporations, Handwriting, Patents, Taxation, etc.*, in  
THE ENCYCLOPAEDIA OF EVIDENCE.

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**CROSS-REFERENCES:**

Appeals;

Judgment;

Process.

VOL. I

# I. INTRODUCTORY AND HISTORICAL. — A. SCOPE STATEMENT.

This article is intended to embrace and treat of matters of practice and procedure in respect of the amendments of pleadings in actions and proceedings generally. The rules of procedure in respect of the amendment of pleadings in special actions or special proceedings will be discussed in the appropriate titles.<sup>1</sup>

B. DEFINITIONS. — An amendment of a pleading is defined to be the correction of some error or mistake therein.<sup>2</sup> This definition has been criticised, however, as a very narrow one, not warranted either by the etymology of the word, or by the practice respecting amendments, as it has existed from the earliest period.<sup>3</sup>

C. HISTORICAL.—1. Origin and Progress.—Probably no better statement in respect of the origin and progress of amendments to pleadings at common law, and under the statutes of jeofails, can be made than that made by Senator Clinton in an early New York case.<sup>4</sup>

1. For a treatment of the amendments in particular instances, see the various appropriate titles throughout this work.

2. *Givens v. Wheeler*, 6 Colo. 149; *Woodruff v. Dickie*, 5 Robt. (N. Y.) 619. And see *In re Sims*, 9 Fed. 440; *Shroyer v. Pittenger*, 31 Ind. App. 158, 67 N. E. 475.

"The object of an amendment is to add something to or withdraw something from that which has been previously pleaded, so as to perfect that which is or may be deficient, or correct that which has been incorrectly stated by the party making the amendment." *Knights of Maccabees v. Cox*, 25 Tex. Civ. App. 366, 60 S. W. 971. And see *Eagle & Phenix Mills v. Muscogee Mfg. Co.*, 129 Ga. 712, 59 S. E. 804; *Louisville & N. R. Co. v. Pointer's Admr.*, 113 Ky. 452, 69 S. W. 1108.

3. *Diamond v. Williamsburgh Ins. Co.*, 4 Daly (N. Y.) 494, where Daly, Ch. J., reviews at great length the history of the law of amendments. In the course of his opinion, he says: "As a law term, the simple definition of amendment given by Rastall, Cowell or Blount, our earliest expositors of law terms, is the espying out of some error in the proceedings and the correcting of it before judgment and after, if the error be not in the giving of the judgment, the remedy in that case being by writ of error. When therefore, a defendant is allowed to withdraw a plea or answer, because it does not set up the defense which he has and put in its stead a plea or answer which does, it is a change for the better, and is therefore an amendment as defined by the

lexicographers; nor is the statement correct that an amendment can be allowed only where there is something to amend by, for amendments have been allowed where that objection existed and the point was expressly taken (*Carr v. Shaw*, 7 Term R. 299; *Rutherford v. Mein*, 2 Smith, K. B. 392; *Gilbert's Com. Pleas*, p. 116, 3rd ed.)." See also *Robertson v. Robertson*, 9 Daly (N. Y.) 44, 55.

4. "The origin and progress of amendments at common law, and under the statutes of *jeofails*, exhibit a curious portion of legal history. At one period, parties were so much harassed by writs of error, brought for mistakes in orthography, or the slightest clerical misprisions, that the chances for justice were forlorn. Redress, in a very limited form, was, indeed, granted at common law. This at first was not extended beyond the term in which the judicial act was done; for during the term, the record was supposed to be in the recollection of the court; but, afterwards, no alteration was admitted. At a subsequent period, the rule was more liberally extended; and all the proceedings were considered as only *in fieri*, and subject to the control of the court, at any time before judgment was rendered and enrolled. Such, however, was the general conduct of the courts of common law in *England*, that justice was entangled in a net of technical form, and the parliament was compelled, by twelve different statutes, denominated the statutes of amendments and *jeofails*, to interfere, and remedy the enormous evil. The amendments, authorized by these statutes, are sel-

**2. Statutes.**—While, as will appear in subsequent sections of this article, it was recognized that the courts, even at common law, had inherent power to allow pleadings to be amended in furtherance of justice, yet statutory provisions expressly recognizing this power of the court and the right of the parties have been enacted by the legislatures of many, if not most of the states.<sup>5</sup> But these statutes are generally regarded as merely declaratory of the common law.<sup>6</sup>

**D. PLEADINGS AMENDABLE.—1. In General.**—Of course, since the term “pleading” is the written statement by the respective parties of facts constituting their respective claims and defenses, any treatment of the law of amendments to pleadings must of necessity embrace any pleading such as declaration, complaint, petition, answer, cross-complaint, reply, etc.<sup>7</sup>

**2. Demurrers.**—And this of course includes demurrers.<sup>8</sup>

**3. Motion for New Trial.**—A motion for a new trial has, however, been held not susceptible of amendment.<sup>9</sup>

**4. Dilatory Pleas.**—Dilatory pleas are not amendable.<sup>10</sup> An excep-

dom, if ever, actually made; but their benefit is attained by the courts overlooking the exception. This is an important idea to bear in mind in the decision of this question; for the present application is founded on amendments, made under the statute, and our statute is a transcript of the different acts, passed on this subject, by the *British* parliament. The first enacting section of our statute, which declares, ‘that no record, or process, shall be annulled or discontinued, by mistaking, in writing, one syllable, or one letter too much or too little,’ shows the little reliance to be reposed in courts, who would thus overlook the right of the case, and sacrifice the interests of justice to the trifling errors of pleaders and clerks.” *Cheetham v. Tillotson*, 4 Johns. (N. Y.) 499.

**5.** No statement in respect of the substance of these various statutes will be here attempted, for the reason that the subsequent sections of this article and the cases cited will treat of the application of the statutes.

In Connecticut, there was no statutory regulation applying directly to amendments of declarations until 1794, but the courts independent of any statute exercised the power of allowing such amendments in furtherance of justice. *Dunnett v. Thornton*, 73 Conn. 1, 46 Atl. 158.

Under the Vermont statute a court is authorized at any time to permit either of the parties to amend a defect in the pleadings upon such conditions as the

court provides. *Chaffee v. Rutland R. Co.*, 71 Vt. 384, 45 Atl. 750.

The principal English statutes of amendment are: 14 Edw. III; 9 Hen. V; 4 Hen. VI, ch. 3; 8 Hen. VI, ch. 12; 32 Hen. VIII, ch. 30; 18 Eliz., ch. 14; 27 Eliz., ch. 5; 21 Jac. I, ch. 13; 4 Ann, ch. 16.

**6. Mo.**—*Chateau v. Hewitt*, 10 Mo. 131. **N. Y.**—*Smith v. Rathburn*, 75 N. Y. 122. **N. C.**—*Knott v. Taylor*, 96 N. C. 553, 2 S. E. 680.

**7.** *Talbot v. Garrettson*, 31 Ore. 256, 49 Pac. 978, where the court said: “The term ‘pleading’ embraces all the pleadings of both parties.”

Where a substituted pleading has been withdrawn, the original pleading stands and is subject to amendment in a proper case. *Thayer v. Smoky Hollow Coal Co.*, 129 Iowa 550, 105 N. W. 1024.

**8. Demurrer Amendable.**—**Ariz.**—*Perrin v. Mallory Com. Co.*, 8 Ariz. 404, 76 Pac. 476. **Cal.**—*Estudillo v. Security Loan & T. Co.*, 149 Cal. 556, 87 Pac. 19. **Ga.**—*Belt v. Lazenby*, 126 Ga. 767, 56 S. E. 81. **Idaho.**—*Dunbar v. Board of Comrs.*, 5 Idaho 407, 49 Pac. 409. **Ia.**—*Wisconsin Lumb. Co. v. Greene & W. Tel. Co.*, 127 Iowa 350, 101 N. W. 742.

See the title “Demurrer.”

**9.** See *Turley v. Griffin*, 106 Iowa 161, 76 N. W. 660; *Culp v. Steere*, 47 Kan. 746, 28 Pac. 987. See the title “New Trial.”

**10. U. S.**—*Anonymous*, Hemp. St. 215, 30 Fed. Cas. No. 18,224. **Ill.**—



tion to this rule, however, is the case of a plea in abatement to the jurisdiction of the person.<sup>11</sup>

**E. DISTINCTION BETWEEN AMENDED AND SUBSTITUTED PLEADINGS.**—An amendment has reference to an existing pleading, whereas the insertion of facts constituting a new cause of action or defense creates what is sometimes termed a substituted pleading.<sup>12</sup>

**F. DISTINCTION BETWEEN AMENDED AND SUPPLEMENTAL PLEADINGS.**—In most jurisdictions, a distinction is observed between an amended and a supplemental pleading, in that an amended pleading can properly speak only of matters which occurred either prior to or concurrently with the commencement of the action, while the office of a supplemental pleading is to bring to the notice of the court and the opposite party matters which occurred subsequent to the commencement of the action, and which do or may affect the rights asserted and the relief asked as originally instituted.<sup>13</sup> In other jurisdictions,

*Spencer v. Aetna Ind. Co.*, 231 Ill. 82, 83 N. E. 102; *Bacon v. Schepflin*, 185 Ill. 122, 56 N. E. 1123; *Dunaway v. Goodell*, 3 Ill. App. 197. **Me.**—*Getchell v. Boyd*, 44 Me. 482. **N. Y.**—*Trinder v. Durant*, 5 Wend. 72.

*Contra*, *Mowry v. Kerrins*, 11 R. I. 556; *Caldwell v. Lamkin*, 12 Tex. Civ. App. 29, 33 S. W. 316.

The settled and salutary rule which requires courts to show little favor to pleas in abatement will often forbid an amendment which might properly be allowed if offered in the case of a plea on the merits. The instances are few where the court can properly allow an amendment to a plea in abatement, unless the matter so pleaded might also be pleaded in bar. *Mitchell v. Smith*, 74 Conn. 125, 49 Atl. 909.

Pleas in abatement are entitled to little favor, especially from the appellate court, where they can seldom serve any purpose but to deprive an appellant permanently of his rights on a mere technicality, and the right to amend such pleas must be exercised within the time prescribed. Otherwise the discretion to allow them would not be favorably exercised unless really in furtherance of justice. *Brockett v. Fair Haven & W. R. Co.*, 73 Conn. 428, 47 Atl. 763. See the title "Abatement, Pleas of."

11. *Drake v. Drake*, 83 Ill. 526. In *Spencer v. Aetna Ind. Co.*, 231 Ill. 82, 83 N. E. 102, where the court said: "A plea of this character is held to be not strictly a plea in abatement, but a meritorious plea necessary to the protection of a substantial right granted by statute."

12. **Colo.**—*Givens v. Wheeler*, 6 Colo. 149. **Conn.**—See also *Thomas v. Young*, 81 Conn. 702, 71 Atl. 1100; *Mechanics' Bank v. Woodward*, 74 Conn. 689, 51 Atl. 1084; *Moran v. Bentley*, 71 Conn. 623, 42 Atl. 1013. **N. Y.**—*Woodruff v. Dickie*, 5 Robt. 619.

**Substitute for Supplemental Answer.** An amendment to set up facts occurring after the filing of the original is properly disallowed, since such matters should be incorporated in a supplemental answer. *Guptill v. City of Red Wing*, 76 Minn. 277, 78 N. W. 970.

A pleading which is styled "Third Amended Answer" and commences as follows: "Now comes the defendant and for an amended answer," etc., is not an amendment to the answer previously filed, but is a substitute for the latter. *Bates v. Kemp*, 12 Iowa 99.

13. **U. S.**—*Mellor v. Smither*, 114 Fed. 116, 52 C. C. A. 64. **Colo.**—*Sylvester v. Jerome*, 19 Colo. 128, 34 Pac. 760. **Ga.**—*Harris v. Moss*, 112 Ga. 95, 37 S. E. 123. **Ill.**—*Bauer Grocer Co. v. Zelle*, 172 Ill. 407, 50 N. E. 238. **Neb.**—*Jordan v. Jackson*, 76 Neb. 15, 106 N. W. 999, 107 N. W. 1047.

**Distinction Between Amended and Supplemental Complaint.**—An amended complaint and a supplemental complaint, although both incorporated into one document, the supplemental complaint being distinguished only by being contained in separate but consecutively numbered paragraphs, are nevertheless to be construed as separate pleadings. *California Farm & Fruit Co. v. Schiappa-Pietra*, 151 Cal. 732, 91 Pac. 593.

**The scope of a supplemental pleading**

however, this distinction has been practically abolished by statute.<sup>14</sup>

## II. POWER OF THE COURT AND RIGHT OF THE PARTIES.—

A. STATEMENTS OF PRINCIPLES.—1. **Power in General.**—The power to allow amendments to pleadings is inherent in the court.<sup>15</sup>

2. **Amendments by Referee or Auditor.**—a. *In General.*—The power of a referee to allow a pleading to be amended is wholly statutory.<sup>16</sup>

is limited to strengthening, developing or reinforcing the original cause of action, or to enlarging the extent of or changing the relief sought. *Kean v. Rogers* (Iowa), 118 N. W. 515, citing *Hervey v. Savery*, 48 Iowa 313; *Foot v. Gas Light Co.*, 103 Iowa 576, 72 N. W. 755.

A motion for leave to serve an amended complaint with a motion for leave to serve a supplemental complaint and an order authorizing the service of an amended and supplemental complaint are improper, since the code makes no provision for any such pleading. *Jones v. Ramsey*, 133 App. Div. 737, 118 N. Y. Supp. 134; *Luckey v. Mockridge*, 112 App. Div. 199, 98 N. Y. Supp. 335; *Washington Life Ins. Co. v. Scott*, 52 Misc. 639, 103 N. Y. Supp. 929. See also *Oelberman v. New York & N. R. Co.*, 31 Abb. N. C. 256, 29 N. Y. Supp. 864.

An amended answer though styled a "supplemental answer" will, nevertheless, be treated as an amended answer if it is such in fact. *Chicago R. I. & P. R. Co. v. Halsell*, 98 Tex. 244, 83 S. W. 15.

14. The Alabama statute provides that a party may by way of amendment "introduce new matter consisting of facts occurring subsequent to the filing of the original bill, pertaining to the matter of the original bill." *Freeman v. Brown*, 96 Ala. 301, 11 So. 249.

The Georgia statute dispenses with supplemental bills and provides that "all such matter shall be allowed by way of amendment." *Merchants' Nat. Bank v. Hall*, 65 Ga. 603. And see the title "Supplemental Pleadings."

In Missouri the Civil Code of Practice recognizes the right to bring before the court new matter arising after the filing of the petition. § 663, Rev. St., 1899, provides that a party may be permitted to file an amended or supplemental petition, and § 666 requires that such amended or supplementary petition shall set forth in one pleading all

matters necessary for the determination of the action. *Cohn v. Souders*, 175 Mo. 455, 75 S. W. 413.

In South Dakota, it has been held that where a release in bankruptcy has been obtained after the issues in a case have been made up, it is not error to allow it to be pleaded by amendment. *Erickson v. Elliot*, 17 N. D. 389, 117 N. W. 361.

15. U. S.—*Tiernan v. Woodruff*, 5 McLean 135, 23 Fed. Cas. No. 14,027; *Tilton v. Cofield*, 93 U. S. 163, 23 L. ed. 858. Ind.—*Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792. Me.—*Augusta v. Moulton*, 75 Me. 551. N. C.—*Cantwell v. Herring*, 127 N. C. 81, 37 S. E. 140; *Smith v. Smith*, 123 N. C. 229, 31 S. E. 471. N. D.—*Morgridge v. Stoeffer*, 14 N. D. 430, 104 N. W. 1112.

Where the plaintiff enters a *nolle prosequi* to certain counts rendering necessary an amendment, the court may require the amendment to be made instantaneously, where it is apparent that it would require but a few minutes to do so. *Wilson v. King*, 83 Ill. 232.

Where the amended answer merely enlarges the defense set up in the original answer, and it does not appear that the plaintiff has lost anything by delay in moving to amend, nor that the amendment would delay the trial, it is error on the part of the court to refuse to allow the amendment. *Murtagh v. Kingsland Brick Co.*, 119 App. Div. 286, 104 N. Y. Supp. 515.

16. *De La Riva v. Berreyesa*, 2 Cal. 196; *In re Muzor's Estate*, 4 Misc. 374, 25 N. Y. Supp. 818; *Eldred v. Eames*, 115 N. Y. 401, 22 N. E. 216.

Where the defendant consents that the referee on the trial before him may pass upon a motion to amend the complaint to conform to the facts proved, he has thereby precluded himself from taking advantage of any question as to the power of the referee and contending that the amendment was such that it could have been granted only at the

b. *Extent of Power.*—The statutes in this respect generally provide that the referee shall have the same powers, to be exercised by him in like manner and upon like terms, as the court, upon a trial.<sup>17</sup>

This power is concurrent with that of the court, and a party who desires to amend, pending an adjournment of the hearing by the referee, may apply to the court for leave to do so.<sup>18</sup> Nor is the referee obliged to grant the leave to amend; he may require the party to apply to the court.<sup>19</sup>

**To Impose Terms.**—And this power to allow amendments carries with it, of course, the power to impose terms.<sup>20</sup>

**New Cause of Action.**—The referee has not the power generally, however, to allow a complaint to be so amended as to state a new cause of action.<sup>21</sup>

**New Defense.**—Nor has he the power to grant the defendant leave to amend his answer by setting up a new defense.<sup>22</sup>

**To Conform Pleadings to Proofs.**—A referee has power, however, to allow an amendment of the pleadings so as to conform them to the proofs.<sup>23</sup>

c. *Discretion of Referee or Auditor.*—The granting or denying of leave to amend is a matter resting in the sound discretion of the referee, and his ruling in that respect will not be disturbed except for want of power, or for a clear abuse of such discretion.<sup>24</sup>

**3. Lex Fori Governs.**—In determining the propriety of an amend-

Special Term. *Perkins v. Storrs*, 114 App. Div. 322, 99 N. Y. Supp. 849.

Under the Georgia statute an auditor is authorized to allow amendments to pleadings, and he should allow any appropriate amendment submitted after the hearing before him has been concluded, and prior to his report. In so far as it merely adjusts the pleadings to the evidence which has been admitted on the hearing without objection, the amendment is timely and should be allowed by the auditor. *First State Bank v. Avera*, 123 Ga. 598, 51 S. E. 665.

Whether an auditor did or did not err in allowing an amendment to pleadings is of no consequence when his doing so had no material bearing upon the result of his investigations. *Marsh v. Hix*, 110 Ga. 888, 36 S. E. 230.

17. *Smith v. Rathbun*, 75 N. Y. 122; *Bennett v. Lake*, 47 N. Y. 93; *Skinner v. White*, 63 Hun 628, 17 N. Y. Supp. 657; *Knapp v. Fowler*, 26 Hun (N. Y.) 200; *Woodruff v. Hurson*, 32 Barb. (N. Y.) 557.

18. *Bullock v. Bemis*, 40 Hun (N. Y.) 623.

19. And the court may in such case impose such terms as will protect the rights of the adverse party. *Barnes v.*

*Seligman*, 55 Hun 339, 8 N. Y. Supp. 834.

20. *Smith v. Rathbun*, 75 N. Y. 122.

21. *National S. S. Co. v. Sheahan*, 122 N. Y. 461, 25 N. E. 858; *Boeckes v. Lansing*, 74 N. Y. 437; *Zoller v. Kellogg*, 21 N. Y. Supp. 226, 49 N. Y. St. 179; *Dougherty v. Vallotton*, 6 Jones & S. (N. Y.) 455.

22. *Case v. Phoenix Bridge Co.*, 11 N. Y. Supp. 724, 34 N. Y. St. 581; *Woodruff v. Hurson*, 32 Barb. (N. Y.) 557.

23. *Ia.*—*Crisman v. Deck*, 84 Iowa 344, 51 N. W. 55. *N. Y.*—*Chapin v. Dobson*, 78 N. Y. 74; *Flynn v. Westmayer*, 14 N. Y. Civ. Proc. 130, 4 N. Y. Supp. 188; *Merriam v. Wolcott*, 61 How. Pr. 377. *S. C.*—*South C. R. Co. v. Barrett*, 12 S. C. 173. *Wis.*—*Gilbank v. Stephenson*, 31 Wis. 592.

Under §§ 723, 1018 of the New York Code of Civil Procedure the referee on the trial has the same power as the court to amend the pleadings to conform to the facts proved. *Perkins v. Storrs*, 114 App. Div. 322, 99 N. Y. Supp. 849.

24. *Price v. Brown*, 98 N. Y. 388; *Haight v. Littlefield*, 71 Hun 285, 24 N. Y. Supp. 1097; *Rocker v. Wildforester*, 65 Hun 620, 20 N. Y. Supp. 9.



ment, the practice of the *lex fori* controls, irrespective of the practice in the jurisdiction in which the cause of action arose.<sup>25</sup>

**4. Practice in Federal Courts.**—A federal statute provides for the allowance of amendments of defects in pleadings in civil actions.<sup>26</sup>

Another statute provides in substance that the practice at law in the federal courts shall conform to the practice of the state in which the court is sitting.<sup>27</sup>

**5. Something To Amend or Amend by.**—Under the various statutes of jeofails enacted to relieve the prevailing party, notwithstanding certain omissions or defects in the record, the general rule was that there must be something in the record to amend by or to enable the statute to take effect.<sup>28</sup>

And this general rule still obtains in the courts of the various states, and precludes the amendment of a complaint or declaration which wholly fails to state any cause of action whatever.<sup>29</sup>

25. *O'Shields v. Georgia Pac. R. Co.*, 83 Ga. 621, 10 S. E. 268; *South Carolina R. Co. v. Nix*, 68 Ga. 572; *Fryklund v. Great Northern R. Co.*, 101 Minn. 37, 111 N. W. 727. See *Miller v. Blow*, 68 Ill. 304.

26. U. S. Rev. St., § 954.

27. U. S. Rev. St., § 914.

Cases construing this statute are, *Rosenbach v. Dreyfuss*, 1 Fed. 391; *Lewis v. Gould*, 13 Blatchf. 216, 15 Fed. Cas. No. 8,324.

Where amendment is matter of right at any stage of the case, under a state statute, the federal court will not exercise a discretion to deny an amendment asked. *Nussbaum v. Northern Ins. Co.*, 40 Fed. 337.

In allowing an amendment to conform to the proof, the state practice defining a material variance will be followed by the federal court. *Liverpool & L. Ins. Co. v. Gunther*, 116 U. S. 113, 6 Sup. Ct. 306, 29 L. ed. 575.

28. Ill.—*Lake v. Morse*, 11 Ill. 587. Ky.—*Louisville & N. R. Co. v. Pointer's Admr.*, 113 Ky. 952, 69 S. W. 1108. S. C.—*Johnson v. Mayrant*, 1 McCord 484.

In *Ellison v. Georgia R. Co.*, 87 Ga. 691, 13 S. E. 809, the court said: "There must be some trace of a particular cause of action in the declaration in order that it may contain enough to amend by. And as the original cause must be adhered to, and no other substituted in its place, the trace furnished must be sufficiently plain and distinct to identify the particular cause of action to which the declaration points or refers. If it points to no one cause more than to any other, it will be too

indefinite, and should be treated as nothing better than a blank. As a cause of action consists of duty and breach, these two questions should be asked and answered in the joint light of the declaration and the proposed amendment: Did the design of the pleader embrace a real duty and breach, or only something which he supposed by mistake of law to be such? If real and not merely supposed, what particular duty and breach did he intend to declare upon? The correct answer to these questions will govern his right to amend in the given instance. No right to amend in aid of a fanciful design, or of a true design which cannot be definitely ascertained, exists."

29. Ala.—*Simpson v. Memphis & C. R. Co.*, 66 Ala. 85; *Bachus v. Mickle*, 45 Ala. 445. Ark.—*State v. Rottaken*, 34 Ark. 144. Colo.—*Givens v. Wheeler*, 6 Colo. 149. Ga.—*Southern R. Co. v. Gardner*, 127 Ga. 320, 56 S. E. 454; *Shepherd v. Southern Pine Co.*, 118 Ga. 292, 45 S. E. 220; *Travelers Ins. Co. v. Gray*, 115 Ga. 764, 42 S. E. 95; *McCosker v. Hilton & D. Lumb Co.*, 110 Ga. 328, 35 S. E. 369; *Ellison v. Georgia R. Co.*, 87 Ga. 691, 13 S. E. 809; *Smith v. Eastern & W. R. Co.*, 84 Ga. 183, 10 S. E. 602. Me.—*Bangor, etc. R. Co. v. Smith*, 49 Me. 9. Mass.—*Keenan v. Knight*, 9 Allen 257; *Guilford v. Adams*, 19 Pick. 376. Mo.—*Brashears v. Strock*, 46 Mo. 221. Nev.—*Mexican Mill v. Yellow Jacket S. M. Co.*, 4 Nev. 40. N. Y.—*Phinney v. Phinney*, 17 How. Pr. 197; *Woodruff v. Dickie*, 5 Robt. 619. Pa.—*Grasser v. Eckart*, 1 Binn. 575. S. C.—*Bleckley v. Branyan*, 26 S. C. 424, 2 S. E. 319; *Kennerty v. Etiwan*

There is authority, however, to the effect that it is not indispensable that there should be something to amend by, on the theory that an amendment is not solely the correction of an error in a pleading already before the court, but may consist of the withdrawal of it, and the substitution of an entirely new pleading.<sup>30</sup>

**Statutes.** — In some states the question is the subject of express statutory provision.<sup>31</sup>

Phosphate Co., 21 S. C. 226. **Tex.** — Boren v. Billington, 82 Tex. 137, 18 S. W. 101.

**Inference of No Cause.** — In Mitchell v. Dunmore Realty Co., 132 App. Div. 180, 116 N. Y. Supp. 812, it appeared that on a prior appeal the court had pointed out the defects in the amended complaint then under consideration and indicated what facts were necessary to be stated in order to set forth a cause of action; but that the suggestions of the court were not followed, and instead thereof an amended complaint was served which in legal effect was substantially the same as the one previously pronounced defective. The court said: "From this it is fairly to be inferred that facts do not exist which will enable the plaintiff to draw a complaint which will state a cause of action;" and it was held that the trial court abused its discretion in allowing the plaintiff to serve another amended complaint.

**A plea must set up a defense** in order that an amendment may be added. Smith v. First Nat. Bank, 115 Ga. 608, 41 S. E. 983.

30. As for example, a new and different defense. Diamond v. Williamsburgh Ins. Co., 4 Daly (N. Y.) 494. See also Jenkins v. Hutchinson, 2 Hill (S. C.) 626, where the court said: "Amendments are in the discretion of the court; but they are to be granted or refused, on something like fixed general principles. Generally the plaintiff or defendant is entitled to amend in form or substance, on paying costs, if such amendment does not delay or surprise the other party. In matters of form, an amendment can only be permitted on the terms which I have stated, and also where the previous parts of the record afford something to amend by; but in matters of substance, the amendment must of course conform to the facts, and as to them, the previous parts of the record can generally be no guide."

31. In Georgia the statutes on the

subject of amendments provide as follows: "The Civil Code (§ 5097) declares that parties may amend their pleadings 'in all respects, whether in matter of form or of substance, provided there is enough in the pleadings to amend by;' but the defendant after the first term cannot set up new matter by way of amendment, except as elsewhere in the Code provided. Section 5098 reads as follows: 'A petition showing a plaintiff, and a defendant, and setting out sufficient to indicate and specify some particular fact or transaction as a cause of action, is enough to amend by. The jurisdiction of the court may be shown, and the details and circumstances of the particular transaction may be amplified and varied by amendment. If the declaration omit to allege facts essential to raise the duty or obligation involved in the cause of action which was evidently originally intended to be declared upon, the omitted fact may be supplied by amendment.' These two sections point out the right of amendment, and what will constitute enough to amend by, and throw light on the question of the extent to which the right may be exercised without being obnoxious to the rule against adding a new and distinct cause of action, stated in the next section (5099)." The court in Eagle & Phenix Mills v. Muscogee Mfg. Co., 129 Ga. 712, 59 S. E. 804, said that speaking in general terms the cases in Georgia might be divided into two classes: those which preceded the case of Ellison v. Georgia R. Co., 87 Ga. 691, 13 S. E. 809, and were overruled by it, and those which came after it and were overruled by the case of Columbus v. Anglin, 120 Ga. 785, 48 S. E. 318, but that the rule had been crystallized into the above section of the Code. He referred to the rule as one which looks to substance more than to mere form, which treats amendments as a "resource against waste" where there is enough to amend by, and which has in view the practical administration of justice

**B. AMENDMENTS BY COURT SUA SPONTE.**—There are cases holding that there is no impropriety in a court suggesting, or even directing, an amendment in certain circumstances,<sup>32</sup> as for example to conform the pleading to the proofs.<sup>33</sup> But the power of the court to this extent is not recognized by all the courts.<sup>34</sup>

**C. AMENDMENTS AS OF COURSE.**—**1. In General.**—At common law, a plaintiff might amend his declaration of course, at any time before the defendant pleaded in his defense.<sup>35</sup> And a defendant also

rather than the dialectical niceties of ancient pleading.

Under the Georgia Code, a petition showing a plaintiff and defendant and setting out sufficient to indicate and specify some particular fact or transaction as a cause of action, is enough to amend by. *Macon v. Melton*, 115 Ga. 153, 41 S. E. 499.

The original petition need not be perfect in either form or substance, but it should have in it at least enough to indicate some particular cause of action. *Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318.

In Florida, a statute (McClell. Dig. 97, p. 834) makes it the duty of the court "at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything to amend by or not." See *Parrish v. Pensacola & A. R. Co.*, 28 Fla. 251, 9 So. 696.

32. Cal.—*Valencia v. Crouch*, 32 Cal. 339, 91 Am. Dec. 589. Kan.—*Jackson Co. v. Hoaglin*, 5 Kan. 558. N. J.—*Cosgrove v. Metropolitan Constr. Co.*, 71 N. J. L. 106, 58 Atl. 82. N. C.—*Allen v. Carolina Cent. R. Co.*, 120 N. C. 548, 27 S. E. 76; *Buie v. Brown*, 104 N. C. 335, 10 S. E. 465; *Turner v. Cuthrell*, 94 N. C. 239.

Thus, where a material amendment has been directed and the defendant has been informed of his right to plead anew and present further evidence, after such amendment, if the defendant fails to avail himself of such opportunity, the directing of such amendment is not error. *LaBarre v. Waterbury*, 69 Conn. 554, 37 Atl. 1068.

While a general demurrer to a plea, or a motion to strike the same, should be overruled, if any part is good in substance the court may and ought to direct looseness and uncertainty to be cured by amendment, and if the defendant refuse to amend in that respect, the plea should be stricken out, the same as if a general demurrer had been inter-

posed. *Finney v. Cadwallader*, 55 Ga. 75.

In *Audley v. Townsend*, 131 App. Div. 79, 115 N. Y. Supp. 145, an action by the assignee of a sheriff in the state of Wisconsin for the breach of an indemnity bond given to the sheriff by an attorney representing non-resident creditors, it was held that the trial court properly exercised its discretion in directing on its own motion an amendment to the complaint to allege that under the Wisconsin law the attorney had authority to indemnify the sheriff for non-resident clients. See *s. c.*, 126 App. Div. 431, 110 N. Y. Supp. 575.

33. *Valencia v. Couch*, 32 Cal. 339, 91 Am. Dec. 589; *Hough v. Porter*, 51 Ore. 318, 98 Pac. 1083, 95 Pac. 732, 102 Pac. 728. *Contra*, *Parrish v. Pensacola & A. R. Co.*, 28 Fla. 251, 9 So. 696, holding that the court cannot so act except on application of the party.

34. *Caldwell v. King*, 76 Ala. 149, holding that, although the court may suggest an amendment, it cannot so order, and that an order amending a pleading does not of itself operate as an amendment. See also *Fagen v. Davison*, 2 Duer (N. Y.) 153; *Enright v. Seymour*, 8 N. Y. St. 356; *Ten Broeck v. Orchard*, 79 N. C. 518, where the court said: "It is not the province of the Judge to order a correction of errors on the removal of defects, though on application he may permit this to be done."

35. *Wakeman v. Sprague*, 7 Cow. (N. Y.) 164. *Compare* *Covey v. Delaware, L. & W. R. Co.*, 14 Pa. Dist. 512, where the court said: "That the pleadings can only be amended by leave of court is an elementary rule of practice, so far as concerns amendments at common law, and, so far as they depend upon our statutes, such leave is expressly required, even in cases where the party is entitled to amend as a matter of right; regardless of the right, the power to amend is in the court, not in the party."



might amend his plea of course, without costs, on a proper affidavit.<sup>86</sup>

**Statutes.**— And in most of the states are to be found statutory provisions giving a party the right to amend as of course, that is, without application to the court for leave so to do.<sup>87</sup>

**36.** See *Wakeman v. Sprague*, 7 Cow. (N. Y.) 164. See also *Schulze v. Fox*, 53 Md. 37; *Newcomer v. Kerdy*, 9 Gill (Md.) 196. Compare *Thorne v. Fox*, 67 Md. 67, 8 Atl. 667.

A plea which may be made by amendment after the first term may be filed after appeal and remittitur. *National Bank of Augusta v. Southern Porcelain Mfg. Co.*, 59 Ga. 157.

**37.** Under the Arkansas statute the defendant may, when served thirty days before the term, file without leave as many pleas as he may deem necessary to his proper defense at or before the calling of the case in its regular order. *State v. Jennings*, 10 Ark. 428.

Under the California statute (§ 472, Code Civ. Prac.), a pleading may be once amended as of course before answer or demurrer, or after demurrer and before the disposition of the issue raised thereby. *Spooner v. Cady* (Cal.), 36 Pac. 104. But an amended answer can be filed after disposition of the demurrer, or the time of filing one, to the original, only by stipulation or leave of court. *Manha v. Union Fert. Co.*, 151 Cal. 581, 91 Pac. 393.

The right to amend after the filing of a demurrer is absolute only when it is exercised before the demurrer is argued and submitted to the court for decision. *Stewart v. Douglass*, 148 Cal. 511, 83 Pac. 699.

**Colorado.**— Under § 73 of the code, after a demurrer is filed to a complaint and before the issues of law are heard, the plaintiff has the right to amend his complaint as of course. *King v. Gardner*, 25 Colo. 395, 55 Pac. 727, holding also that, if in vacation, no other notice of the filing of such amended complaint is required except to serve defendant with a copy within ten days after the filing thereof.

Under the Connecticut Act, a plaintiff may, within the first thirty days, file an allowable amendment as of right, the law consequently presuming the amendment to be in furtherance of justice. *Dunnett v. Thornton*, 73 Conn. 1, 46 Atl. 158, holding also that as the statute allows a plaintiff who sues upon the so called common counts to add a special count or counts, showing fully

his cause of action, if such count is originally admitted, it may be inserted by way of amendment under the statute without regard to any amendment of the common counts to conform thereto.

In Delaware, although the defendant has filed his plea and the case been placed upon the trial calendar, he may amend the same by withdrawing it and filing a new plea with notice of recoupment. But the filing of the recoupment, being in the nature of an amendment, entitles the other side to a continuance or to the imposition of terms. *National Dredging Co. v. Grand Trunk R. Co.* (Del.), 41 Atl. 975.

In Georgia, where the statute provides that all parties, whether plaintiff or defendant, may at any stage of the cause, as a matter of right, amend their pleadings in all respects, whether in matter of form or of substance, provided there is enough in the pleadings to amend by, it is held error for the court to refuse the defendant leave to amend a plea of the general issue by filing a plea of the statute of limitations, although the case has been submitted to the jury, and they have retired for deliberation and the plaintiff is surprised. *Savannah, F. & W. R. Co. v. Watson*, 86 Ga. 795, 13 S. E. 156. See also *Jones v. Grantham*, 80 Ga. 472, 5 S. E. 764.

A defendant may, as a matter of right, amend his answer if he attach the affidavit therein prescribed. *Wynn v. Wynn*, 109 Ga. 255, 34 S. E. 341.

**Striking Out Averment.**— In all cases, both at law and in equity, the plaintiff has a right, which is not subject to any limitations, to strike out any averment that he sees proper, and the court must allow the amendment. *Ogburn v. Elmore*, 123 Ga. 677, 51 S. E. 641.

Leave extending from the appearance to the trial term of cases, the right of a particular attorney at law to resist motions to strike petitions or pleas filed by him, does not of itself confer upon him the right at the trial term to amend his pleadings in any case. *Norton v. Scruggs*, 108 Ga. 802, 34 S. E. 166.

Where an amendment to a pleading is

filed in open court during the progress of the trial, is entered upon the notice books, is embodied in the court's instructions and presents an issue which the appellants at least claim is in the case, an objection that formal leave to file the same was not granted, is without merit. *McGuire v. Chicago, B & Q. R. Co.*, 138 Iowa 664, 116 N. W. 801.

Where a plea of a general issue has been filed at the first term it may be amended at the trial term by filing other defenses as a matter of right. *Barrett v. Pascoe*, 90 Ga. 826, 17 S. E. 117; *Hagerstown Steam-Engine Co. v. Grizzard*, 86 Ga. 574, 12 S. E. 939; *National Bank of Augusta v. Southern Porcelain Mfg. Co.*, 59 Ga. 157 (by statute).

In Louisiana, a party cannot amend as matter of right; he must secure leave of court. *Tullos v. Lane*, 45 La. Ann. 333, 12 So. 588; *Kirkland v. His Creditors*, 7 Mart. N. S. (La.) 511; *Robinson v. Williams*, 3 Mart. N. S. (La.) 665.

In Maine amendments in matter of form are allowed under the Maine statutes. *Anderson v. Wetter*, 103 Me. 257, 69 Atl. 105.

In Massachusetts, the practice of amending as of course does not seem to obtain; leave to amend is necessary. *Jones v. Ilsley*, 1 Allen 273; *Hulbert v. Comstock*, 11 Gray 14.

In Mississippi, a defendant may, under Pleading Act of 1850, amend without leave at any day of the return term. *Rowland v. Dalton*, 36 Miss. 702.

A statute allowing a party to amend any pleading demurred to, as a matter of right, provided the same is done during the term of court when the demurrer is decided, must be construed in connection with another statute providing that either party may amend once as of course at or before the second term, and that the pleadings shall in all cases be made up and prepared for trial at the second term of court after the filing of a complaint; hence amendment at the third term of court is not a matter of right, but depends upon the discretion of the court. *Lewis v. Black*, 27 Miss. 425.

Missouri.—“A petition or answer may be amended by the proper party, of course without costs, and without prejudice to the proceedings already had, at any time before the answer or reply thereto shall be filed.” See *Lumpkin v. Collier*, 69 Mo. 170, where

the court in speaking of the statute said: “It does not allow an amendment which could not have been made before it was enacted; but allows such amendments as before could only be made in the discretion of the court and with costs, to be ‘of course without costs.’ ”

In New Jersey, leave to amend is discretionary with the court, and is now granted as matter of course. *Hale v. Lawrence*, 22 N. J. L. 72. See also *Rix v. New York Cent. & H. R. R. Co.*, 67 N. J. L. 503, 51 Atl. 924.

In New York, § 542 of the New York Code of Civil Procedure provides that within twenty days after a pleading, or the answer, demurrer, or reply thereto is served, or at any time before the period for answering it expires, the pleading may be once amended by the party of course without costs and without prejudice to the proceedings already had. And in *Backes v. Mechanics' and Traders' Bank*, 130 App. Div. 20, 114 N. Y. Supp. 459, it was held that an amendment by leave of court on sustaining a demurrer to the complaint was not one served under the above section of the code and that plaintiff could amend again to correct mistakes and supply deficiencies.

And it is only when it is made to appear to the court that the pleading was amended for the purpose of delay, and that the adverse party will thereby lose the benefit of a term for which the case is or may be noticed for trial, that the amended plea can be stricken out. *Muglia v. Erie R. Co.*, 97 App. Div. 532, 90 N. Y. Supp. 216.

Although § 542, New York Code Civ. Proc. permits a plaintiff to amend his complaint as of course within twenty days after service of the demurrer thereto, yet this does not permit amendment of a complaint so as to sever the action into two actions against the defendants separately, the complaint stating two causes of action arising out of two independent transactions. *Neun v. B. H. Bacon Co.*, 121 N. Y. Supp. 718.

On the day when the time for defendant to serve an amended answer expired he obtained an *ex parte* order extending such time. It was held that after notice of motion to vacate, but before such motion was granted, he could serve his answer. *Levy v. New York Press Co.*, 57 Misc. 138, 107 N. Y. Supp. 541. The court held that as the

**Manner of Exercising Right.**—And it is held that the right so given by such a statute must be exercised within the time and in the manner specified in the statute.<sup>38</sup>

**2. Time and Condition of Cause.**—These statutes generally provide that this right exists and can be exercised only in connection with the time and condition of the cause. Thus they give the right to amend of course at any time before the pleading is actually answered or before the time limited by law for answering expires.<sup>39</sup> And after service of an answer or demurrer the defendant is generally given a certain time to amend as of course.<sup>40</sup>

And if the pleading be served by mail, additional time is given in which to amend of course.<sup>41</sup>

order extending the time remained in full force and effect until the order vacating it had been actually signed and entered, the answer was served at a time when the defendant had a right to serve it, *following De Pallandt v. Flynn*, 104 App. Div. 501, 93 N. Y. Supp. 678.

**N. C.**—*Goodwin v. Caraleigh Fert. & P. Wks.*, 121 N. C. 91, 28 S. E. 192. **Ohio.**—*Moorman v. Schmidt*, 69 Ohio St. 328, 69 N. E. 617. **S. D.**—*Tripp v. Yankton*, 10 S. D. 516, 74 N. W. 447.

In Texas, it is held unnecessary to obtain leave to amend unless the amendment will operate a continuance of the cause (*Haynes v. Rice*, 33 Tex. 167), and that filing an amendment without leave is not fatal error, leave to file being asked before the case is called for trial (*Hopkins v. Seay*, Tex. Civ. App., 27 S. W. 899).

In West Virginia, the plaintiff may as matter of right amend at any time before appearance by the defendant. *Phelps v. Smith*, 16 W. Va. 522.

In Wisconsin, a pleading may as of course be amended, by consent of the parties, though the time allowed for such amendment has expired. *Whitefoot v. Leffingwell*, 90 Wis. 182, 63 N. W. 82.

Formal leave is not indispensable to the filing of an amendment to make more definite, certain, explicit and perfect the pleadings upon the course of action really before the court. *Haynes v. Rice*, 33 Tex. 167.

38. *Spooner v. Cady* (Cal.), 36 Pac. 104.

39. See cases cited *supra* in this section.

40. *Macqueen v. Babcock*, 22 How. Pr. (N. Y.) 229, 3 Abb. Dec. 129; *Wyman v. Remond*, 18 How. Pr. (N. Y.) 272.

Where plaintiff has demurred to a defense in a particular paragraph of the answer on the ground that it fails to state any defense, the defendant may, within twenty days, serve his amended answer omitting the objectionable defense. *Ullman v. Tanner*, 127 App. Div. 808, 111 N. Y. Supp. 844.

**Amended Answer to Amended Complaint.**—Where plaintiff serves an amended complaint to an amended answer and the defendant answers, the latter may within the proper time serve an amended answer as of course. *Brooks Bros. v. Tiffany*, 117 App. Div. 470, 102 N. Y. Supp. 626.

Where a default in pleading is opened, and the order opening the default is complied with by the payment of costs imposed and the service of an answer conforming to that submitted on the motion to open the default, the defendant is in the same position with regard to any subsequent steps in the litigation as if no default had occurred and he has the right to amend within twenty days the answer served in accordance with the requirements of the order opening the default. *O'Reilly v. Skelley*, 56 Misc. 122, 106 N. Y. Supp. 1082.

Where an answer is corrected by amendment before a demurrer thereto has been determined, it is error to sustain the demurrer. *Bell v. Byerson*, 11 Iowa 233, 77 Am. Dec. 142.

In Georgia, under the act of 1897, defendant may amend as of course at any stage of the case, provided he makes the affidavit required by the act. *Wynn v. Wynn*, 109 Ga. 255, 34 S. E. 341.

41. If an answer is served by mail, it may be amended of course before the expiration of the time within which the opposite party may plead, under § 542, N. Y. Code Civ. Proc. *Schlesinger v.*



**3. Number of Amendments.**—The statutes giving the right to amend a pleading as of course generally limit the right to one amendment.<sup>42</sup> But an amendment compelled by order or act of the court is not to be considered as an exercise of the right to amend as of course.<sup>43</sup>

**4. Waiver of Right.**—A party may of course waive his right to amend as of course either by an express stipulation or by doing some act inconsistent with an intention to claim his right,<sup>44</sup> as where the plaintiff notices the cause for trial;<sup>45</sup> or applies, after answer

Borough Bank of Brooklyn, 112 App. Div. 121, 98 N. Y. Supp. 136, *overruling* Toomey v. Andrews, 48 How. Pr. (N. Y.) 332, and *disapproving* Armstrong v. Phillips, 60 Hun 243, 14 N. Y. Supp. 582. Compare Seckel v. Tangemann, 53 Misc. 268, 103 N. Y. Supp. 77.

An amended answer served by mail thirty-seven days after the mailing of the original answer is served in time. Wood v. Ordway, 63 Misc. 181, 118 N. Y. Supp. 422, on authority of Schlegel v. Roman Catholic Church, 194 N. Y. 391, 87 N. E. 426.

42. *Mussinan v. Hatton*, 8 Misc. 95, 28 N. Y. Supp. 1006; *Sands v. Calkins*, 30 How. Pr. (N. Y.) 1; *White v. New York*, 6 Duer (N. Y.) 685, 5 Abb. Pr. 322; *Tripp v. Yankton*, 10 S. D. 516, 74 N. W. 447.

Where plaintiff serves an amended complaint in response to defendant's motion to require the amendment of his complaint by separately stating and numbering his causes of action, and the defendant's motion is subsequently withdrawn, the service of a second amended complaint as of course and without leave of court is unauthorized. Freyhan v. Wertheimer, 52 Misc. 636, 102 N. Y. Supp. 839.

In *Town of Hancock v. Delaware & E. R. Co.*, 128 App. Div. 693, 113 N. Y. Supp. 80, the complaint was served in July, 1907, and answered in August, and in November defendant stipulated that plaintiff might amend on payment of costs. Subsequently in March, 1908, plaintiff served another amended complaint, without leave, which the defendant was required to accept. It was held on appeal that the pleading could be amended once only under § 542 and that when, pursuant to stipulation, plaintiff had paid the costs and served an amended complaint, he was in no other or better position than if he had served such complaint within

the statutory time allowed by section 542; that he could not repeat the process to amend as a matter of course merely because as a favor he had been permitted that which by his delay he had lost the right to do. "There is no authority for amending an amended pleading as matter of course. The pleading referred to in section 542 which may be amended is obviously the original pleading, and not an amended pleading. Were it otherwise, a party might continue to serve amended pleadings *ad infinitum* and the word 'once' in the section would be meaningless."

43. *Lintzenich v. Stevens*, 3 N. Y. Supp. 394, 17 N. Y. St. 862. See also *Ross v. Dinsmore*, 12 Abb. Pr. (N. Y.) 4, where the defendant's motion to strike out portions of the complaint as irrelevant and redundant was granted, after which plaintiff served an amended complaint without leave. The court said: "This cannot be considered an amendment within the meaning of this section. It was the act of the court, and not the act of the party. It was against his consent, for it was resisted by him. It was not even essential that the expurgated pleading should be served, for the order of the court would necessarily define what portions of the pleading were struck out. It did not, therefore, curtail the plaintiff's right of amendment."

44. *Phillips v. Suydam*, 6 Abb. Pr. N. S. (N. Y.) 289.

45. *Phillips v. Suydam*, 6 Abb. Pr. N. S. (N. Y.) 289. *Contra*, *Clifton v. Brown*, 27 Hun (N. Y.) 231.

After plaintiff has served notice of trial, he may amend his complaint as of course, at any time before the expiration of twenty days from the filing of the answer. *Congregation K. A. J. M'Yassy v. University Bldg. & Const. Co.*, 118 N. Y. Supp. 478.

served, for leave to amend.<sup>46</sup> So, too, where the defendant, after issue joined, obtains leave to withdraw his plea, and put in a new one, he cannot amend this second plea as of course.<sup>47</sup> But plaintiff does not waive this right by examining the defendant before trial.<sup>48</sup>

**D. AMENDMENTS BY LEAVE OF COURT. — 1. In Respect of the Principles Governing the Practice. — a. In General. —**The purpose of the trial is to do justice to the parties litigant, and not to prevent it by invoking technical rules of pleading or practice. And not only at common law was it the recognized rule that the court had inherent and undoubted power to permit a pleading to be amended in a proper case,<sup>49</sup> but the legislatures of the various states have enacted statutes expressly vesting such power in the courts.<sup>50</sup>

Unquestionably a party litigant may, in the first instance, put his pleading in such shape as he may see fit, but it may afterwards appear to him to be insufficient to secure to him a fair trial and decision on the real merits of the controversy, and hence it is that, so soon as it may be made to appear that he has so framed his case as not to secure to himself such trial and decision, leave to amend may, and it may almost be said should, be granted to him as matter of right,<sup>51</sup> provided no injustice be thereby done to the adverse

46. *Hamilton v. Carrington*, 41 S. C. 385, 19 S. E. 616. See also *Tripp v. Yankton*, 10 S. D. 516, 74 N. W. 447.

47. *Lewis v. Watkins*, 6 Hill (N. Y.) 230.

48. *Stilwell v. Kelly*, 5 Jones & S. (N. Y.) 417.

49. The purpose of a trial is to do justice, and not to prevent by invoking technical rules of pleading or practice. The power which the court has to permit an amendment to the pleading ought to be freely exercised. A party in the first instance can put his pleading in such shape as he sees fit, and when an application to amend is made the court should grant it unless something has taken place intermediate the service of the original pleading and the application to amend which will work to the prejudice of the adverse party if the amendment be allowed, or the trial will be delayed by reason of it. *Washington Life Ins. Co. v. Scott*, 119 App. Div. 847, 104 N. Y. Supp. 898.

An amendment which is intended to remedy a defect in the original pleading, will be treated as accomplishing that purpose, if it is not attacked. *Waltz v. Etnier*, 137 Iowa 604, 115 N. W. 209.

50. See, for example, *California Code Civ. Proc.*, § 473.

It is within the power of the court to allow an amendment. *Manning v. Conway*, 192 Mass. 122, 78 N. E. 401, citing

R. L. 1, c. 173, § 48, Rule 43 of the Superior Court of 1900 (Rule 40 of 1906).

Under the Florida statute a court may order amended a single plea which sets up partial payment and set-off as to the balance in the form of common counts without a bill of particulars. *Knight v. Dunn & Son*, 47 Fla. 175, 36 So. 62.

Where the court orders a plea to be amended within ten days and after the expiration of this time the clerk enters a default and final judgment this judgment will be reversed with directions to the court below to set aside the default and final judgment based thereon, and to permit the defendant to file such pleas as it may be advised. *Gulf Lumb. Co. v. Dunn & Son*, 47 Fla. 161, 36 So. 63. Decided on the authority of *Knight v. Dunn & Son*, 47 Fla. 175, 36 So. 62.

51. *Cropper v. Smith*, L. R. 26 Ch. Div. (Eng.) 700.

Defendant who has pleaded a general issue should have leave to file additional pleas, where an additional plea is indispensable to enable him to make a legal defense, and he has been guilty of no culpable negligence in asking for such leave. *Misch v. McAlpine*, 78 Ill. 507.

Where an immaterial issue has been tendered, leave may be given to amend

party.<sup>53</sup> And ordinarily where material matter is omitted from an answer by mistake or inadvertence, an amendment should be allowed.<sup>54</sup>

b. *Furtherance of Justice*.—An important principle, and indeed it may with propriety be termed a pervading principle, and certainly one to be found in the various statutes of amendments,<sup>54</sup> is, that an amendment is to be allowed or refused as the court may consider it in furtherance of justice.<sup>55</sup>

or replead upon terms. *McDaniel v. Cater*, 21 N. H. 227.

Although a party has no absolute right to file an amendment without leave of court, it should not be stricken from the files on motion if it is one which should have been allowed, had leave to file it been asked. *Hanson v. Cline*, 142 Iowa 187, 118 N. W. 754.

Instead of striking out a single plea which sets up two distinct defenses, the courts may, under the statute, require it to be amended to set up such matters in separate counts. *Knight v. Dunn*, 47 Fla. 175, 36 So. 62.

Striking out a pleading which is susceptible of being amended by a statement of facts known to exist, and which constitute a cause of action or defense to an action, is a harsh proceeding and should be resorted to only in extreme cases. *Burns v. Scooffy*, 98 Cal. 271, 33 Pac. 86. In this case the court struck from the files an answer on the ground of its insufficiency and refused to permit the defendant to amend so as to cure the defects therein, it appearing from the affidavit in support of the motion for leave to amend that the omission of the allegations from the answer was in all probability an oversight on the part of the counsel who drew the pleading.

52. If no claim of prejudice or surprise is made by the adverse party, the motion to amend should be granted. *Cahill v. Torrey*, 121 N. Y. Supp. 598.

The probability that the defense set up by amendment of the answer might be effectual on the facts to defeat the alleged cause of action, is not a valid reason for complaint by the plaintiff. *Schaller v. Chicago & Northwestern R. Co.*, 97 Wis. 31, 71 N. W. 1042.

Where defendant after filing the general issues discovers that he has a substantial defense not admissible thereunder, he should at the earliest con-

venient date ask for leave to file an additional plea, so as not to take plaintiff by surprise or delay the business of the court. *Fisher v. Greene*, 95 Ill. 94.

53. *Palmer v. Schultz*, 138 Wis. 455, 120 N. W. 348, citing *Vilas v. Mason*, 25 Wis. 310; *Greggory v. Hart*, 7 Wis. 532.

54. See for example Cal. Code Civ. Proc., § 473; Iowa Code, § 3600; N. Y. Code Civ. Proc., § 723.

The Iowa code, providing in substance that amendments may be filed in furtherance of justice and that either party may amend his pleadings for the purpose of correcting mistakes and by answering other allegations material to the case, or when the amendment does not change substantially the claim or defense by conforming the pleadings or proceedings to the facts proved, should be liberally construed, and it is the rule to allow amendments whenever substantial rights are not prejudiced by so doing. *Hanson v. Cline*, 142 Iowa 187, 118 N. W. 754.

55. Cal.—*Gould v. Stafford*, 101 Cal. 32, 35 Pac. 429; *Bradley v. Parker*, 34 Pac. 234; *Wells Fargo & Co. v. McCarthy*, 5 Cal. App. 301, 90 Pac. 203. Colo.—*Archibald v. Thompson*, 2 Colo. 388. Del.—*State v. Vandever*, 3 Harr. 29; *Hendrixon v. Huey*, 2 Harr. 301. Ill.—*Jackson v. Warren*, 32 Ill. 331. Ia.—*Brockman v. Berryhill*, 16 Iowa 183. Kan.—*Snider v. Windsor*, 77 Kan. 67, 93 Pac. 600. Ky.—*Greer v. Covington*, 2 S. W. 323. La.—*Meyer v. Farmer*, 36 La. Ann. 785. Me.—*Fuller v. Wing*, 17 Me. 222. Mass.—*Cronan v. Woburn*, 185 Mass. 91, 71 N. E. 38. Mo.—*Godard v. Williamson's Admr.*, 72 Mo. 131. N. J.—*Bartley v. Smith*, 43 N. J. L. 321. N. Y.—*Harrington v. Slade*, 22 Barb. 161. Ohio.—*Spice v. Steinruck*, 14 Ohio St. 213. Vt.—*Chaffee v. Rutland R. Co.*, 71 Vt. 384, 45 Atl. 750. Wash.—*Balch v. Smith*, 4 Wash. 497, 30 Pac. 648.



c. *Liberality the Rule.* — (I.) Generally. — The administration of the law requires that a policy of liberality be pursued in the allowance of amendments which are in furtherance of justice,<sup>56</sup> so that the production before the court of the facts bearing upon the question involved may be facilitated, and in order that neither party shall be deprived of

56. Ala. — Boardman v. Parrish, 56 Ala. 54. Cal. — Burns v. Scooffy, 98 Cal. 271, 33 Pac. 86; Link v. Jarvis, 33 Pac. 206; Ward v. Clay, 82 Cal. 502, 23 Pac. 50, 227; Kirstein v. Madden, 38 Cal. 158. Colo. — Lebanon Min. Co. v. Consol. Min. Co., 6 Colo. 371. Conn. — Bennett v. Collins, 52 Conn. 1. D. C. — Tyler v. Mutual Dist. Mess. Co., 13 App. Cas. 367. Ga. — Woodson v. Law, 7 Ga. 105. Idaho. — Kindall v. Lincoln Hdw. & Ins. Co., 10 Idaho 13, 76 Pac. 992; Kroetch v. Empire Mill Co., 9 Idaho 277, 74 Pac. 868. Ill. — Drake v. Drake, 83 Ill. 526; Chicago C. C. & St. L. R. Co. v. Bozarth, 91 Ill. App. 68. Ia. — Le Mars Bldg. & L. Assn. v. Burgess, 129 Iowa 422, 105 N. W. 641. Kan. — Harper v. Hendricks, 49 Kan. 718, 31 Pac. 734; Culp v. Steere, 47 Kan. 746, 28 Pac. 987. La. — Carter v. Farrell, 39 La. Ann. 102, 1 So. 279. Me. — Willoughby v. Atkinson Furn. Co., 93 Me. 185, 44 Atl. 612; Solon v. Perry, 54 Me. 493. Mich. — Beecher v. Circuit Judges, 70 Mich. 363, 38 N. W. 322. Miss. — Bloom v. Price, 44 Miss. 73. Mo. — House v. Duncan, 50 Mo. 453. Neb. — Berrer v. Moorhead, 22 Neb. 687, 36 N. W. 118. N. H. — Stebbins v. Lancashire Ins. Co. 59 N. H. 143. N. Y. — Reeder v. Sayre, 70 N. Y. 180; Richmond v. Second A. R. Co., 65 Hun 619, 19 N. Y. Supp. 597; Harrington v. Slade, 22 Barb. 161. N. C. — Kron v. Smith, 96 N. C. 389, 2 S. E. 532; Deal v. Palmer, 68 N. C. 215. Ore. — Baldock v. Atwood, 21 Ore. 73, 26 Pac. 1058. Pa. — Miller v. Pollock, 99 Pa. 202; Fidler v. Hershey, 90 Pa. 363; Steffy v. Carpenter, 37 Pa. 41. Tenn. — Stovall v. Bowers, 10 Humph. 560. Tex. — Reid v. Harris, 37 Tex. 167. Wis. — Palmer v. Schultz, 138 Wis. 455, 120 N. W. 348; Thorn v. Smith, 71 Wis. 18, 36 N. W. 707; Brown v. Bosworth, 62 Wis. 542, 22 N. W. 521.

The provisions of the New York code, in relation to the amendment of pleadings, were designed to be more broad and liberal even than the former practice. The codifiers say, in respect of the very section authorizing the amendment of pleadings, that their object was "to provide a means of amendment of

the most liberal character; as liberal, indeed, as we could advise." First Report of Commissioners, N. Y., 1848, p. 158.

Courts should be liberal in allowing amendments for purpose of facilitating trial of causes upon their merits. Ordinarily an application to amend a pleading to present more fully or accurately a cause of action or a defense should be granted upon such terms as shall appear just. Wells, Fargo & Co. v. McCarthy, 5 Cal. App. 301, 90 Pac. 203, and cases cited.

Reason for Liberality. — In Swift v. Raleigh, 54 Ill. App. 44, the court said: "The object of pleading is to apprise the opposite party of the charge against him or of the defense interposed, so that due preparation for trial may be made, and not to furnish a sword for defeating a good case on technical fanciful distinctions which in no manner interfere with the proper decision of the case on its merits."

In Maine, the statute provides that "no process or proceeding in courts of justice shall be abated, arrested or reversed for want of form only, or for circumstantial errors and mistakes which by law are amendable, when the person and case can be rightly understood." This statute, being remedial, has been liberally construed and applied in furtherance of justice. Thomas v. Friendship, 95 Me. 201, 49 Atl. 1056.

It is the approved practice in Iowa to allow the amendment and substitution of pleadings with great liberality. It is true that this rule is not broad enough to permit the joinder of causes of action not triable by the same kind of proceedings nor between the same parties, but this does not exclude nor define the right of the plaintiff to take advantage of material facts happening or coming to his knowledge after the filing of his original pleadings, and after that to plead such facts in a substituted or supplemental pleading and ask relief appropriate to such amended showing. Kean v. Rogers (Iowa) 118 N. W. 515.

a substantial right through defects or omissions in pleadings where they use reasonable diligence in applying for leave to amend.<sup>57</sup>

But, while it is true that greater liberality than formerly is allowed in the matter of amendments, and mere technicalities are not viewed with favor, it is also true that well established principles and precedents are not to be lightly set aside.<sup>58</sup>

(II.) **Liberality Decreasing.** — It has been said, and it would seem well said, that the liberality to be exercised by the court in allowing amendments is to be exercised in a greater degree in the earlier stage of the cases, and as the case progresses the liberality decreases, and changes to a strictness almost amounting to a prohibition after the matters litigated have received the final sanction of an adjudication by the trial court, and especially when affirmed on appeal by the court of last resort.<sup>59</sup>

(III.) **Defendant Favored.** — Under the old practice a plaintiff would not be allowed to amend his declaration if the amendment would change the nature of his action.<sup>60</sup>

But the rule was not so strict in respect to amending pleas, or adding a new and different plea as a defense to the action; the reason given being that the plaintiff, if he has misconceived the form or

57. *Northwestern Mut. L. Ins. Co. v. Richardson*, 130 Ill. App. 205; *Balch v. Smith*, 4 Wash. 497, 30 Pac. 648.

58. *Anderson v. Wetter*, 103 Me. 257, 69 Atl. 105, *quoting* *Lawry v. Lawry*, 88 Me. 482, 34 Atl. 273: "It will not be wise to depart too far from the established rules of pleading. Constant departure from these rules will soon result in confusion. In the end it will be found that justice will be better subserved by adhering to the remedies provided by law than in departing from them."

A defendant will not be allowed to amend his answer to a bill in equity by alleging matters which if proved would be in violation of the rule against the admission of oral evidence to vary a written instrument. *Dyer v. Cranston* Print Wks., 21 R. I. 63, 41 Atl. 1015.

59. *Todd v. Bettingen*, 102 Minn. 260, 113 N. W. 906, where the court said: "Where, however, the decision of the trial court directing judgment is affirmed, the ordinary result is that the litigation is ended. The losing party has no right to take a new start in that action and to try *de novo* another controversy on the same or any other subject. He cannot thus take two lawsuits together. He cannot experiment on one theory, and then try another in the same action, if the first is not upheld. This follows necessarily from the

doctrines of estoppel by judgment and of *res adjudicata*. In logical order, the liberality in allowing amendments is greatest at the time the lawsuit is commenced, and steadily decreases as the suit progresses. It finally changes to a strictness amounting ordinarily to prohibition after the matters in litigation have received the normally final sanction of an adjudication by the trial court, affirmed on appeal by the court of last resort. When that affirmance is of the trial court's order for judgment, it amounts to a direction not to proceed to a determination, as in case of a reversal on appeal, but to enter the judgment affirmed. The trial court is not, ordinarily at least, justified in allowing an amendment after the case has been submitted and decided. See *Hoatson v. McDonald*, 97 Minn. 201, 106 N. W. 311. This accords with the general rule that the statutory grounds for a new trial are exclusive. *Valerius v. Richard*, 57 Minn. 443, 447, 59 N. W. 534. Counsel for defendant has collected many cases in this connection. An elaborate review of the authorities will be found in 6 Current Law, 1039. The conclusion is so obviously and necessarily true that we refrain from incumbering the record with citation of cases."

60. *Cope v. Marshall*, Sayer 234, 96 Eng. Reprint 864.

nature of his action, can discontinue and bring a new action; whereas the defendant must avail himself of his defense in the action brought against him.<sup>61</sup> The defendant would, therefore, be allowed to amend his pleading at a stage of the case when the plaintiff would not be allowed to amend his declaration,<sup>62</sup> and to amend by setting up a new defense.<sup>63</sup> And the various statutes have not changed the law in this respect.<sup>64</sup>

**Municipal Corporations Favored.** — And in this respect it is held that a municipal corporation when sued is to be shown greater favor than an individual.<sup>65</sup>

**d. Diligence of Applicant.** — Of course, in order that the applicant may bring his case within the rules above stated, he must have been diligent in presenting the proposed amendment, otherwise the court is justified in refusing him leave to amend.<sup>66</sup>

61. *Waters v. Bovell*, 1 Wils. K. B. 223, 95 Eng. Reprint 585.

62. *Skutt v. Woodward*, 1 H. Bl. (Eng.) 238.

63. *Huber v. Steiner*, 4 Moore & S. 328, 30 E. C. L. 345; *Prior v. Buckingham*, 8 Moore 584, 17 E. C. L. 114.

64. *Cal.* — *Peters v. Foss*, 16 Cal. 357. *Conn.* — *McAlister v. Clark*, 33 Conn. 253. *Mo.* — *Cayse v. Ragsdale*, 17 Mo. 32. *N. Y.* — *Robertson v. Robertson*, 9 Daly 44; *Diamond v. Williamsburgh Ins. Co.*, 4 Daly 494. *Ore.* — *Garrison v. Goodale*, 23 Ore. 307, 31 Pac. 709. *Wis.* — *Palmer v. Schultz*, 138 Wis. 455, 120 N. W. 348; *Thorn v. Smith*, 71 Wis. 18, 36 N. W. 707; *Brown v. Bosworth*, 62 Wis. 542, 22 N. W. 521; *Carmichael v. Argard*, 52 Wis. 607, 9 N. W. 470.

"From necessity greater liberality exists in allowing amendments to answers than in amending complaints. Plaintiff may always, in the absence of a counterclaim or cross-complaint, dismiss his action and begin a new, and, in any event, the case tried upon the cause of action stated in his complaint and an adverse decision thereon does not prevent him from instituting a new suit on another different and distinct cause of action. But the defendant is not so fortunate. If by mistake he pleads an ineffective or insufficient defense, to say that he may not by amendment bring in a good defense is to inflict a drastic penalty for his inadvertence or mistake. This penalty virtually denies him his day in court; for the judgment for plaintiff, which he is powerless to prevent, will preclude him, not only as to defenses pleaded, but also as to defenses which he might have pleaded, but did not. Hence it is

that, especially under Code practice, the courts are more liberal in permitting the amendment of answers than in allowing the amendment of complaints; and this liberality is sometimes extended to the admission of entirely new defenses." *Cartwright v. Ruffin*, 43 Colo. 377, 96 Pac. 261.

**Amendment of a defective answer** should be allowed with great liberality if offered at such a stage in the proceedings that the other party will not lose an opportunity to fairly present his case. *Kirstein v. Madden*, 38 Cal. 158, holding a refusal to allow an amendment for the purpose of correcting insufficient denials and adding a verification was error.

**Under the Kansas code**, an answer may be amended where the amendment does not substantially change the defense. *Robertson v. Lombard Liquidation Co.*, 73 Kan. 779, 85 Pac. 528.

65. *Seaver v. New York*, 7 Hun (N. Y.) 331; *Wisconsin Cent. R. Co. v. Lincoln County*, 57 Wis. 137, 15 N. W. 121.

66. *Ala.* — *Elyton Land Co. v. Denny*, 108 Ala. 553, 18 So. 561. *Cal.* — *Emerie v. Alvarado*, 90 Cal. 444, 27 Pac. 356. *Colo.* — *Richner v. Plateau Livestock Co.*, 44 Colo. 302, 98 Pac. 178. *Conn.* — *Bristol v. Pitchard*, 81 Conn. 451, 71 Atl. 558. *Ga.* — *Burch v. Swift*, 116 Ga. 595, 43 S. E. 64. *Ia.* — *Spurrier v. Bulard*, 131 Iowa 123, 107 N. W. 1036; *Davis v. Boyer*, 122 Iowa 132, 97 N. W. 1002. *Miss.* — *National Bldg. & L. Assn. v. Brahan*, 80 Miss. 407, 31 So. 840. *Mont.* — *Bitlings v. Sanderson*, 8 Mont. 201, 19 Pac. 307. *N. Y.* — *Riesgo v. Clark*, 116 App. Div. 415, 101 N. Y. Supp. 832. *Ore.* — *Osmun v. Winters*, 30 Ore. 177, 46 Pac. 780. *Wis.* — *Rice*



He will not be permitted to amend if in the meantime the adverse party by reason of his delay has so acted that it would be unjust and inequitable to permit the party applying to change his position; in other words, he is estopped either by lapse of time or his own acts from obtaining the amendment.<sup>67</sup>

But mere laches is not always an unanswerable objection to an amendment, especially if it appears that no prejudice will arise therefrom to the party opposing the motion.<sup>68</sup>

**Previous Knowledge of Facts.**—So, too, ordinarily a party will not be permitted to amend a pleading for the purpose of setting forth facts of which he had full knowledge at the time of interposing the original pleading, unless facts satisfactorily excusing the failure or neglect in not setting forth all the material facts in the original pleading be shown.<sup>69</sup>

*v. Ashland Co.*, 114 Wis. 130, 89 N. W. 908.

While a party to an action ought to be permitted to put his action in such shape as will enable him to raise and have determined at the trial, every question affecting his interest involved in the subject-matter of the litigation, and the court is disposed to use its power to allow amendments with liberality, yet a party should not be permitted by laches, or from a misunderstanding of the rules of pleading or otherwise, to place his opponent at an unfair disadvantage. *Calvert v. Thurston*, 58 Misc. 347, 109 N. Y. Supp. 567. In this case, at the time of commencement of the actions the plaintiff had no right to maintain the same, as the causes of action were vested in a receiver of plaintiff's property duly appointed in proceedings supplementary to execution. Defendant failed to set up that the plaintiff was not a real party in interest, and thus waived the defense. The receivership was discharged and the order appointing the receiver duly cancelled. To allow the defendant to amend his answer at the trial to set up the above defense would place plaintiff in an unfair position.

An amendment to a petition in an action on certain promissory notes, filed without leave of court or notice to the defendant and after the evidence is all in, to which no answer is filed alleging a cause of action on promissory notes different from those described in the original petition, is filed too late to be considered for the purpose. *Sturman v. Sturman*, 118 Iowa 620, 92 N. W. 886.

Except under extraordinary circumstances an amendment permitting the defendant to deny what has been pre-

viously admitted after trial and reversal and when the case has been placed on the day calendar for a second trial will be denied on the ground of laches. *Treadwell v. Clark*, 45 Misc. 268, 92 N. Y. Supp. 166.

**Reason for Rule.**—The exercise of the power of the court to permit an amendment is controlled by the consideration that a party should not, by laches or otherwise, place his opponent at an unfair disadvantage, and for this reason an amendment, which otherwise would be freely allowed, may be refused because of the laches of the party moving. *Herbert v. De Murias*, 115 App. Div. 453, 101 N. Y. Supp. 381.

67. *Muller v. Philadelphia*, 113 App. Div. 92, 99 N. Y. Supp. 93.

68. *Herbert v. De Murias*, 115 App. Div. 453, 101 N. Y. Supp. 381.

69. *Pratt, Hurst & Co. Ltd. v. Tailor*, 99 App. Div. 236, 90 N. Y. Supp. 1023.

In *Jacobs v. Mexican Sugar Ref. Co.*, 115 App. Div. 499, 101 N. Y. Supp. 320, the court said: "Notwithstanding recent decisions by which this court has indicated a policy of liberality in the allowance of amendments to pleadings, in order that litigants may shape their issues as may seem best to them, yet it seems to me that the order in this case should not have been made. The defense proposed to be inserted in the answer some 18 months after the commencement of the action seeks to defeat the action by the present repudiation of a lease, upon the ground that it was fraudulent in fact at the time it was made, because of the participation in the making of the lease by directors interested in the result. But, in the original answer, it asserts that it did 'in earnestness cancel said lease be-

*e. Discretion of Court.*—At Common Law the matter of granting or refusing leave to amend was regarded as so exclusively addressed to the discretion of the court, that its action in that regard was not reviewable.<sup>70</sup>

**Power To Allow Amendments.**—In some of the states this rule of absolute discretion is recognized, and the appellate court will not review the action of the lower court except where it is attacked on the ground of want of power to allow the amendment.<sup>71</sup> And this

cause of default of the sugar company in paying the rent then due and payable to this company,' which was an acknowledgment of the original validity of the lease. It appears affirmatively that the officers of the company controlling it and making the affidavits upon which this motion was based were possessed of all the knowledge to enable them to set up the defense now sought to be interposed, not only when the original answer was served, but when the action was commenced, as they expressly so admit. It may be a question whether the proposed amendment sets up a good defense, for it would seem that equity requires prompt action in repudiating a contract for actual or constructive fraud when the facts are discovered, and also a restoration of the consideration received or an offer so to restore, to sustain rescission."

Where an additional defense is interposed in an amended answer, there should be some showing why it was not presented before. *A fortiori* where a defendant with full knowledge of the defense intentionally omits to plead it, or, having pleaded it, withdraws it, he ought not to be permitted to change his defense by pleading it. *Clark v. Spencer*, 14 Kan. 398, 19 Am. Rep. 96.

Where the facts originally in the amended answer were as well known to the defendant and his attorney at the time of filing his original answer, as when the amended answer was prepared and tendered, leave to file it is properly denied, if no valid excuse is made for not presenting the new defense in the original answer. *Bransford v. Norwich Union F. Ins. Soc.*, 21 Colo. 34, 39 Pac. 419.

Where the defendant, although cognizant of the matters contained in the proposed amendment, was not aware that he was entitled to litigate them in the impending action and did not disclose such matters to his counsel, the

amendment should be permitted. *McDougald v. Hulet*, 132 Cal. 154, 64 Pac. 278.

**Mistake of Law.**—The fact that the failure to plead a defense set up in the amended answer was due to a mistake of law by the defendant's attorney does not prevent the court from allowing the amendment, under Cal. Code, Civ. Proc., § 473, which allows an amendment to correct mistakes "in any other respect," or "in other particulars." *Gould v. Stafford*, 101 Cal. 32, 35 Pac. 429.

Leave should be given to amend an unverified answer containing a material admission after depositions have been taken, when the affidavits of defendant and his attorneys set out that the answer had been loosely prepared, signed without reading, and that the admission was a mistake of the attorneys and contrary to the fact. *Taylor v. Dodd*, 5 Ind. 246.

**70. U. S.**—*Mandeville v. Wilson*, 5 Cranch 15, 3 L. ed. 23. **Ala.**—*Holloway v. Lowe*, 1 Ala. 246. **N. Y.**—*Travis v. Waters*, 12 Johns. 500. **Pa.**—*Smith's Admr. v. Kessler*, 44 Pa. 142; *Burk v. Huber*, 2 Watts 306.

**71. Conn.**—*Taylor v. Keeler*, 51 Conn. 397; *McAlister v. Clark*, 33 Conn. 253. **Del.**—*Vandergrift v. Hollis*, 6 Houst. 90. **Me.**—*Cameron v. Tyler*, 71 Me. 27; *Ayer v. Gleason*, 60 Me. 207; *Gilman v. Emery*, 54 Me. 460; *Rowell v. Small*, 30 Me. 30. **Md.**—*Staley v. Thomas*, 68 Md. 439, 13 Atl. 53. **Mo.**—*Scarelett v. Academy of Music*, 43 Md. 203. **N. H.**—*Morse v. Whitcher*, 64 N. H. 591, 15 Atl. 207; *Sawyer v. Keene*, 47 N. H. 173. **N. Y.**—*Davis v. New York R. Co.*, 110 N. Y. 646, 17 N. E. 733. **Vt.**—*Harris v. Belden*, 48 Vt. 478; *Bates v. Cilley*, 47 Vt. 1.

Ordinarily when the allowance of any amendment is within the discretion of the trial court, this action will not be reviewed; and in those instances where

rule is recognized and followed by the United States Supreme Court.<sup>72</sup>

In most of the states, however, and especially in those where the code system of practice has been adopted, the action of the court in allowing or refusing leave to amend, while subject to review, will not be disturbed unless there appears to have been a palpable abuse of discretion under the circumstances of the case as disclosed.<sup>73</sup> This

it may be reviewed an order of disallowance will not be set aside unless the supreme court is of the opinion that the amendment should have been allowed. *Mitchell v. Smith*, 74 Conn. 125, 49 Atl. 909.

Within the first thirty days the plaintiff may file an allowable amendment as of right under the practice act, but afterwards other conditions may arise so that it may happen that the amendment would work injustice, and therefore the presumption that an amendment is in furtherance of justice filed within the first thirty days is no legal conclusion and the court is called upon to a certain extent to exercise its discretion. *Dunnott v. Thornton*, 73 Conn. 1, 46 Atl. 158.

Though a plaintiff has no absolute right to amend his complaint during the hearing in damages, the court under the statute has discretionary power to permit the amendment. *LaBarre v. Waterbury*, 69 Conn. 554, 37 Atl. 1068.

72. *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. ed. 800; *Walden v. Craig*, 9 Wheat. (U. S.) 576, 6 L. ed. 164. Compare *Maddox v. Thorn*, 60 Fed. 217, 8 C. C. A. 574.

73. Cal. — *In re Hall's Est.*, 154 Cal. 527, 98 Pac. 269; *San Joaquin Val. Bk. v. Dodge*, 125 Cal. 77, 57 Pac. 687; *Wixon v. Devine*, 91 Cal. 477, 27 Pac. 777; *Emerick v. Alvarado*, 90 Cal. 444, 27 Pac. 356; *Coubrough v. Adams*, 70 Cal. 374, 11 Pac. 634; *Wells, Fargo & Co. v. McCarthy*, 5 Cal. App. 301, 90 Pac. 203. Colo. — *Cartwright v. Ruffin*, 43 Colo. 377, 96 Pac. 261; *Cascade Ice Co. v. Austin Bluff L. & W. Co.*, 23 Colo. 292, 47 Pac. 268; *Klippel v. Oppenstein*, 8 Colo. App. 187, 45 Pac. 224. Ill. — *Dow v. Blake*, 148 Ill. 76, 35 N. E. 761; *Sturtevant v. Sullivan*, 69 Ill. App. 47. Ia. — *American Life Ins. Co. v. Melcher*, 132 Iowa 324, 109 N. W. 805; *Williams Shoe Co. v. Gotzian & Co.*, 130 Iowa 710, 107 N. W. 807; *Le Mars Bldg. & L. Assn. v. Burgess*, 129 Iowa 422, 105 N. W. 641; *Davis v. Huber Mfg. Co.*, 119 Iowa 56, 93 N. W. 78; *Jarozewski v. Allen*, 117

Iowa 632, 91 N. W. 941; *Pierson v. Chicago, G. W. R. Co.*, 116 Iowa 601, 88 N. W. 363; *Brockman v. Berryhill*, 16 Iowa 183. Ind. — *Koons v. Price*, 40 Ind. 164; *Bequette v. Lassalle*, 5 Blackf. 443. Kan. — *Phoenix Ins. Co. v. Washington*, 71 Kan. 777, 81 Pac. 461; *Rogers v. Hodgson*, 46 Kan. 276, 26 Pac. 732. Mass. — *Manning v. Conway*, 192 Mass. 122, 78 N. E. 401; *Golding v. Brennan*, 183 Mass. 286, 67 N. E. 239. Minn. — *Wilson v. Northwestern M. L. Ins. Co.*, 103 Minn. 351, 114 N. W. 251; *Gerdtsen v. Cockrell*, 52 Minn. 501, 55 N. W. 58; *Iltis v. Chicago M. & St. P. R. Co.*, 40 Minn. 273, 41 N. W. 1040. Miss. — *Barker v. Justice*, 41 Miss. 240. Mo. — *Gale v. Foss*, 47 Mo. 276; *Johnson v. Blell*, 61 Mo. App. 37. Mont. — *Barngrover v. North*, 35 Mont. 448, 90 Pac. 162; *First Nat. Bank v. How*, 1 Mont. 604. Neb. — *Omaha & R. V. R. Co. v. Moschel*, 38 Neb. 281, 56 N. W. 875. N. Y. — *People v. Munn*, 131 App. Div. 341, 115 N. Y. Supp. 803; *Lyon v. Wood*, 130 App. Div. 294, 114 N. Y. Supp. 272; *Toher v. Schaefer*, 96 N. Y. Supp. 470. N. D. — *Marten v. Luger Furn. Co.*, 8 N. D. 220, 77 N. W. 1003. Vt. — *Chaffee v. Rutland R. Co.*, 71 Vt. 384, 45 Atl. 750. Wis. — *Price v. Grzyll*, 133 Wis. 623, 114 N. W. 100; *Kleimenhagen v. Dixon*, 122 Wis. 526, 100 N. W. 826; *Illinois Steel Co. v. Budzisz*, 106 Wis. 499, 81 N. W. 1027, 82 N. W. 534.

It is within the court's discretion to allow an amendment to a petition which cannot occasion surprise to the opposite party. *Northern Tex. T. Co. v. Mullins*, 44 Tex. Civ. App. 566, 99 S. W. 433.

The time within which plaintiff may serve and file an amended complaint when permitted by the court so to do, is not specified by any statutory provision, but is a matter resting entirely within the discretion of the court; and § 1054 of the Code of Civil Procedure has no application in such case. *Vestal v. Young*, 147 Cal. 715, 82 Pac. 381, holding that an extension of time within which to file an amended complaint for more than thirty days is not an abuse of discretion.



discretion is, however, a legal, and not an arbitrary, discretion. To arbitrarily refuse to allow an amendment which should be allowed, is an improper exercise of judicial discretion.<sup>74</sup>

There is authority, however, to the effect that the allowance of an amendment is, in most cases, a more just ground for complaint than the refusal, because the allowance more or less affects the issues, while the refusal leaves the parties to the issues which they themselves deliberately and advisedly made.<sup>75</sup> Of course, the circumstances of the case may be such that there is in reality no ground for the exercise of a discretion,<sup>76</sup> and if the presiding judge is satis-

74. Colo.—Tomboy Gold Mines Co. v. Arapahoe Co., 23 Colo. 441, 48 Pac. 537. Ga.—Adams v. Haigler, 123 Ga. 659, 51 S. E. 638. Ill.—Northwestern Mut. Life Ins. Co. v. Richardson, 130 Ill. App. 205. Ky.—O'Hara v. Williamstown Cem. Co., 133 Ky. 828, 119 S. W. 234. Neb.—Gage v. West, 62 Neb. 612, 87 N. W. 344. N. Y.—Pritchard v. Nederland L. Ins. Co., 38 App. Div. 111, 56 N. Y. Supp. 604. N. D.—Marten v. Luger Furn. Co., 8 N. D. 220, 77 N. W. 1003. Tex.—Ford v. Liner, 24 Tex. Civ. App. 353, 59 S. W. 943.

Although the power to permit amendments is, to a considerable extent, discretionary, the decision of the trial court may be reviewed and reversed where it results in substantial injustice. Home Ins. Co. v. Overturf, 35 Ind. App. 361, 74 N. E. 47, citing Chicago, etc. R. Co. v. Jones, 103 Ind. 386, 6 N. E. 8.

Leave asked before trial to amend an answer on the ground that it does not truly set out the facts relied upon, should be granted. Koons v. Price, 40 Ind. 164, citing Taylor v. Dodd, 5 Ind. 246, *supra*, note 69.

The discretion of the court should be exercised liberally so as to secure to defendant his statutory right of asserting as many defenses as he may have and to bring about a trial upon the merits. Rees v. Storms, 101 Minn. 381, 112 N. W. 419 (holding it error for the court during trial to refuse to permit amendment of the answer to set up additional defenses on the ground of their inconsistency when they were not in fact inconsistent); Hardman v. Kelley, 19 S. D. 608, 104 N. W. 272; Case Threshing Mach. Co. v. Eichinger, 15 S. D. 530, 91 N. W. 73.

Where refusal to allow a proper amendment is based, not on the exercise of an independent discretion, but solely on an erroneous conception of a formal ruling of another judge in the same case

which the trial court intended to follow, it is a proper subject of review on appeal. Moran v. Bentley, 71 Conn. 623, 42 Atl. 1013.

75. German Evang. Soc. v. Prospect Hill Cem., 2 App. Cas. (D. C.) 310.

76. A defendant in an action of ejectment who has been defeated because of inability to prove a defense not alleged, and who some two years later obtains an order for the statutory new trial upon payment of costs, cannot then move for leave to amend his answer to meet the defect in the original answer. "The sufficiency of the answer, in view of the plaintiff's proof, was ruled upon at the trial nearly two years before this application, but, rather than correct the pleading then, the defendants continued to assert its sufficiency, and now move only because defeated upon appeal. There is no ground here for the exercise of discretion, unless the term implies the mere fixing of a price which a party may pay, whatever his laches, to avoid the consequences of an erroneous policy." Barson v. Mulligan, 94 N. Y. Supp. 687.

In St. Clara F. Academy v. Northwestern Nat. Ins. Co., 101 Wis. 464, 77 N. W. 893, an action upon insurance policies for loss of a building burned while in course of erection, the defendants, more than three years after the commencement of the action, and after there had been two trials and two appeals, applied, just upon the eve of a third trial, for leave to amend their answers by alleging as a further defense that plaintiffs had been indemnified by the contractor rebuilding the building at his own expense. The facts in regard to such alleged indemnification were as well known to the defendants when they filed their original answers as when they asked leave to amend. It was a matter in dispute whether plaintiffs were not liable to pay the contractor,

fied that the purpose of the amendment is vexation and delay, and not the setting up of what is honestly thought to be a defense, it is proper to refuse the defendant's motion to amend.<sup>77</sup>

The statutes in some states expressly provide that any order refusing to allow a motion to amend the pleadings is the subject of review in the appellate court.<sup>78</sup>

**2. In Respect of the Time and Condition of the Cause.**—*a. Before Trial.*—(I.) Generally. — Bearing in mind the general principles which have just been stated, the generally well recognized rule is that when an application to amend is made in advance of trial, and the court can see that there is substantial merit in the proposed amendment, that it is made in good faith, in short that its allowance would be in furtherance of justice, the application is ordinarily granted.<sup>79</sup>

in consideration of such rebuilding, a large sum in addition to the original contract price, and an action to test that question was pending when the motion to amend was made, and, after that motion had been denied, the plaintiffs were found to be so liable. It was held that there was no abuse of discretion in denying leave to amend.

77. *Fay v. Hunt*, 190 Mass. 378, 77 N. E. 502.

The allowance of an amendment is a matter of discretion where nothing appears on appeal except that leave to amend was asked at the last moment and was denied. This is no ground for exception. *Benjamin v. Casey*, 181 Mass. 542, 63 N. E. 925.

78. A Florida statute which makes it the duty of the court at all times to amend all defects and errors in any proceeding in civil cases, and further provides that all such amendments as may be necessary for the purpose of determining the real question in controversy shall be made if duly applied for; and such a statute makes it the court's duty to allow an amendment setting up an entirely new defense where it is necessary to do so, to determine the true question in controversy. *Robinson v. Hartridge*, 13 Fla. 501, 519, holding this statute to be a copy of the English Statute, and citing *Cornish v. Abingdon*, 1 F. & F. (Eng.) 562; *Taylor v. Shaw*, 1 C. & R. (Eng.) 1057.

**Discretion.**—Where the statute provides that amendment after the time allowed for answer shall not be made except upon affidavit that the new matter was not omitted and is not now filed for purpose of delay, the court has no discretion to disallow the amendment when accompanied by the affidavit. *Alabama*

*M. R. Co. v. Guilford*, 114 Ga. 627, 40 S. E. 794; *Wynn v. Wynn*, 109 Ga. 255, 34 S. E. 341. When not accompanied by affidavit the court may exercise its discretion. *Georgia R. & Bkg. Co. v. Gardner*, 113 Ga. 897, 39 S. E. 299 (as explained in *Alabama Midland & R. Co. v. Guilford*, 114 Ga. 627, 40 S. E. 794).

Where the allowance of amendment without the required affidavit does not necessitate a continuance or re-reference or introduction of further evidence, there is no abuse of discretion. *Marsh v. Hix*, 110 Ga. 888, 36 S. E. 230.

79. **III.**—*Northwestern Mut. L. Ins. Co. v. Richardson*, 130 Ill. App. 205. **Kan.**—*Robertson v. Lombard Liquidation Co.*, 73 Kan. 779, 85 Pac. 528. **N. Y.**—*Muller v. Philadelphia*, 113 App. Div. 92, 99 N. Y. Supp. 93, reversing 49 Misc. 322, 99 N. Y. Supp. 194. **Wis.**—*Kersten v. Weichman*, 135 Wis. 1, 114 N. W. 499.

In *Bell v. Standard Quick Silver Co.*, 146 Cal. 699, 81 Pac. 17, an action attacking the validity of an assessment on corporate stock and to set aside a sale under that assessment, it was held that there was no abuse of discretion on the part of the court in refusing leave to file a second amended complaint, inasmuch as the only new matter the proposed amendment contained was an allegation that the assessment was not levied for the purpose of conducting the business or paying the debts of the corporation, and there being no showing that the plaintiff did not know of the facts involved in this allegation at the time the original complaint was filed, nor any claim that any evidence could be procured to prove the allegation if the amendment had been allowed, the court said: "The court under these circumstances might in its discretion have either allowed or refused the amend-

(II.) Amendment To Meet Amendment.— And where one party has been permitted to amend his pleading in a material respect,<sup>80</sup> his adversary should be permitted to amend his pleading so as to meet such amendment.<sup>81</sup>

ment and in either case this court would not interfere."

In *Thompson v. Young*, 53 Misc. 250, 103 N. Y. Supp. 200, an action to recover for medical services, the complaint alleged an assignment to the plaintiff by one person, and it was held proper to permit the plaintiff to amend by alleging an assignment from another person, inasmuch as the complaint stated the nature of the services, to whom they were rendered, the time and place of their rendition, and their price. "These are the essentials of the claim, and no change whatever in the allegations of these elements of the claim is asked. The claim in the complaint as it stands and the claim in the proposed amended complaint are identical; the change being in the person from whom the plaintiff derives title."

Defective pleas may be amended by order of court where there is merely such a defect or want of form, or such error or mistake, that the person or case may be rightly understood without pleading. *Berry v. Osborn*, 28 N. H. 279.

In *Massachusetts* the statute requiring a declaration in set-off to be filed with the answer does not prevent the court from allowing it to be filed as an amendment at a later time. *Hall v. Rosenfeld*, 177 Mass. 397, 59 N. E. 68.

Where an answer has been stricken out because unverified it is not error for the court to deny leave to file an amended answer differing from the original only in the fact of verification where such verification might have been made in the beginning. *Tulare Bldg. & Loan Assn. v. Coleman* (Cal.), 44 Pac. 793.

80. Where the amendment to the complaint is simply clerical, it is not error to refuse to allow the defendant to amend his answer. *Butcher v. Bank of Brownsville*, 2 Kan. 70, 83 Am. Dec. 446.

Permission to amend by striking out certain allegations and inserting others in their stead does not of itself amount to an amendment of such counts, justifying the defendant in filing new pleas.

*Sinsheimer v. Skinner Mfg. Co.*, 165 Ill. 116, 46 N. E. 262.

The fact that on motion of the defendant certain portions of the petition are stricken out without changing its material allegations, does not give him a right to plead over or to file new pleas. *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586, 9 N. E. 263.

Error on the part of the court, if any, in refusing to permit the defendant to amend his answer by special traverse of each of the material allegations in the complaint after the original complaint had been amended, by striking out one of the parties, is cured where it appears that afterwards, and after all the amendments to the complaint had been made, the defendant was allowed to file and did file an amended answer in which he had an opportunity to deny and did substantially deny all of the material allegations of the complaint as amended. *Frei v. Vignier*, 145 Cal. 251, 78 Pac. 733.

81. Ia.—*Logan v. Tibbott*, 4 G. Gr. 389. N. H.—*Bassett v. Salisbury Mfg. Co.*, 43 N. H. 249. Wis.—*Devereux v. Peterson*, 126 Wis. 558, 106 N. W. 249.

Where the plaintiff is permitted to amend his cause of action in such a way as to change the issues, plaintiff has the right to amend his answer to meet such amendment. *Bennett v. Collins*, 52 Conn. 1, where the court said: "We do not mean to say that there may not be cases where, even after a trial and finding of the facts, the amendment of the complaint or of some of the pleadings may so clearly make no change in the issue presented that there should be no reason for a new trial of the facts. But where a new issue is made and the trial already had does not constitute a full trial of the changed issue, as it generally will not, the party against whom the amendment is made should be allowed a new trial of the facts."

Amendment of the petition at the trial term, in a material matter, justifies the amendment of the plea or answer by pleading any matter thereby rendered available for the first time. *Quillian v. Johnson*, 122 Ga. 49, 49 S. E.



(III.) **After Demurrer.**—In the early history of amendments, a party to whose pleading a demurrer had been interposed, could not amend without the consent of the court.<sup>82</sup> This rule was, however, later relaxed so as to permit the pleader to amend after joinder on demurrer and before argument.<sup>83</sup> Later, again, the rule was still further relaxed so as to permit the pleader to amend at any time before judgment on the demurrer.<sup>84</sup>

(IV.) **After Demurrer Sustained.**—And under the modern practice, this rule has been so far relaxed as to permit the pleader to amend his pleading after the demurrer thereto has been sustained,<sup>85</sup>

801; *Southern Bell Tel. Co. v. Parker*, 119 Ga. 721, 47 S. E. 194; *O'Conner v. Brucker*, 117 Ga. 451, 43 S. E. 731 (all holding that an amendment is "immaterial" within the meaning of the code, unless it renders the proposed new defense available for the first time).

Permitting an attorney to sign an amended complaint which has been answered is not error, though defendant was not allowed to amend his answer at the time, and even if error, the defendant's substantial rights were not affected because after the close of the plaintiff's evidence in chief the defendants by leave of the court did file an amended answer to the amended complaint before they introduced their evidence, and the case was tried upon this amended answer. *Smith v. Dorn*, 96 Cal. 73, 30 Pac. 1024.

82. *Bramah v. Roberts*, 1 Bing. (N. C.) 481, 27 E. C. L. 466.

83. *Lanning v. Shute*, 5 N. J. L. 778.

84. *Harkins v. Edwards*, 1 Iowa 296.

In Georgia, the rule is that a pleader may amend almost as matter of right, any time before argument on demurrer. *Grand Lodge v. Creswill*, 128 Ga. 775, 58 S. E. 163; *Patton v. Lafayette Bank*, 124 Ga. 965, 53 S. E. 664; *Adams v. Hayler*, 123 Ga. 659, 51 S. E. 638.

When a defendant, after demurring to a petition at the appearance term, dies during such term, and before the time allowed by law for demurring has expired, and the executor of his will is, at the next succeeding term, made a party defendant in his suit, and thereupon immediately offers to amend the demurrers filed by his testator, he is properly allowed to do so. The time allowed by law for filing demurrers had not expired at the death of the original defendant, and when the executor was made the party defendant he came into the case where it was left by his testator, and as the latter had further time

in which to demur, the executor was entitled to like time for such purpose. *Belt v. Lazenby*, 126 Ga. 767, 56 S. E. 81.

There is no error in permitting a declaration to be amended during a term of court without notice to the defendant, the rule requiring notice of applications to amend referring to amendments made in vacation and not to those made in term. The foregoing is true although the cause has been submitted upon demurrer by briefs at such term. The mere fact that the parties chose to submit the demurrer upon briefs during the term does not deprive the court of the power to make any appropriate order in term without requiring special notice to be given that it could have made had the demurrer been submitted orally or if the case had not been before the court upon demurrer at all. *Hartford Fire Ins. Co. v. Redding*, 47 Fla. 228, 37 So. 62.

85. U. S.—*McDonald v. Nebraska*, 101 Fed. 171, 41 C. C. A. 278. Ala.—*Kingsbury v. Milner*, 69 Ala. 502. Ark.—*Reynolds v. Roth*, 61 Ark. 317, 33 S. W. 105. Cal.—*Stewart v. Douglass*, 148 Cal. 511, 83 Pac. 699; *Schaake v. Eagle Auto. Can Co.*, 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759; *Hibernia Sav. & L. Soc. v. Laidlaw*, 4 Cal. App. 626, 88 Pac. 730. Colo.—*Anthony v. Slayden*, 27 Colo. 144, 60 Pac. 826. Conn.—*Wakeman v. Throckmorton*, 74 Conn. 616, 51 Atl. 554. Ga.—*Patton v. Bank of Lafayette*, 124 Ga. 965, 53 S. E. 664. Ill.—*Lansing v. Birge*, 3 Ill. 375. Ia.—*Newcom v. Dubois*, 95 Iowa 194, 63 N. W. 677. Ky.—*Goff v. Lowe*, 25 Ky. L. Rep. 2176, 80 S. W. 219. Me.—*Littlefield v. Maine Cent. R. Co.*, 104 Me. 126, 71 Atl. 657; *McGee v. McCann*, 69 Me. 79. Mass.—*Lewis v. Jackson*, 165 Mass. 481, 43 N. W. 206. Neb.—*Berrer v. Moorhead*, 22 Neb. 687, 36 N. W. 118. N. J.—*Hale v. Lawrence*, 22 N. J. L. 72. N. Y.—*Mitchell v. Dunmore Realty*

Co., 132 App. Div. 180, 116 N. Y. Supp. 812. *Okla.*—*Armour Pkg. Co. v. Orrick*, 4 *Okla.* 661, 46 *Pac.* 573. *Ore.*—*Sears v. Dunbar*, 50 *Ore.* 36, 91 *Pac.* 145. *R. I.* *Jackson Bank v. Irons*, 18 *R. I.* 718, 30 *Atl.* 420. *S. C.*—*Smith v. Southern R. Co.*, 80 *S. C.* 1, 61 *S. E.* 205; *Bell v. Floyd*, 64 *S. C.* 246, 42 *S. E.* 104. *Tex.* *Wisley v. Houston Nat. Bank*, 28 *Tex. Civ. App.* 268, 67 *S. W.* 195. *Wash.*—*Crane Co. v. Aetna Indem. Co.*, 43 *Wash.* 516, 86 *Pac.* 849. *Wyo.*—*Bonnifield v. Price*, 1 *Wyo.* 172.

It is the duty of the court upon sustaining a demurrer to an answer to allow an amendment setting up a defense, or facts constituting the same which have come to the knowledge of the defendant after filing the original answer. *Hibernia Sav. & Loan Soc. v. Laidlaw*, 4 *Cal. App.* 626, 88 *Pac.* 730, citing *Guidery v. Green*, 95 *Cal.* 630, 30 *Pac.* 786.

Where an amended answer has twice been held good by the court when attacked by the plaintiff, it is error for the court to refuse defendant leave to amend after demurrer to such answer has been subsequently sustained. *Leitz v. Rayner*, 37 *Kan.* 470, 15 *Pac.* 571.

When a demurrer is sustained to a complaint, it is within the discretion of the court either to allow an amended complaint to be filed, or to give judgment forthwith in favor of the defendant. The appellate court will in every such case sustain the action of the lower court, whatever course it may take, unless it is made to appear by the record that there has been an abuse of discretion. *Stewart v. Douglass*, 148 *Cal.* 511, 83 *Pac.* 699, where the plaintiff merely asked leave to file an amended complaint, and so far as the record disclosed, did not show that there were any allegations of fact omitted from the complaint to which the demurrer had been sustained, which if inserted therein, would in any respect change its legal effect, nor did he make any statement whatever of the grounds or reasons for making the application for leave to amend, and it was held there was clearly no abuse of discretion shown in the action of the court in refusing leave to file amended complaint.

Where one defendant, the owner of a lot on which it is sought to foreclose a lien, demurs to the petition on grounds affecting it as a whole and the demurrer is sustained, the effect of entry of judgment sustaining the demurrer is

to end the case so far as the lot owner is concerned, although no formal words of dismissal are in the order and at this time the petition cannot be amended under § 5097 of the civil code, which declares that parties may amend their pleadings "at any stage of the cause," but it is not a stage of the cause after the cause is ended. There was a cause as to the remaining defendants but there was none as to the demurrant after judgment on the demurrer was signed and no time allowed therein for amendment. *Wells v. Butler's Supply Co.*, 128 *Ga.* 37, 57 *S. E.* 55.

The fact that a demurrer to the answer, for lack of a certain allegation, has been overruled, does not make it error to allow an amendment introducing such allegation. *Dickenson v. Columbus State Bank*, 71 *Neb.* 260, 98 *N. W.* 813.

In Rhode Island, under the provisions of the court and practice act, a declaration may be amended in the discretion of the superior court after it has sustained a substantial demurrer, and there is no reason why the same power may not be exercised in a proper case after the supreme court has overruled an exception of such ruling. *Hebert v. Handy*, 28 *R. I.* 317, 67 *Atl.* 325.

In *Williamson v. Joyce*, 137 *Cal.* 151, 69 *Pac.* 980, an action to enforce a lien for sewer work, the original complaint alleged that the warrant, diagram and assessment were recorded more than two years before the commencement of the action, thus making it apparent that the suit had not been commenced within the two years of the life time of the lien as required by law, to which a demurrer was sustained with leave to amend. The amended complaint merely alleged that the warrant, diagram and assessment were duly recorded, omitting the date entirely. It was held in support of the action of the court in sustaining a demurrer of the amended complaint without leave to amend that the court was justified in assuming that the date of the record given in the original complaint was correct and that the complaint could not be truthfully amended so as to obviate the objection.

In so far as objections raised by special demurrer to the plaintiff's petition are well taken, they may be met by appropriate amendment. *Montgomery v. King*, 123 *Ga.* 14, 50 *S. E.* 963; *Greer v. Andrew*, 133 *Ga.* 193, 65 *S. E.* 416; *Patton v. Bank of Lafayette*,

provided, of course, that the defect or error is not incurable.<sup>86</sup>

Where a demurrer has been sustained to the complaint, it is not an abuse of discretion on the part of the trial judge to refuse leave to amend where the plaintiff does not specify any amendment which he could make or desires to make.<sup>87</sup>

The practice on a motion for judgment on the pleadings is analogous to that upon demurrer, and in a proper case the court may grant leave to a party whose pleading has been found insufficient, permitting him to amend upon proper terms.<sup>88</sup>

(V.) After Issue Joined. — Although the issues have been joined, the court may, in its discretion, nevertheless permit either party to amend in a proper case.<sup>89</sup> And the court may likewise, in its discretion, refuse leave so to do; and such refusal will not be interfered with unless the pleader claiming to be aggrieved thereby shows an abuse of such discretion.<sup>90</sup>

(VI.) On Eve of Trial. — In a number of cases amendments have been allowed, although proposed on the eve of the trial of the cause.<sup>91</sup> But, as in other cases, the matter of the allowance or refusal of the proposed amendment in such case is discretionary with the court.<sup>92</sup>

124 Ga. 965, 53 S. E. 664, 5 L. R. A. (N. S.) 592; *Lippincott v. Behre*, 122 Ga. 543, 50 S. E. 467.

Where an unverified plea of non est factum is demurred to at the trial term, it may be perfected by verification. *Patton v. Bank of Lafayette*, 124 Ga. 965, 53 S. E. 664, 5 L. R. A. (N. S.) 592.

86. *Hibernia Sav. & Loan Soc. v. Laidlaw*, 4 Cal. App. 626, 88 Pac. 730.

87. *Burling v. Newlands*, 112 Cal. 476, 44 Pac. 810.

The refusal of leave to amend a complaint after demurrer thereto has been sustained is not an abuse of discretion where the record does not show in what manner the plaintiff desired to amend, what change he proposed to make in his complaint, and there is nothing to indicate that he specified in the court below the nature of the proposed amendment. *Klienclaus v. Dutard*, 147 Cal. 245, 81 Pac. 516.

88. *Schleissner v. Goldsticker*, 135 App. Div. 435, 120 N. Y. Supp. 333.

89. Ind. — *Dewey v. State*, 91 Ind. 173. Neb. — *Southern Pine L. Co. v. Fries*, 1 Neb. (Unof.) 691, 96 N. W. 71. N. Y. — *Harp v. Bull*, 3 How. Pr. 45. N. D. — *More v. Burger*, 15 N. D. 345, 107 N. W. 200. Okla. — *Swope v. Burnham*, 6 Okla. 736, 52 Pac. 924. Tex. — *Hutchins v. Wade*, 20 Tex. 7; *Caldwell v. Lamkin*, 12 Tex. Civ. App. 29, 33 S. W. 316. Wis. — *Gates v. Paul*, 117 Wis. 170, 94 N. W. 55.

A plea of the statute of limitations is not a plea to the merits, and the court may refuse to allow it to be set up by amendment after issue joined on the merits. *Waples v. M'Gee*, 2 Har. (Del.) 444.

90. Ill. — *Dow v. Blake*, 148 Ill. 76, 35 N. E. 761. Ind. — *Lindley v. Sullivan*, 133 Ind. 588, 32 N. E. 738, 33 N. E. 361. Ky. — *Cavanaugh v. Britt*, 90 Ky. 273, 13 S. W. 922. Neb. — *Commercial Nat. Bank v. Gibson*, 37 Neb. 750, 56 N. W. 616. Ore. — *Osmun v. Winters*, 30 Ore. 177, 46 Pac. 780.

91. Ill. — *Great Western Tel. Co. v. Mears*, 154 Ill. 437, 40 N. E. 298. Ia. — *Snyder v. Ward*, 125 Iowa 146, 100 N. W. 348. Neb. — *Union Pac. R. Co. v. Broderick*, 30 Neb. 739, 46 N. W. 1121. S. C. — *Richardson v. Wallace*, 39 S. C. 216, 17 S. E. 725.

92. *Anderson Transfer Co. v. Fuller*, 174 Ill. 221, 51 N. E. 251; *Shank v. Woodworth*, 111 Mich. 642, 70 N. W. 140. See also U. S. — *Moore v. Petty*, 135 Fed. 668, 68 C. C. A. 306. Cal. — *Shadburne v. Daly*, 76 Cal. 355, 18 Pac. 403 (holding it to be no abuse of discretion to refuse the amendment where the case is tried as though all the matters therein set forth had been fully pleaded). S. C. — *Kitchen v. Southern R. Co.*, 68 S. C. 554, 48 S. E. 4. Tex. — *Western Union Tel. Co. v. Bowen*, 84 Tex. 476, 19 S. W. 554; *Walker v. Hernandez*, 42 Tex. Civ. App. 543, 92 S. W. 1067.



b. *At the Trial.*—(I.) *Statements of Rules.*—(A.) *GENERALLY.*—Probably, however, the most numerous instances in which the power of the court to grant or refuse, and the right of the party to leave to amend, are those in which the amendment is sought during the progress of the trial, and before final judgment. No hard and fast rule can be declared which can be considered as applicable in all cases. It can be stated, however, that the court should exercise its discretion in granting<sup>93</sup> or refusing<sup>94</sup> leave to amend in the particu-

It is within the discretion of the court to refuse the defendants permission to withdraw their announcement of "ready for trial" and tender new issues or frame issues under the direction of the court because of their surprise in the ruling of the court in sustaining exceptions to the evidence offered by defendants, and this discretion will not be revised except in case of abuse. *Blain v. Popper* (Tex. Civ. App.), 49 S. W. 129. See also *Obert v. Landa*, 59 Tex. 475. *Compare Boren v. Billington*, 82 Tex. 137, 18 S. W. 101.

93. Cal.—*Barnes v. Berendes*, 139 Cal. 32, 69 Pac. 491, 72 Pac. 406; *Hibernia Sav. & L. Soc. v. Jones*, 89 Cal. 507, 26 Pac. 1089; *Beronio v. Southern P. R. Co.*, 86 Cal. 415, 24 Pac. 1093; *Gavitt v. Doub*, 23 Cal. 78; *Simpson v. Miller*, 7 Cal. App. 248, 94 Pac. 252. Colo.—*Cartwright v. Ruffin*, 43 Colo. 377, 96 Pac. 261. Conn.—*LaBarre v. Waterbury*, 69 Conn. 554, 37 Atl. 1068. Ga.—*Bryant v. Hambrick*, 9 Ga. 133. Ind.—*Holcraft v. King*, 25 Ind. 352; *Case v. Moorman*, 25 Ind. App. 293, 58 N. E. 85. Ia.—*Jones v. Shelby Co.*, 124 Iowa 551, 100 N. W. 520. Kan.—*Stevens v. Matthewson*, 45 Kan. 594, 26 Pac. 38; *Snider v. Windson*, 77 Kan. 67, 93 Pac. 600. N. Y.—*Eisner v. Pringle Mem. Home*, 130 App. Div. 559, 115 N. Y. Supp. 58; *Case v. Case*, 121 N. Y. Supp. 746. Ohio.—*Spice v. Steinwick*, 14 Ohio St. 213. Vt.—*Chaffee v. Rutland R. E. Co.*, 71 Vt. 384, 45 Atl. 750. Wis.—*Post v. Campbell*, 110 Wis. 378, 85 N. W. 1032; *Simpson v. Miller*, 7 Cal. App. 248, 94 Pac. 252.

In *Chamberlain v. Loewenthal*, 138 Cal. 47, 70 Pac. 932, when the case was called for trial, the plaintiffs asked leave to amend their complaint by changing the dates between which the services sued for were alleged to have been rendered, which leave was granted and the complaint thereupon amended by writing the changed dates upon the face of the original. The defendant objected to this alteration upon the ground that it

would be, in effect, the institution of a new cause of action as to a proof of claim and that such leave to amend was not proper. It was held that there was no error in the proceeding inasmuch as in granting the motion the court stated to the defendant that he could amend his answer if he so desired and would allow the answer on file to stand in all other respects, whereupon the defendant filed an amended answer and the case proceeded to trial, there also being no show of any surprise or inability to present evidence in support of his answer or in refutation of the plaintiff's claim.

Amendments may be allowed during the trial if the adverse party is allowed to apply for a continuance. *Aultman & Taylor Co. v. Shelton*, 90 Iowa 288, 57 N. W. 857.

Where only the general issue has been pleaded in an action for work and labor, it is not error to refuse leave to amend after the plaintiff has introduced his evidence. *Leek v. Flink* (Miss.), 33 So. 494.

94. Cal.—*Siskiyou County v. Gamlich*, 110 Cal. 94, 42 Pac. 468. Colo.—*Richner v. Plateau Live Stock Co.*, 44 Colo. 302, 98 Pac. 178. Del.—*Burton v. Waples*, 3 Harr. 75. Ia.—*Spurrier v. Bullard*, 131 Iowa 123, 107 N. W. 1036; *Kettering v. Eastlack*, 130 Iowa 498, 107 N. W. 177; *Snyder v. Ward*, 125 Iowa 146, 100 N. W. 348; *Pierson v. Chicago G. W. R. Co.*, 116 Iowa 601, 88 N. W. 363; *Gallaher v. Head*, 108 Iowa 588, 79 N. W. 387; *Rosenberger v. Marsh*, 108 Iowa 47, 78 N. W. 837; *Marsh v. Chown*, 104 Iowa 556, 73 N. W. 1046. Mo.—*Clark v. St. Louis Tr. R. Co.*, 127 Mo. 255, 30 S. W. 121.

An application for leave to amend an answer made when the case is called for trial may properly be denied where it is not made to appear that the proposed amendment is material and the reasonable necessity thereof is not shown. *Federal Betterment Co. v. Reeves*, 77 Kan. 111, 93 Pac. 627.

lar case, bearing in mind that its action in this respect should be in furtherance of justice.<sup>95</sup>

95. *In re Hill's Estate*, 8 Cal. App. 286, 96 Pac. 918.

The discretion is not abused by allowing an amendment of an answer at the trial where no claim of surprise is made and no continuance is asked on that ground. *Weis v. Morris*, 102 Iowa 327, 71 N. W. 208.

In *Levels v. St. Louis & H. R. Co.*, 196 Mo. 606, 94 S. W. 275, which was an action for the death of a minor, the petition stated that the plaintiff, the father of the deceased, had been adjudicated insane and that the public administrator had taken charge of his estate and represented him in this suit. The answer was a general denial and a plea of contributory negligence. During the trial, after the plaintiffs had introduced the most of their evidence, the defendant asked leave to file an amendment to his answer denying that the father of the minor was insane or that he had been adjudicated insane, or that the public administrator had been lawfully authorized to take charge of his estate. On objection of the plaintiffs the court refused to allow the amendment for the reason that it would not be in the furtherance of justice. As to the propriety of this ruling the supreme court said: "If the defendant intended to deny the capacity in which the plaintiff sued, it should have made a specific denial of the allegations of the petition in that respect in the nature of a plea in abatement. The general denial is addressed to the merits of the case and does not put in issue those facts which are raised only by a plea in abatement. Plaintiffs were not put to the proof of those facts to maintain their case as the pleadings stood when the trial began and the trial court wisely ruled that it would not further the ends of justice under the circumstances of the case to allow the issue to be raised after the trial had progressed."

In *Bannon v. Insurance Co. of N. A.*, 115 Wis. 250, 91 N. W. 666, a consolidated action against several insurance companies, most of the defendants admitted the allegations of the complaint and set up affirmative defenses; but two of the answers contained certain denials, so that technically, on the pleadings, plaintiff had the right to open and close.

At the opening of the trial the matters denied were admitted, but no offer was made to amend the answers. After the evidence was mostly in, defendants moved to amend the answers so as to withdraw said denials, and renewed their application for the right to open and close. It was held, that it was not an abuse of discretion to deny such application on the ground that the admissions had merely taken the place of proof and that the amendment should not be permitted because intended merely to obtain the advantage of opening and closing; that even had the answers been formally amended, the refusal to give defendants the opening and closing would not justify a reversal unless it appeared that they were prejudiced thereby.

In *Carroll v. Fethers*, 102 Wis. 436, 78 N. W. 604, an action of tort for the conversion of money, it was held proper for the court to permit the defendants to amend their answer during the trial so as to allege that in a former action which had been dismissed because the plaintiff declined to bring in another defendant, plaintiff had sought with full knowledge of the facts to recover the identical sum of money upon an implied contract as for money had and received and had thereby waived the tort, inasmuch as it appeared, amongst other things, that the plaintiff had greatly delayed the prosecution of the present action, that an order dismissing it for want of prosecution had been set aside as a matter of favor to him and that the amendment could not operate as a surprise. The court said: "The amendment to the answer simply allowed the defendants to prove a record made by the plaintiff himself, and which, from its nature, was conclusive, and hence could not be disproved. The amendment of the answer, therefore, did not, and could not, operate as a surprise to the plaintiff. It was certainly in the furtherance of justice that the plaintiff should abide by the record he had himself made in the controversy over this same money. . . . A supposed advantage, by reason of a technical defect in the answer, whereby such records, made by the plaintiff himself, might have been kept out of the case, cannot be regarded as a substantial right of

(B.) DISCRETION OF COURT. — As during other stages of the cause, so the allowance or refusal of amendments during trial rests within the sound discretion of the trial court, and its action in respect thereto will not ordinarily be disturbed unless an abuse of discretion be shown,<sup>96</sup> the theory being that, liberality being the rule, the

the plaintiff;" *distinguishing* St. Clara F. Academy v. Northwestern Nat. Ins. Co., 101 Wis. 464, 77 N. W. 893.

In Bay v. Monroe County, 121 Iowa 302, 96 N. W. 854, an action against a county by a physician employed to treat contagious diseases during an epidemic, where the evidence conclusively established the contract with the proper officers, the rendition of the services, and there was no showing of bad faith, it was held not to be an abuse of discretion to strike from the files at the close of the evidence an amendment which set up that the board of health had not properly certified the account.

Where during the trial the defendant discovers new defensive matter, but does not ask leave to amend until six months thereafter and after judgment has been ordered, the denial of his request is not error. Blood v. La Serena L. & W. Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252.

Where by reason of mistake or inadvertence of counsel, an allegation material to the cause of action is omitted from the complaint, an opportunity should be afforded the plaintiff on proper terms to amend. Fredericks v. Kreuder, 121 N. Y. Supp. 1001.

An amendment making a plea of rescission more specific may be filed during the progress of the trial without formal leave of court, and when considered in the submission of the case, an amendment to the abstract containing the same on appeal is not subject to a motion to strike. Berkey v. Lefebure, 125 Iowa 76, 99 N. W. 710.

Under the Georgia code all parties may, at any stage of the cause, as a matter of right, amend their pleadings in all respects, whether in matter of form or of substance. Cureton v. Cureton, 120 Ga. 559, 48 S. E. 162.

Under the Iowa statute permitting amendments in furtherance of justice, it is not error to refuse to allow defendant to file an amendment which contradicts his own testimony. Chlein v. Kabat, 72 Iowa 291, 33 N. W. 771.

The provision of the Texas statute which states that "all amendments of

pleadings, pleas and pleas of intervention must when the court is in session be filed under leave of the court under such terms as the court may prescribe before the parties announce ready for trial and thereafter" has been held directory, and it is held notwithstanding such provisions that the trial court may in the exercise of a sound discretion permit an amendment after an announcement of ready for trial by the parties. And so where, in an action on a contract, objections have been sustained to the introduction of evidence by defendants as to a waiver of a certain clause of the contract, the action of the court in allowing defendants to withdraw their announcement of ready for trial and file a trial amendment for the purpose of introducing evidence to show the alleged waiver is a proper exercise of its discretion, plaintiff's counsel having announced in open court that he had no objection to the jury nor to trying the case before it, his only objection being to the action of the court in permitting the amendment. Colorado Canal Co. v. McFarland & Southwell (Tex. Civ. App.), 94 S. W. 400.

96. U. S. — Dunn v. Yayo Mills, 134 Fed. 804, 67 C. C. A. 450. Ariz. — Brady v. Pinal County, 8 Ariz. 114, 71 Pac. 910. Cal. — Siskiyou County v. Gamlich, 110 Cal. 94, 42 Pac. 468; Conbrough v. Adams, 70 Cal. 374, 11 Pac. 634. Colo. — Richner v. Plateau Live Stock Co., 44 Colo. 382, 93 Pac. 178. Conn. — Goodale v. Rohan, 76 Conn. 680, 58 Atl. 4; Botsford v. Wallace, 69 Conn. 263, 37 Atl. 902; Gulliver v. Fowler, 64 Conn. 556, 30 Atl. 852. Ill. — Shovers v. Warlick, 152 Ill. 355, 38 N. E. 792. Ind. — Case v. Moorman, 25 Ind. App. 293, 58 N. E. 85. Ia. — Jarozewski v. Allen, 117 Iowa 632, 91 N. W. 941. Kan. — Phoenix Ins. Co. v. Washington, 71 Kan. 777, 81 Pac. 461; Mitchell v. Ripley, 5 Kan. App. 818, 49 Pac. 153. Mass. — Cogswell v. Hall, 185 Mass. 455, 70 N. E. 461; Hurley v. Donovan, 182 Mass. 64, 64 N. E. 685. Mo. — Greene v. Gallagher, 35 Mo. 226. Neb. — Bliss v. Beck, 80 Neb. 290, 114 N. W. 162. N. Y. — Lanpher v. Clark, 149 N. Y. 472, 44 N. E.



allowance of amendments is the rule, refusal the exception."

**Harmless Error.** — Although in some circumstances the refusal of the court to allow the proposed amendment might be considered error, frequently such error is, under the circumstances of the case, considered as harmless, or as having been cured by some subsequent action of the court.<sup>98</sup>

(C.) **TRIAL ON ACTUAL MERITS.** — Many of the courts hold that the trial court has full power to allow an amendment at any stage of the trial so as to bring the merits of the controversy fairly to trial, and that unless such discretion is clearly abused to the preju-

182; *Rice v. Cowtaut*, 38 App. Div. 543, 56 N. Y. Supp. 351; *Toher v. Schaefer*, 96 N. Y. Supp. 470. N. C. — *King v. Dudley*, 113 N. C. 167, 18 S. E. 110. N. D. — *Rectenbaugh v. Northwestern Port Huron Co.*, 118 N. W. 697. S. C. — *De Hihins v. Free*, 70 S. C. 344, 49 S. E. 841. Tex. — *Altgelt v. Oliver Bros.* (Tex. Civ. App.), 86 S. W. 28. Vt. — *Chase v. Watson*, 75 Vt. 385, 56 Atl. 10. Wis. — *Gates v. Paul*, 117 Wis. 170, 94 N. W. 55.

It is within the sound discretion of the trial court to refuse to permit an amendment after the parties have announced "ready for trial," and the trial has progressed several days, and if such discretion is exercised manifestly without abuse, the action of the court is not subject to review on appeal. *Altgelt v. Alamo Nat. Bank* (Tex. Civ. App.), 79 S. W. 582.

97. Cal. — *Jackson v. Jackson*, 94 Cal. 446, 29 Pac. 957; *McPherson v. Weston*, 85 Cal. 90, 24 Pac. 733. Colo. — *Jordan v. Greig*, 33 Colo. 360, 80 Pac. 1045. Ill. — *Postal Tel. Cable Co. v. Likes*, 124 Ill. App. 459. Ind. — *Burns v. Fox*, 113 Ind. 205, 14 N. E. 541. Ia. — *Taylor v. Star Coal Co.*, 110 Iowa 40, 81 N. W. 249; *Clough v. Bennett*, 99 Iowa 69, 68 N. W. 578. Ky. — *Metro-politan L. Ins. Co. v. Smith*, 22 Ky. L. Rep. 868, 59 S. W. 24. Ore. — *Good v. Smith*, 44 Ore. 578, 76 Pac. 354. Tenn. — *Nunnally v. Southern Iron Co.*, 94 Tenn. 397, 29 S. W. 361. Wash. — *Thomas v. Price*, 33 Wash. 459, 74 Pac. 783. Wis. — *Kleimenhagen v. Dixon*, 122 Wis. 526, 100 N. W. 826.

In *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786, after the court had sustained plaintiff's objection to the introduction of certain evidence as not being within the issues made by the pleadings, the defendant asked leave to file an

amended answer so as to permit him to prove the facts sought to be proved and it was held error for the court to refuse to permit this to be done. The court said: "It can very rarely happen that a court will be justified in refusing a party leave to amend his pleading so that he may properly present his case, and obviate any objection that the facts which constitute his cause of action or his defense are not embraced within the issues, or properly presented by his pleading. This rule is especially cogent when the objection to testimony is not that it is then for the first time brought to the notice of the adversary, but that by reason of the language of the pleading it is not within the terms of the issue. The fact sought to be shown by the testimony offered on the part of the defendant was not a defense then for the first time presented in the case. The defendant had attempted to set it up as a defense in his original answer, but by reason of certain phraseology used therein, the court held, upon the objection of the plaintiff, that it did not present an issue that would render the testimony admissible; and when the defendant asked leave to amend his answer so as to obviate this ruling, the court should have granted his motion."

98. As where the court receives evidence and finds upon the very matter to which the amendment was directed. *MacDougald v. Hulet*, 132 Cal. 154, 64 Pac. 278.

Whether or not a trial court committed error in permitting the defendant to amend his answer in respect of a particular defense, will not be considered where it appears that the defense in question was withdrawn from the consideration of the jury before the conclusion of the trial. *Minneapolis Thrashing-Machine Co. v. Currey*, 75 Kan. 365, 89 Pac. 688.

dice of the moving party, the appellate court will not interfere.<sup>99</sup>

(D.) DILIGENCE OF APPLICANT. — The applicant for leave to amend at the trial in a material respect must excuse his apparent lack of diligence in not having either incorporated the proposed amendatory matter in his original pleading, or asked for leave at any earlier stage of the cause; otherwise the court may be justified in refusing leave.<sup>1</sup>

99. Ala. — *Karthauss v. Nashville C. & St. L. R. Co.*, 140 Ala. 433, 37 So. 433. Cal. — *Cowdery v. McChesney*, 124 Cal. 363, 57 Pac. 221. Ky. — *Robinson & Co. v. O'Brien*, 109 Ky. 270, 58 S. W. 920. Mass. — *Hirsh v. Beard*, 200 Mass. 369, 86 N. E. 954, amending an answer after verdict. Miss. — *Kelly v. Continental Casualty Co.*, 87 Miss. 438, 40 So. 1; *Barker v. Justice*, 41 Miss. 240. Neb. — *Brown v. Brown*, 71 Neb. 200, 98 N. W. 718. Ore. — *Ridings v. Marion Co.*, 50 Ore. 30, 91 Pac. 22. R. I. — *Gautieri v. Romano*, 28 R. I. 246, 66 Atl. 652. Wis. — *Kleimenhagen v. Dixon*, 122 Wis. 526, 100 N. W. 826.

**Rationale of Rule.** — "The reason of our very liberal and broad statute permitting amendments of pleadings at any stage of the trial is, that a party may fail to state the real ground that will save in him in his cause, and that the amendment will serve to settle the cause on its actual merits." *Mitchell v. Smith*, 74 Conn. 125, 49 Atl. 909. See also *McDougald v. Hulet*, 132 Cal. 154, 64 Pac. 278, where the court said: "The trial court in furtherance of justice should allow amendments liberally in order to mold and direct its proceedings so as to dispose of cases upon their substantial merits and without unreasonable delay, regarding mere technicalities as obstacles to be avoided rather than as principles to which effect is to be given in derogation of substantial right."

Where there is nothing to show that the defendant is not defending in good faith on a material issue, it is error for the court to refuse to allow him to amend at the trial so as to sufficiently state his defense. *Chatfield v. McDaniel*, 85 Cal. 518, 24 Pac. 839.

The words "vi et armis," omitted from a declaration in an action of trespass, may be supplied by amendment at any stage of the case. *Gautieri v. Romano*, 28 R. I. 246, 66 Atl. 652.

Where a declaration contains two inconsistent counts the plaintiff may be allowed before going to the jury to

strike out one count and press his case on the second. *Brown v. Woodbury*, 183 Mass. 279, 67 N. E. 327.

Where a complaint contains two counts upon conclusion of the evidence, the same being without conflict, and sustaining the defendant's plea in abatement, and if the defendant has requested in writing the general charge in its favor on the plea, at this stage of the proceeding the plaintiff should be allowed to amend his complaint by striking out one of such counts. *Karthauss v. Nashville, C. & St. L. R. Co.*, 140 Ala. 433, 37 So. 268.

**Value of Services.** — In *Cowdery v. McChesney*, 124 Cal. 363, 57 Pac. 221, an action against an executor to recover the balance due on mutual, open and current account in which it appeared that a claim embodying an itemized statement of the account had been presented to the defendant as executor and by him rejected, the complaint alleged that the deceased at the time the plaintiff commenced working for him, agreed to pay what his services were reasonably worth, but it contained no allegation as to the value of those services. It was held error to refuse to permit the plaintiff to amend his complaint so as to state the value of his services.

**A defective amended plea in abatement**, after evidence has been introduced, may be further amended to meet the objection that the plea was insufficient to admit the evidence. *Gray v. Fuller* (Tex. Civ. App.), 117 S. W. 919.

**Waiver.** — In *Jaroszewski v. Allen*, 117 Iowa 632, 91 N. W. 941, where plaintiff had been allowed to amend his petition and offer testimony after he had rested and defendant had moved for a directed verdict, and defendant declined to take a continuance at plaintiff's cost, it was held that the defendant could not thereafter allege prejudice.

1. Cal. — *Tingley v. Times Mirror Pub. Co.*, 151 Cal. 1, 89 Pac. 1097; *In re Redfield's Estate*, 116 Cal. 637, 48 Pac. 794; *McMinn v. O'Connor*, 27 Cal. 138.

(II.) **Particular Stages of Trial Considered.**—(A.) **GENERALLY.**—The allowance of an amendment in an otherwise appropriate case is not to be denied solely because the trial has progressed to a particular stage. Thus it may be allowed after the jury has been sworn;<sup>2</sup> although there are cases upholding the rejection of an amendment proposed at such a time.<sup>3</sup> And in some jurisdictions it is held that the jury must be re-sworn if the issues are changed by the proposed amendment.<sup>4</sup>

(B.) **AFTER EVIDENCE CLOSED.**—So, too, amendments may be allowed after the evidence is closed;<sup>5</sup> or it may be disallowed if it does not tend to promote justice.<sup>6</sup>

(C.) **AFTER MOTION FOR NON-SUIT.**—And amendments have frequently been allowed in furtherance of justice after the plaintiff has

Fla.—*Livingston v. Anderson*, 30 Fla. 117, 11 So. 270. Ill.—*Phenix Ins. Co. v. Caldwell*, 85 Ill. App. 104; *Mason v. Strong*, 51 Ill. App. 482. Ind.—*Sharpe v. Dillman*, 77 Ind. 281. Ia.—*Vorhes v. Buchwald*, 112 N. W. 1105. Kan.—*Baughman v. Hale*, 45 Kan. 453, 25 Pac. 856. Ky.—*Weimer v. Smith*, 101 S. W. 327. N. Y.—*Bowen v. Sweeney*, 63 Hun 224, 17 N. Y. Supp. 752. Tex.—*McGregor v. Skinner* (Tex. Civ. App.), 47 S. W. 398. Wis.—*Brillion Lumb. Co. v. Barnard*, 131 Wis. 284, 111 N. W. 483.

Refusal to allow amendment of an answer during trial is not error where two amendments have already been made, and the suit has been pending for two years because of dilatory pleading. *Billings v. Sanderson*, 8 Mont. 201, 19 Pac. 307.

In the absence of any showing of mistake or inadvertence, an amendment for the purpose of denying the execution of the instrument set out in the complaint, made for the first time during the trial, is properly denied. *Weed Sew. Mach. Co. v. Philbrick*, 70 Mo. 646.

2. Ala.—*Union Naval Stores Co. v. Pugh*, 156 Ala. 369, 47 So. 48. Cal.—*Beronio v. Southern Pac. R. Co.*, 86 Cal. 415, 24 Pac. 1093. Ind.—*Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792. Mo.—*Cotner v. St. Louis & S. F. R. Co.*, 220 Mo. 284, 119 S. W. 610; *Coleman v. Drane*, 116 Mo. 387, 22 S. W. 801. Tenn.—*Brazelton v. Turney*, 7 Coldw. 267.

**Nul Tiel Record.**—Where the constitution provides that amendments may be made for the purposes of justice at any time before judgment, although the courts have uniformly refused to permit amendments so as to affect issues of

fact after a jury has been sworn, this rule does not apply to the plea of *nul tiel record* which the jury are not sworn to try, and for such plea may be added after the jury is sworn where justice seems to require it. *Janvier v. Vandever*, 3 Harr. (Del.) 29.

3. *Atkinson v. Cox*, 54 Ark. 444, 16 S. W. 124; *Dulany v. Norwood*, 4 Har. & M. (Md.) 496.

4. *Record v. Ketcham*, 76 Ind. 482; *Brown v. Shearon*, 17 Ind. 239; *Williams v. Miller*, 10 Iowa 344.

5. Ala.—*Huggins v. Southern R. Co.*, 148 Ala. 153, 41 So. 856. Mich.—*Detroit R. Co. v. Forbes*, 30 Mich. 165. Okla.—*Lookabaugh v. Bowmaker*, 21 Okla. 489, 96 Pac. 651. Pa.—*Fay v. Fay*, 22 Pa. Super. 328. Compare *Joyce v. Growney*, 154 Mo. 253, 55 S. W. 466.

It is within the discretion of the trial judge to allow an amendment after the announcement of "ready for trial," and after the closing of the testimony, and his action will not be ground for reversal unless there has been an abuse of discretion. *Lewis v. Hoeldtke* (Tex. Civ. App.), 76 S. W. 809.

6. *Bay v. Monroe Co.*, 121 Iowa 302, 96 N. W. 854.

The court is under no obligation to grant a motion to amend a complaint after the evidence has been partially heard. *Botsford v. Wallace*, 69 Conn. 263, 37 Atl. 902.

There is no error in disallowing a proposed amendment after the evidence is closed by the addition of another court which is subject to demurrer and is not sustained by the evidence. *Nash v. Southern R. Co.*, 136 Ala. 177, 33 So. 932, 96 Am. St. Rep. 19.



closed his case in chief and the defendant has moved for a non-suit.<sup>7</sup>

(D.) THE ARGUMENT. — So, also, during<sup>8</sup> or after the argument, an amendment may be allowed.<sup>9</sup>

(E.) AFTER INSTRUCTION TO JURY. — Amendments have also been allowed after the jury have been instructed,<sup>10</sup> although the court may in its discretion refuse the amendment at such time.<sup>11</sup>

(F.) AFTER CAUSE SUBMITTED TO JURY. — Most of the courts hold that ordinarily a pleading cannot be amended in a material respect after the case has been submitted to the jury;<sup>12</sup> although there are

7. Cal. — *Kamm v. State Bank*, 74 Cal. 191, 15 Pac. 765; *Valencia v. Couch*, 32 Cal. 339. Me. — *Kelly v. Bragg*, 76 Me. 207. N. J. — *Hasbrouck v. Winkler*, 48 N. J. L. 431, 6 Atl. 22. Ore. — *Koshland v. F. Assn.*, 31 Ore. 362, 49 Pac. 865.

Compare *Cuthbert v. Brown*, 49 S. C. 513, 27 S. E. 485.

A demurrer to the evidence does not *ipso facto* deprive the defendant in such demurrer of the right of amendment provided by the statutes. While the statute treating of demurrer to the evidence commands the court to require the adverse party to join in the demurrer, yet that duty of the court may be well performed and the right of amendment still preserved to the adversary in the demurrer. *Atlas Coal Co. v. O'Rear* (Ala.), 50 So. 63.

8. *Sanders v. Knox*, 57 Ala. 80; *Hall v. Rice*, 64 Cal. 443, 1 Pac. 891, 2 Pac. 889.

9. Ark. — *Burke v. Snell*, 42 Ark. 57. Ia. — *Herrstrom v. Newton & N. W. R. Co.*, 129 Iowa 507, 105 N. W. 436. S. C. — *Mew v. Charleston R. Co.*, 55 S. C. 90, 32 S. E. 828.

But at such time a very clear showing must be made that justice will be promoted by the amendment. *Herrstrom v. Newton & N. W. R. Co.*, 129 Iowa 507, 105 N. W. 436.

10. *Prater v. Miller*, 25 Ala. 320; *Wade v. Curtis*, 96 Me. 309, 52 Atl. 762.

An amendment does not come too late when made not only before verdict but before the submission of the case to the jury. *City of Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318.

Plea of plaintiff's bankruptcy in bar of action was held properly made by amendment after both parties rested but before submission, in *Simpson v. Miller*, 7 Cal. App. 248, 94 Pac. 252.

11. *Staley v. Thomas*, 68 Md. 439, 13 Atl. 53.

12. Ala. — *Abbott v. Mobile*, 119 Ala.

595, 24 So. 565; *Ashley's Admr. v. Robinson*, 29 Ala. 112. Cal. — *Gluckauf v. Bliven*, 23 Cal. 312. Ia. — *Hatfield v. Rano*, 15 Iowa 177. N. Y. — *Browne v. Stecher Litho. Co.*, 24 App. Div. 480, 48 N. Y. Supp. 1038.

See also *Stone v. Mattingly*, 14 Ky. L. Rep. 113, 19 S. W. 402.

In *Griffith v. Merchants' Life Assn.*, 141 Iowa 414, 119 N. W. 694, an action on a life insurance policy where no issue as to assessments had been raised until after the submission of the cause for decision by the court, when the plaintiff amended, in contradiction of proof and of a stipulation, that assessments had been fully paid, it was held that the question of legality of assessment could not be brought into the case by amendment without first setting aside the submission and giving the defendant an opportunity to be heard.

*Bays v. Herring*, 51 Iowa 286, 1 N. W. 558, held that an amendment by the defendant after the evidence is in, the argument made and the cause submitted, is properly disallowed, since the defendant should offer his proposed amendment as soon as he sees the necessity therefor, which ordinarily is not later than the close of plaintiff's testimony.

The trial judge may properly refuse to permit defendant to amend to plead the statute of limitations after the case has been submitted. *San Joaquin Val. Bank v. Dodge*, 125 Cal. 77, 57 Pac. 687.

An amendment to a petition filed after the submission of the case, asking for an accounting, is properly disregarded if such relief could not be given without setting aside the submission and opening the case for further proceedings. *Burkhardt v. Burkhardt*, 107 Iowa 369, 77 N. W. 1069.

In *American Soda Fountain Co. v. Dean Drug Co.*, 136 Iowa 312, 111 N. W. 534, an action to recover for goods sold on conditional contract to which a

instances in which the allowance of an amendment at such time has been upheld.<sup>13</sup>

(G.) TRIAL BY COURT. — In the case of trial by the court without a jury, amendments after the cause has been submitted to the court have frequently been allowed.<sup>14</sup>

(III.) Particular Amendments Considered. — (A.) CLERICAL ERRORS. — Amendments may be allowed during the trial, almost as of course, for the purpose of correcting mere clerical errors.<sup>15</sup>

breach of contract was affirmatively pleaded by defendant, it was held that a refusal to permit an amendment to the petition alleging waiver of compliance after the cause was submitted on a motion to direct a verdict for the defendant, and the court had indicated its intention of granting such a motion, was not an abuse of discretion.

After a referee's report has been filed, and exceptions taken, and when the argument thereof was to occur, at this stage of the case the court in its discretion may or may not permit the answer to be amended and its decision cannot be reversed unless, under all the circumstances, it allowed plaintiff to succeed on a technical point which might have been determined without prejudice to his substantial rights in aid of the justice of the cause. *Frazier v. Harrison*, 137 Mo. App. 375, 118 S. W. 108.

After Findings. — Refusing to allow an amendment upon a point already covered by the answer, after a return of the findings of the jury upon certain facts submitted to them, is proper. *Sears v. Collins*, 5 Colo. 492.

13. As where the amendment did not materially change the issues. *Jeune v. Burt*, 121 Ind. 275, 22 N. E. 256; *Kennedy v. Brown*, 50 Mich. 336, 15 N. W. 408.

The right to amend under the Georgia Code exists even after the evidence has been concluded and the jury have the case under consideration. *Cureton v. Cureton*, 120 Ga. 559, 48 S. E. 162.

14. Cal. — *Andrus v. Smith*, 133 Cal. 78, 65 Pac. 320; *Myers v. Holton*, 9 Cal. App. 114, 98 Pac. 197. Mo. — *Hale v. Skinner*, 33 Mo. 452. Neb. — *Higgins v. Supreme Castle*, 83 Neb. 504, 120 N. W. 137. Ore. — *Heywood v. Doenbecher Mfg. Co.*, 48 Ore. 359, 86 Pac. 357, 87 Pac. 530.

15. Cal. — *Hall v. Rice*, 64 Cal. 443, 1 Pac. 891, 2 Pac. 889. Colo. — *Mullins v. Gilligan*, 12 Colo. App. 13, 54 Pac.

1106. Conn. — *Allen v. Chase*, 81 Conn. 474, 71 Atl. 367. Ind. — *Reed v. Cheney*, 111 Ind. 387, 12 N. E. 717. Mich. — *Ludeman v. Hirth*, 96 Mich. 17, 55 N. W. 449. Neb. — *Ward v. Davis*, 5 Neb. (Unof.) 111, 97 N. W. 437, a formal change for the purpose of letting in testimony. N. Y. — *Havana Bank v. Magee*, 20 N. Y. 355. S. C. — *Dent v. South-Bound R. Co.*, 61 S. C. 329, 39 S. E. 527. Tenn. — *Patten v. Dixon*, 105 Tenn. 97, 58 S. W. 299. Wis. — *Chandos v. Edwards*, 86 Wis. 493, 56 N. W. 1098.

In *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549, 955, where the trial court had permitted an amendment to the complaint after the case had been submitted, the court said: "The power given under section 473 of the Code of Civil Procedure to allow amendments in the interest of justice is uniformly held to be within the discretion of the trial court and it has been frequently held that this court will not disturb the action of the trial court except where an abuse of that discretion is shown. It is unusual to find it necessary to amend the complaint after a case has been submitted, but I find no limitation as to the time before judgment entered when the power of the court ceases and even after judgment results from mistake, inadvertence, surprise or excusable neglect."

Where the proposed amendment is only a formal one, rendered necessary by the interpretation placed by the court upon the facts alleged in the answer, and does not change the material facts, refusal to allow it at the trial is error. *Rice v. Longfellow Bros. Co.*, 78 Minn. 394, 81 N. W. 207, where the answer set up as counterclaim facts constituting an alleged contract of sale between plaintiff and defendant, which the court interpreted to constitute rather a contract of agency to sell, the alleged breach being the same in either case.

Amendment to correct a mistake in

(B.) CHANGING FORM OF ACTION. — A limitation upon the power of the court to allow, and the right of a party to an amendment during the trial generally recognized by the courts is that the form of the action must not be changed.<sup>16</sup>

(C.) CHANGE OF PARTIES. — Nor can there be an entire change of parties by amendment.<sup>17</sup>

(D.) CHANGE OF ISSUES. — Nor can the court ordinarily allow an amendment at the trial which will work a change of the issues, by introducing an entirely new cause of action or defense,<sup>18</sup> the reason

the answer is properly permitted after the evidence is in. *Mullins v. Gilligan*, 12 Colo. App. 13, 54 Pac. 1106.

16. *Huggins v. Southern R. Co.*, 148 Ala. 153, 41 So. 856; *Townes v. Dallas Mfg. Co.*, 154 Ala. 612, 45 So. 696.

17. *Huggins v. Southern R. Co.*, 148 Ala. 153, 41 So. 856; *Petterson v. Stockton & T. R. Co.*, 134 Cal. 244, 66 Pac. 304 (where it was sought to change the action from one against the defendant individually to one against the defendant and another jointly).

18. Ala. — *Townes v. Dallas Mfg. Co.*, 154 Ala. 612, 45 So. 696; *Huggins v. Southern R. Co.*, 148 Ala. 153, 41 So. 856. Ga. — *Exposition Cotton Mills v. Western & A. R. Co.*, 83 Ga. 441, 10 S. E. 113. Ill. — *Phenix Ins. Co. v. Caldwell*, 85 Ill. App. 104. Ind. — *Maxwell v. Day*, 45 Ind. 509. Ia. — *Moyers v. Fogarty*, 140 Iowa 701, 119 N. W. 159; *Vorhes v. Buchwald*, 137 Iowa 721, 112 N. W. 1105. Mass. — *Kellogg v. Kimball*, 142 Mass. 124, 7 N. E. 728; *Cutter v. Richardson*, 125 Mass. 72. N. Y. — *Zoller v. Kellogg*, 66 Hun 194, 21 N. Y. Supp. 226. Eng. — *New Zealand & Australian Land Co. v. Watson*, 7 Q. B. D. 382.

A party cannot allege one cause of action and then recover upon another. *Moran v. Bentley*, 69 Conn. 392, 37 Atl. 1092.

This subject will be treated at length in the titles "Cause of Action;" "Complaint and Petition in Code Pleading."

An amendment tendering a new issue is properly refused after the argument in the case has been concluded. *Gallaher v. Head*, 108 Iowa 588, 79 N. W. 387, citing *Emerson v. Converse*, 106 Iowa 330, 76 N. W. 705.

It is error to permit an amendment which raises a false issue calculated to divert the attention of the jury from the real question for their determina-

tion. *Marshall v. Goble*, 32 Neb. 9, 48 N. W. 898.

Leave to file an amended answer after the plaintiff's evidence is in, is properly denied where it changes materially the whole aspect of the case and no reason is given why it was not sought earlier. *Gale v. Foss*, 47 Mo. 276. And see *Wixon v. Devine*, 91 Cal. 477, 27 Pac. 777. See the title "Answer in Code Pleading."

Refusal to allow amendment during trial, which entirely shifts defendant's position, is not error. *Pierce v. Brennan*, 88 Minn. 50, 92 N. W. 507.

Demurrer. — It is too late at the trial term of a case for the plaintiff to file an amendment to a demurrer to defendant's plea setting up new and distinct grounds of objection thereto. *Farkas v. Monk*, 119 Ga. 515, 46 S. E. 670, citing Civil Code, §§ 5045-5047. See the title "Demurrer."

The Iowa statute permitting the amendment of pleadings does not contemplate the filing of an amendment after a case has been submitted, which substantially changes the cause of action or defense. *Le Mars Bldg. & Loan Assn. v. Burgess*, 129 Iowa 422, 105 N. W. 641. The proper function of amendment after the trial of a case is to conform the pleadings to the proofs, but it is not permitted to substitute a new cause of action or bring in new parties. *Austin Western Co. v. Weaver Twp.*, 136 Iowa 709, 114 N. W. 189. In *Boardman v. Louis Draeh Construction Co.*, 123 Iowa 603, 99 N. W. 176, the court said: "While amendments, under our practice, are allowed with great liberality, yet it is quite irregular to introduce a new cause of action after the submission of a case, by amendment to the petition, even though made to conform the pleadings to the proofs. A defendant has some rights in such matters, and, if he has presented his case



being that a party after having deliberately selected his ground of contest, and finding himself defeated thereon, should not be permitted, by amending his pleading, so to shift the ground of contest as to court the hazard of another battle.<sup>19</sup>

(E.) ADDITIONAL PLEAS.—It is discretionary with the court to allow or reject additional pleas proposed to be filed during the progress of the trial,<sup>20</sup> especially after a plea has been filed by defendant and the

on the issues as they existed at the time of trial, he is not called upon to meet some other supposed cause of action existing in favor of the plaintiff, but not declared upon his petition. To hold otherwise would result in putting a defendant to a great disadvantage. Our liberal system of pleading should not be converted into an instrument of injustice."

After a cause has been tried and submitted on the theory of a trespass, a new cause of action seeking recovery on the ground of an implied agreement to pay rent, cannot be made by amendment of the petition. *Cole v. Thompson*, 134 Iowa 685, 112 N. W. 178.

In Texas trial amendments are authorized by rule 27 (67 S. W. xxii), adopted for the government of county and district courts. This rule provides: "When the exceptions have been presented and decided, leave may be granted to either or both parties, to file an amendment in one instrument of writing separate from those which have been previously filed by each, which shall close the pleadings in the case to be then determined by the court so as to decide all the questions of sufficiency arising upon them." This language has reference to proceedings occurring after the case is called for trial, as is shown by the provisions of rule No. 26 (67 S. W. xxii). The statute gives the defendant in an action the right to plead as many several matters, whether of law or fact, as he shall think necessary for the defense, and which may be pertinent to the cause; provided that he shall file them all at the same time and in due order of pleading." Art. 1262, Rev. St. 1895. In *Hoffman v. Lemm* (Tex. Civ. App.), 106 S. W. 712, in which case the above rules were set forth, the court said, "The only departures permitted from this requirement that the pleadings of the defendant shall all be filed at the same time are under the terms of the rule above quoted, where exceptions have been sustained after the case is

called for trial. This latitude is allowed for the purpose of preventing an injustice to the defendant in the presentation of his defense, and to avoid delay in the trial. We do not think it was ever contemplated that it should be resorted to by defendants as a means of presenting new matter, supplementary to those contained in the answer then on file, as was done in this case. Such departures from the well-established rules of pleading should be discountenanced, rather than encouraged, by trial courts. In the case before us the court had the undoubted right to refuse permission to file the 'trial amendment' in the form presented, and, if filed without its permission, might have ordered it stricken from the file, or might disregard it in presenting the issues to the jury. The exercise of this authority could not be complained of, for the reason that the conditions had not arisen under which trial amendments should have been permitted."

19. *Barret v. Kansas & Texas Coal Co.*, 70 Kan. 649, 79 Pac. 150.

20. *Chicago v. Cook*, 204 Ill. 373, 68 N. E. 538; *Davis v. Lang*, 153 Ill. 175, 38 N. E. 635; *Phenix Ins. Co. v. Stocks*, 149 Ill. 319, 36 N. E. 408; *Dow v. Blake*, 148 Ill. 76, 35 N. E. 761; *Fisher v. Greene*, 95 Ill. 94; *Haas v. Stinger*, 75 Ill. 597; *Hoffman v. Rothenberger*, 82 Ind. 474.

Where such an application is made after the cause has gone to trial, it should be supported by a showing of some reasonable excuse for the delay. *Phenix Ins. Co. v. Stocks*, 149 Ill. 319, 36 N. E. 408. See also *Dow v. Blake*, 148 Ill. 76, 35 N. E. 761; *Fisher v. Greene*, 95 Ill. 94; *Millikin v. Jones*, 77 Ill. 372.

Being a discretionary matter, it is not error for the court to refuse to allow defendant to file a new plea after a jury has been impaneled to try the cause. *Lincoln v. McLaughlin*, 74 Ill. 11.

Upon the failure of a defendant to file a statement of demands with a plea

time for pleading as prescribed by the rules of practice is past.<sup>21</sup>

(F.) VERIFICATION. — The verification of a pleading which has been duly filed may be added by amendment at the trial.<sup>22</sup>

c. *After Verdict.* — While before the decision of a case, courts should liberally exercise the power conferred on them as to amendments in order that substantial justice may be done, a somewhat different question is presented where it is sought to amend after decision or verdict.<sup>23</sup> The matter is even then within the sound discretion of the trial court, the exercise of which will not be disturbed except for an abuse thereof.<sup>24</sup>

in set-off, a motion for leave to file such statement during the progress of the trial is properly denied. *Battey v. Warner*, 28 R. I. 312, 67 Atl. 63.

21. *Murphy v. St. Louis Coffin Co.*, 150 Ala. 143, 43 So. 212. See the title "Answer in Code Pleading."

22. *Neal v. Davis Foundry & Mach. Wks.*, 131 Ga. 701, 63 S. E. 221. See also *Patton v. Bank of La Fayette*, 124 Ga. 965, 53 S. E. 664, 5 L. R. A. (N. S.) 592; *Rogers v. Caldwell*, 122 Ga. 279, 50 S. E. 95.

Adding verification by amendment at the trial is not an amendment "which materially changes the defense" so as to open the answer to a special demurrer. *Neal v. Davis Foundry & Mach. Wks.*, 131 Ga. 701, 63 S. E. 221. See the title "Demurrer."

Leave extending from the appearance to the trial term of cases the right of a particular attorney at law to resist motions to strike petitions or pleas filed by him does not of itself confer upon him the right at the trial term to amend his pleadings in any case. When, however, the only defect in a plea of *non est factum* filed by such attorney at the appearance term is that the same has not been sworn to, and the plaintiff does not at that term move to strike the plea on this ground, it is erroneous when such a motion is made at the trial term not to allow the plea to be amended by having the same properly verified. *Norton v. Scruggs*, 108 Ga. 802, 34 S. E. 166.

23. In *Clark v. San Francisco & S. J. V. R. Co.*, 142 Cal. 614, 76 Pac. 507, where the plaintiff after recovering a verdict in excess of the damages alleged in his complaint, to support which excess there was not sufficient evidence, the court in holding that it was error to permit the plaintiff to amend his complaint by raising the damages claimed to the amount of the verdict

said: "Ordinarily it is certain that a defendant has a right to rely upon the plaintiff's allegations as to the amount of the actual damage and the amount asked therefor, knowing that a verdict for any amount in excess thereof will as to such excess be without the issues and in the face of reasonable and proper objection invalid. If the plaintiff wishes to make an amendment in this regard by increasing his demand, he should ask to do so before the case is submitted for decision or at least before decision in order that the defendant may have proper notice of the higher demand and an opportunity to take such action in regard thereto as he may deem proper."

If the plaintiff accepts the benefit of a condition, such as the payment of money imposed upon defendant in allowing him to amend his answer after trial and verdict so as to conform it to the proofs, he waives any objection he might otherwise have had thereto and the court will not consider whether or not there is any error therein. *Price v. Grzyll*, 133 Wis. 623, 114 N. W. 100.

Where the court finds that the case has been fully and fairly tried upon the merits and that the amendment did not change the issue, the plaintiff cannot complain because defendant was allowed to amend after the trial and before the allowance of plaintiff's exceptions to the refusal of rulings that certain defenses were not open under the pleadings. *Quimby v. Jay*, 196 Mass. 584, 82 N. E. 1084. And see *Cronan v. Woburn*, 185 Mass. 91, 70 N. E. 38.

24. Cal. — *Abbott v. Mobile*, 119 Ala. 595, 24 So. 565. Cal. — *Richard v. Hupp*, 37 Pac. 920. Ill. — *Milwaukee Mech. Ins. Co. v. Schallman*, 188 Ill. 213, 59 N. E. 12. Ind. — *Raymond v. Wathen*, 142 Ind. 367, 41 N. E. 815. Mass. — *Kurinsky v. Lynch*, 201 Mass. 28, 87 N. E. 70. Mont. — *Neimik v. American Ins. Co.*

Indeed, at common law, the court has power to allow such amendments,<sup>25</sup> and this power has not only been preserved by express statute,<sup>26</sup> but may be said fairly to be enlarged by the statutes.<sup>27</sup>

Some of the courts, however, while not in express terms disapproving of the practice of allowing amendments after verdict, nevertheless declare that the power should be exercised with greater caution after verdict than before it.<sup>28</sup>

**Necessity of Sustaining Verdict.**—But such an amendment must support the verdict; otherwise the court is justified in refusing it.<sup>29</sup>

d. *After Judgment.*—At common law, until final judgment was entered, and the term passed, amendments might be allowed; but after the term at which a judgment was entered, amendments could only be made by the statute of jeofails.<sup>30</sup> But under the modern practice as regulated by statute in most of the states, the court has undoubted power to allow amendments after final judgment, and there are numerous cases in which the exercise of this power has been upheld.<sup>31</sup>

16 Mont. 318, 40 Pac. 597. Wis.—*Gates v. Paul*, 117 Wis. 170, 94 N. W. 55.

The allowance of an amendment after verdict, as of an earlier date, is within the discretionary power of the court. *Kurinsky v. Lynch*, 201 Mass. 28, 87 N. E. 70.

The trial court may allow an amendment at any time before final judgment. *Quimby v. Jay*, 196 Mass. 584, 82 N. E. 1084, citing Rev. Laws, c. 173, § 48.

25. Conn.—*North v. Nichols*, 39 Conn. 355. Me.—*Kendall v. White*, 13 Me. 245. Pa.—*Bailey v. Musgrave*, 2 Serg. & R. 219. N. Y.—*Sargent v. Dennison*, 2 Cow. 515. Vt.—*Chaffee v. Rutland R. Co.*, 71 Vt. 384, 45 Atl. 750.

**Only on Terms.**—*Clarapede & Co. v. Commercial Union Assn.*, 32 W. R. (Eng.) 203.

26. Kan.—*Lemon v. Dryden*, 43 Kan. 477, 23 Pac. 641. Mass.—*Manning v. Conway*, 192 Mass. 122, 78 N. E. 401. Minn.—*Beckett v. Northwestern M. Aid Assn.*, 67 Minn. 298, 69 N. W. 923. Wis.—*Price v. Grzyll*, 133 Wis. 623, 114 N. W. 100.

27. Fla.—*Burt v. Florida S. R. Co.*, 43 Fla. 339, 31 So. 265. Ill.—*Winheim v. Marshall Field*, 107 Ill. App. 145. N. H.—*Fellows v. Judge*, 72 N. H. 466, 57 Atl. 653.

28. *O'Gorman v. Sabin*, 62 Minn. 46, 64 N. W. 84, where the practice was declared to be "mongrel and irregular." See also *Todd v. Bettingen*, 102 Minn. 260, 113 N. W. 906, where the court said: "It is evident that the court should exercise its power to sus-

pend an order for judgment entered, after the affirmation of the order or judgment on appeal, and should allow the pleadings in that action to be so amended and supplemented as to involve a new trial, if ever, in extraordinary cases only, and then only when the proposed amendment sets forth clearly and distinctly bases for relief which have not before been presented for judicial determination in the action in which the amendment is sought." See also *Aiken v. Bruen*, 21 Ind. 137; *Thyssen v. Davenport I. and C. Storage Co.*, 134 Iowa 749, 112 N. W. 177, 13 L. R. A. (N. S.) 572, (where it was said that the plaintiff has no right to attempt to recover on a new theory by amendment).

29. Kan.—*Dunham v. Brown*, 9 Kan. App. 889, 58 Pac. 232. N. Y.—*Williams v. Birch*, 6 Bosw. 674. Vt.—*White River Bank v. Downer*, 29 Vt. 332.

30. *Choteau v. Hewitt*, 10 Mo. 131; *State Bank v. Simpson*, 2 Spears L. (S. C.) 41.

31. U. S.—*Mexican Cent. R. Co. v. Duthie*, 189 U. S. 76, 23 Sup. Ct. 610, 47 L. ed. 715. Ga.—*City of Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318; *Cureton v. Cureton*, 120 Ga. 559, 48 S. E. 162. Ia.—*O'Connell v. Cotter*, 44 Iowa 48. Minn.—*Briggs v. Ruthford*, 94 Minn. 23, 101 N. W. 954. Neb.—*Frey v. Owens*, 27 Neb. 862, 44 N. W. 42. R. I.—*Smith Granite Co. v. Newall*, 22 R. I. 295, 47 Atl. 597. S. C.—*Kitchen v. Southern R. Co.*, 68 S. C. 554, 48 S. E. 4. Wis.—*Nelson v. Allen*, 117



But such amendments must be in aid of the judgment, and not to defeat it.<sup>32</sup> And if the party has been guilty of laches, the court may refuse the proposed amendment.<sup>33</sup>

Wis. 91, 93 N. W. 807. Wyo. — *Lellman v. Mills*, 15 Wyo. 149, 87 Pac. 985.

Compare *Smith v. Farmers Bank*, 51 S. W. 451.

In *Gilliam v. Brown*, 126 Cal. 160, 58 Pac. 466, an action to recover for the construction of a bridge under an alleged contract between plaintiff and defendants, in which there had been a non-suit on the ground of want of evidence of acceptance of the ditch, the plaintiff at the time he made his motion for a new trial moved for leave to amend his complaint by striking out the allegations of acceptance, which the trial judge denied. In sustaining the action of the trial judge the court said: "The motion not having been made during the trial of the case, we cannot say that the court erred in denying it, and therefore this order appealed from is affirmed. We think, however, that if plaintiff, before another trial, should ask for such amendment, it should be allowed."

Leave to file a cross-complaint asking affirmative relief after the case has been tried is properly denied. *Kindall v. Lincoln Hdw. & Imp. Co.*, 10 Idaho 13, 76 Pac. 992.

Although it is too late to amend the pleadings after a verdict and the judgment, upon the question as to whether the report of an auditor duly filed in accordance with the order of reference is to be treated as the equivalent of a verdict or judgment so as to prevent any further amendment of the pleadings, the court in the case of *Cureton v. Cureton*, 120 Ga. 559, 48 S. E. 162, said: "An amendment to the pleadings setting up new and distinct issues is not allowable after the filing of an auditor's report. To allow a party to amend his pleadings after the hearing before the auditor would be to make the trials interminable. Besides, the statute empowers the auditor to allow amendments to pleadings while the case is before him. Civil Code, Sec. 4583. This is the opportune time to present any proper amendment suggested on the trial of the case. But where the scope of the amendment offered, after the filing of the report, is to adjust the pleadings to the evidence, which was admitted without objection, the amend-

ment may be allowed if it does not set up a new and distinct issue."

32. Ky. — *Russell v. Howerton*, 22 Ky. L. Rep. 1468, 60 S. W. 916. Neb. — *Frey v. Owens*, 27 Neb. 862, 44 N. W. 42. N. J. — *Gulick v. Loder*, 15 N. J. L. 416. N. Y. — *Sherman v. Fream*, 8 Abb. Pr. 33.

**After Trial and Decision.** — The allowance of an amendment of a general denial, after trial and decision of the case, to set up other defensive matter is error. *Hoatson v. McDonald*, 97 Minn. 201, 106 N. W. 311. See *Lamm v. Armstrong*, 95 Minn. 434, 104 N. W. 304, holding it proper to refuse to allow amendments at such time.

In *Jones v. Clark*, 31 Iowa 497, the decree merely found Clark entitled to some boilers whereupon Jones refused to yield to that adjudication and the propriety of allowing an amendment setting up these facts and demanding the value of the boilers was upheld, and this because it was essential to give effect to the adjudication of the court in the very matter litigated.

Where the trial court has, against the defendant's objection and exception, received evidence not warranted by the complaint, the error cannot be cured after decision by amendment to the complaint. *Ward v. Bronson*, 126 App. Div. 508, 110 N. Y. Supp. 335.

33. *North v. Webster*, 36 Minn. 99, 30 N. W. 429; *Woods v. Campbell*, 87 Miss. 782, 40 So. 847 (where an application to amend an answer on the ground of newly discovered evidence, made after decree for complainants, was held too late where, by the exercise of diligence, defendants could have known the facts sooner).

A defendant against whom a motion for judgment on the pleadings is interposed and granted is not entitled to amend his answer as of course without making a showing in support of his application. *Morgan v. King*, 27 Colo. 539, 63 Pac. 416.

The refusal to allow the filing of a plea of *nil debet* on the day of the trial is the proper exercise of discretion where the filing of such plea would operate as a surprise to the plaintiff. *Pinkston v. Stone*, 3 Mo. 119.

e. *After Appeal*.—(I.) *Trial De Novo*.—Where a hearing on an appeal from a judgment of a justice of the peace or other inferior court is in fact a trial *de novo*, the allowance of amendments is governed by the same general principles as would govern if the cause had been instituted originally in such appellate court.<sup>84</sup>

**Statutes**.—In some jurisdictions the allowance of amendments on such appeals is expressly regulated by statute.<sup>85</sup>

(II.) *Hearing on Record*.—The statute of jeofails usually provides that the court at every stage of the cause shall disregard any defect or error in the pleadings or proceedings which does not affect the substantial rights of the adverse party, and that no judgment shall be reversed by reason of such defect or error.<sup>86</sup> And it is because of this rule that

34. Ark.—*Vestal v. Little Rock*, 54 Ark. 321, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778. Cal.—*Ketchum v. Superior Court*, 65 Cal. 494, 4 Pac. 492. Ga.—*Reynolds v. Neal*, 91 Ga. 609, 18 S. E. 530. Ind. Ter.—*Simon v. Aubrey*, 3 Ind. Ter. 689, 64 S. W. 575. Ia.—*Kuhn v. Kuhn*, 70 Iowa 682, 28 N. W. 541; *Crow v. Murphy*, 52 Iowa 695, 3 N. W. 723. Ky.—*Robert v. Abner*, 19 Ky. L. Rep. 887, 42 S. W. 337. Me.—*Willet v. Clark*, 103 Me. 22, 67 Atl. 566. Mich.—*Anderson Carriage Co. v. Pungs*, 127 Mich. 543, 86 N. W. 1040. Minn.—*Bingham v. Stewart*, 14 Minn. 214. Neb.—*Ball v. Beaumont*, 66 Neb. 56, 92 N. W. 170; 63 Neb. 215, 88 N. W. 173. N. M.—*Sanchez v. Candelaria*, 5 N. M. 400, 23 Pac. 239. N. C.—*Moore v. Garner*, 109 N. C. 157, 13 S. E. 768. R. I.—*Walker Ice Co. v. Blanchard*, 18 R. I. 243, 27 Atl. 330. Wash.—*State v. Superior Court*, 3 Wash. 705, 29 Pac. 213.

35. The Connecticut statute (Gen. St., 1888, § 1029) provides that on appeal to the superior court from doings of commissioners "the claimant shall have liberty to amend any defect, mistake or informality in the statement of the claim not changing the ground of the action." *Donahue's Appeal*, 62 Conn. 370, 26 Atl. 399.

In Kansas, the statute (Gen. St., 1905, § 5801) provides that the cause shall be tried *de novo* on the original pleadings "unless the appellate court, in furtherance of justice, allow amended pleadings to be made, or new pleadings to be filed." *Missouri P. R. Co. v. Piper*, 26 Kan. 58.

The Missouri statute provides that "In all cases of appeal, the bill of items of the account sued on or filed as a counter-claim or set-off, or the

statement of the plaintiff's cause of action, or of defendant's counter-claim or set-off, or other ground of defense filed before the justice, may be amended upon appeal in the appellate court to supply any deficiency or omission therein, when by such amendment substantial justice will be promoted; but no new item or cause of action not embraced or intended to be included in the original account or statement shall be added by such amendment. Such amendment shall be allowed upon such terms as to costs as the court may deem just and proper." Rev. St., 1889, § 6347-y. See *Rippee v. Kansas City S. R. Co.*, 154 Mo. 358, 55 S. W. 438.

North Dakota.—Where the statute relating to such appeals provides that the action shall be tried anew in the district court, in the same manner as actions originally commenced therein, the answer or pleading may be amended after appeal if the amendment does not pertain to a matter that would not be within the jurisdiction of the justice court. *Erickson v. Elliot*, 17 N. D. 389, 117 N. W. 361.

36. *Garland v. Davis*, 4 How. (U. S.) 131, 11 L. ed. 907.

The statute of amendments and jeofails does not cure defects in matters of substance. *Schueler v. Mueller*, 193 Ill. 402, 61 N. E. 1044.

**On Appeal**.—Where the statute authorizes amendment at any stage of the case, a plea of *non est factum* may be filed on appeal. *Stanton v. Burge*, 34 Ga. 435.

It is no objection to the allowance of an amendment to a petition that the motion was made after a rescript had been sent from the supreme court, though the added counts state the liability differently. *Com. v. Nat. Con*

practically all of the courts hold that the amendment of defects or errors in the pleadings or proceedings which the trial court would have allowed to be amended if timely application had been made will be considered by the appellate court as having been made.<sup>37</sup> But this practice is invoked only to aid the judgment, and not to defeat it.<sup>38</sup>

In other jurisdictions, however, it is not the practice for appellate courts to grant amendments in case pending before them on appeal; but if such amendments are found to be necessary the cause is remanded with directions to amend.<sup>39</sup>

*f. After Remand.*—(I.) *With Directions To Amend.*—As has just been stated, it is very common practice, in case of reversal on appeal, for the appellate court to remand the cause with directions to the lower court to allow amendments.<sup>40</sup> And there are cases where the appel-

tracting Co., 201 Mass. 248, 87 N. E. 590.

*After Motion in Arrest of Judgment.* See *State v. Marsh*, 134 N. C. 184, 47 S. E. 6, 67 L. R. A. 179, and note; and the title "Arrest of Judgment."

37. **U. S.**—*Schaeffer Piano Mfg. Co. v. National Fire Exting. Co.*, 148 Fed. 159, 78 C. C. A. 293. **Ark.**—*Dorris v. Grace*, 24 Ark. 326. **Ga.**—*Artope v. Barker*, 74 Ga. 462. **Ind.**—*Kohli v. Hall*, 141 Ind. 411, 40 N. E. 1060; *Ketue-e-mun-guah v. McClure*, 122 Ind. 541, 23 N. E. 1080, 7 L. R. A. 782; *Southern R. Co. v. Bulleit*, 40 Ind. App. 457, 82 N. E. 474. **Kan.**—*Excelsior Mfg. Co. v. Boyle*, 46 Kan. 20, 26 Pac. 408. **Me.**—*Conway F. Ins. Co. v. Sewall*, 54 Me. 352. **Mich.**—*Warder v. Gibbs*, 92 Mich. 29, 52 N. W. 73; *Wright v. Treat*, 83 Mich. 110, 47 N. W. 243. **Miss.**—*Noble v. Terrell*, 64 Miss. 830, 2 So. 14. **Mo.**—*Sawyer v. Wabash R. Co.*, 156 Mo. 468, 57 S. W. 108. **N. J.**—*Hasbrouck v. Winkler*, 48 N. J. L. 431, 6 Atl. 22. **N. Y.**—*Ackly v. Tarbox*, 31 N. Y. 564; *Havana Bank v. Magee*, 20 N. Y. 355. **N. C.**—*Wilson v. Pearson*, 102 N. C. 290, 9 S. E. 707. **Pa.**—*Clifford v. Prudential Ins. Co.*, 161 Pa. 257, 28 Atl. 1085; *Shaffer v. Eichert*, 132 Pa. 285, 19 Atl. 81. **Va.**—*Orange A. & M. R. Co. v. Miles*, 76 Va. 773. **Wash.**—*Brown v. Baldwin*, 46 Wash. 106, 89 Pac. 483; *Jones v. Herrick*, 35 Wash. 434, 77 Pac. 798. **Wis.**—*Donner v. Genz*, 129 Wis. 245, 107 N. W. 1039, 109 N. W. 71.

38. **Mo.**—*Megher v. Stewart*, 6 Mo. App. 498. **N. Y.**—*Harris v. Harris*, 83 App. Div. 123, 82 N. Y. Supp. 568; *Weems v. Shaughnessey*, 70 Hun 175, 24

N. Y. Supp. 271. **N. C.**—*Justices v. Simmons*, 48 N. C. 187.

*After Motion in Arrest of Judgment.* At this stage of the case amendments should be allowed only when it is clear that the matters were litigated as fully as though they had been presented by the pleadings. *Baker v. Sherman*, 73 Vt. 26, 50 Atl. 633.

39. **Ia.**—*Ottumwa Brick Co. v. Ainley*, 109 Iowa 386, 80 N. W. 510; *Manatt v. Starr*, 72 Iowa 677, 34 N. W. 784. **Mass.**—*Locke v. Kennedy*, 171 Mass. 204, 50 N. E. 531. **Ore.**—*Bamford v. Bamford*, 4 Ore. 30. **Utah.**—*Reynolds v. Pascoe*, 24 Utah 219, 66 Pac. 1064.

40. **U. S.**—*Great Southern F. P. Hotel Co. v. Jones*, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. ed. 842. **Cal.**—*Williams v. Myer*, 150 Cal. 714, 89 Pac. 972; *Fish v. Redington*, 31 Cal. 185. **Colo.**—*Denver v. Spencer*, 34 Colo. 270, 82 Pac. 590, 2 L. R. A. (N. S.) 201. **Ind.**—*Bucklen v. Cushman*, 145 Ind. 51, 44 N. E. 6. **Ky.**—*Greer v. Louisville & N. R. Co.*, 94 Ky. 169, 21 S. W. 649. **Me.**—*Jenness v. Barron*, 95 Me. 531, 50 Atl. 712. **Minn.**—*Briggs v. Rutherford*, 94 Minn. 23, 101 N. W. 954. **Mo.**—*Smoot v. Judd*, 161 Mo. 673, 61 S. W. 854; *Courtney v. Blackwell*, 150 Mo. 245, 51 S. W. 668. **Neb.**—*McKeighan v. Hopkins*, 19 Neb. 33, 26 N. W. 614. **N. J.**—*Dimick v. Metropolitan L. Ins. Co.*, 67 N. J. L. 367, 51 Atl. 692. **Ore.**—*Bamford v. Bamford*, 4 Ore. 30. **Tex.**—*Schmidt v. Mackey*, 31 Tex. 659. **Utah.**—*Jones v. Ogden*, 32 Utah 221, 89 Pac. 1006. **Wash.**—*Leaman v. Thompson*, 43 Wash. 579, 86 Pac. 926.

In *Palatine v. Canajoharie Water S. Co.*, 116 App. Div. 530, 101 N. Y. Supp.



late court has suggested what amendments should be made.<sup>41</sup>

(II.) Without Direction.—When the appellate court reverses generally, without specific directions as to any amendment of the pleadings, the cause then stands as if no appeal had been taken, and the general rules as to granting or refusing amendments apply.<sup>42</sup>

810, it was held that the special term, after demurrer sustained for improper joinder of parties, had power to permit an amendment of the complaint omitting the parties plaintiff held to have been improperly joined.

41. *Cincinnati Tobacco W. Co. v. Mathews*, 24 Ky. L. Rep. 2445, 74 S. W. 242; *Fergus v. Dodson* (Tex.), 33 S. W. 273. See *Perkins v. West Coast Lumb. Co.* (Cal.), 33 Pac. 1118.

42. U. S.—*Patillow v. Allen West Corn. Co.*, 131 Fed. 680, 65 C. C. A. 508. Ala.—*Woodstock Iron Wks. v. Kline*, 149 Ala. 391, 43 So. 362. Cal.—*Ellis v. Mitner*, 148 Cal. 528, 83 Pac. 800. Fla.—*Hart's Excr. v. Smith*, 20 Fla. 58. Ill.—*Dinsmoor v. Rowse*, 211 Ill. 317, 71 N. E. 1003; *Parker v. Shannon*, 121 Ill. 452, 13 N. E. 155. Ia.—*Martin v. Shannon*, 101 Iowa 620, 70 N. W. 720. Kan.—*Tullock v. Mulvane*, 61 Kan. 650, 60 Pac. 749; *Missouri Pac. R. Co. v. Moffatt*, 60 Kan. 113, 55 Pac. 837. Mich.—*Jones v. Pendleton*, 151 Mich. 442, 115 N. W. 468. Mo.—*Bender v. Zimmerman*, 135 Mo. 53, 36 S. W. 210. N. Y.—*Reynolds v. Wynne*, 127 App. Div. 69, 111 N. Y. Supp. 248; *Miller v. Carpenter*, 79 App. Div. 130, 80 N. Y. Supp. 82. Ore.—*State v. Richardson*, 48 Ore. 309, 85 Pac. 225, 8 L. R. A. (N. S.) 362. Tex.—*Jones v. Bull*, 90 Tex. 187, 37 S. W. 1054; *McLawry v. Watelsky*, 39 Tex. Civ. App. 394, 87 S. W. 1045. Wash.—*Albin v. Seattle Elec. Co.*, 46 Wash. 420, 90 Pac. 435. Wis.—*Blodgett v. Hitt*, 29 Wis. 169.

After reversal on appeal the defendant may, in the discretion of the court, be permitted to amend his answer so as to omit one defense and set up other defensive matter. *Gould v. Stafford*, 101 Cal. 32, 35 Pac. 429, where the court said that liberality is the rule, particularly as to answers, to the end that the defendant may get in all the defenses that he has, the rights of the plaintiff not being impaired.

In *Martin v. Luger Furn. Co.*, 8 N. D. 220, 77 N. W. 1003, where defendants had pleaded and relied upon a memorandum as embodying a contract, and the same had been so treated by the

trial court, but upon appeal was held not to constitute a contract, it was held that the trial court after the reversal of the judgment should allow an amendment to the answer framed in harmony with the opinion of the appellate court, and involving a change of front on the part of defendants.

In *Shorthill v. Ferguson*, 47 Iowa 284, the court held the plaintiffs entitled to recover a certain amount upon the tender of a sufficient deed. Upon the filing of the *procedendo* in the lower court, the plaintiff moved for decree in accordance with the *procedendo* and opinion and tendered a deed. The defendant appeared and moved for leave to amend his answer by alleging the perfecting of title in the plaintiff and that plaintiff had refused to convey, and it was held that as the suit was commenced without tendering a conveyance, it was the defendant's right to object by a proper pleading to the conveyance when it was tendered.

Under § 723 of the New York Code Civ. Proc., authorizing the court upon the trial or at any other stage of the action before or after judgment in furtherance of justice and on such terms as it deems just to permit any pleading to be amended, upon retrial of an action after reversal of judgment for the plaintiff, the plaintiff may amend his complaint so as to set up a new cause of action, upon terms. *Manhattan Rolling Mill v. Dellon*, 63 Misc. 48, 116 N. Y. Supp. 583, citing *Deyo v. Morss*, 144 N. Y. 216, 39 N. E. 81; *Troy & Boston R. v. Tibbits*, 11 How. Pr. 168.

Where it has been decided by the court of appeals that the plaintiff is not entitled to a recovery under the allegations of the original complaint, the plaintiff, if allowed to amend so as to try another issue, should pay on taxable costs and disbursements in both the appellate division and the court of appeals, there being no discretion to allow the amendment otherwise. *House v. Carr*, 52 Misc. 648, 103 N. Y. Supp. 929.

New Counter-Claim.—The statute which provides for the dismissal of an

But neither party should be permitted to raise a new issue for litigation by an amendment after remand except to give effect and to enforce the adjudication previously had, save when sufficient in allegation to require its consideration as the basis for a new trial.<sup>43</sup> And no claim by the defendant that he was misled or surprised by an amendment on the retrial can be upheld where the issue conforms to the theory of the first trial.<sup>44</sup>

**3. In Respect of the Application for Leave To Amend.** — a. *In General.* — Where leave to amend is necessary, the usual practice is to make formal application therefor to the court. Whether or not this application may be made orally or must be written, depends upon various circumstances, such as the time and condition of the cause when leave to amend is desired. And sometimes the matter is regulated by statute or rules of court.<sup>45</sup>

action by the plaintiff and allows the defendant to proceed to the trial of a counter-claim set up in his answer, contemplates the trial of a counter-claim pleaded before the dismissal of the action and reaches no further. Page v. Sackett, 69 Iowa 226, 28 N. W. 567.

**After New Trial.** — An amendment to the answer should not be allowed after a new trial has been granted. Palmer v. Utah & N. R. Co., 2 Idaho 382, 16 Pac. 553.

**In Equity.** — While there are cases where additional pleadings should be allowed after an equity case has been tried anew on its merits in the appellate court and remanded to the court below, such instances are exceedingly rare, and where the proposed amendment simply sets up matter known to the defendant at the time he filed his original answer and no showing is made why it was not included therein, the amendment will not be allowed. Reed v. Howe, 44 Iowa 300, *distinguishing* Jones v. Clark, 34 Iowa 497, in which a supplemental answer was allowed to be made after trial anew in the appellate court.

In Adams County v. B. & M. R. R. Co., 44 Iowa 335, the correct ruling was declared to be that "after the reversal of a suit in equity which is remanded for further proceedings not inconsistent with the opinion, it stands precisely as any suit in equity stands between the submission and the entry of the decree, the court being fully advised in the premises and the decision announced as to what decree should be entered upon the pleadings and evidence as they then stand." When the case came out for rehearing at the third appeal in 55

Iowa 94, it was regarded that the allowance of an amendment and the tendering of a new issue in an equity case after a trial *de novo* in this court, and after *procedendo* filed in the court below, should be allowed only on the strongest showing of accident, mistake, or for matters arising subsequently to the decree or the like.

43. Allen v. Davenport, 115 Iowa 20, 87 N. W. 743. In this case the attempt was to plead a new cause of action at law not in existence when the original case in equity was submitted, and presenting it for the first time after every issue raised by the pleadings had been fully disposed of except the formal entry of the decree. The court said: "To prosecute a counterclaim under such circumstances amounts to nothing less than the maintenance of a new and separate action under the old title. . . . The remedy was in a new action, and to permit the filing of a counterclaim under the circumstances disclosed clear abuse of discretion."

44. Taylor v. Atchison, T. & S. F. R. Co., 81 Kan. 232, 68 Pac. 691.

45. A formal motion for leave to renew, upon perfected papers, a motion to amend an answer, should be granted where it appears that upon the first motion the papers were defective because the attorney had neglected to submit his client's affidavit as to the facts within his knowledge, thereby rendering an appeal from the order denying the motion unavailing. Slatery v. Noble, 95 N. Y. Supp. 606.

The court may require a proposed amendment to be made at once where it is easily made, and without inconvenience, although the amendment

b. *Form of Stating Proposed Amendment.* — In order that the court may determine whether or not leave to amend should be granted or refused the amendment proposed should be stated.<sup>46</sup>

Whether or not in stating the amendment desired, it should be in writing or can be stated orally depends much upon the conditions of the cause at the time. Many times it can be stated orally, as for example where a defect can be corrected by mere interlineation or erasure; or where the amendment is for the purpose of conforming the pleadings to the proofs.<sup>47</sup> Ordinarily, however, the practice is to present with the application a copy or draft of the proposed amendment in writing.<sup>48</sup>

is necessitated by an amendment to the complaint. *Ellen v. Lewison*, 88 Cal. 253, 26 Pac. 109.

General authority to amend a pleading given on a hearing on demurrer authorizes a change only with respect to that part of the pleading which was questioned by the demurrer. So where the appellate division has reversed an interlocutory judgment and sustained the demurrer but with leave to the defendant to amend his answer upon conditions, the defendant should, in the absence of a stipulation or consent to amend the other defenses, make a formal motion at special term for leave to do so and explain satisfactorily why, in accordance with the practice, the complaint had not been served originally in the proposed changed form. *Mann v. Press Pub. Co.*, 135 App. Div. 361, 120 N. Y. Supp. 534.

46. Cal. — *Jessup v. King*, 4 Cal. 331. Ill. — *Dilchor v. Schorik*, 207 Ill. 528, 69 N. E. 807. Ind. — *Shaw v. Binkard*, 10 Ind. 227. Ia. — *Harvey v. Spaulding*, 7 Iowa 423. Kan. — *Stewart v. Winner*, 71 Kan. 448, 80 Pac. 934. Minn. — *Newman v. Springfield F. & M. Ins. Co.*, 17 Minn. 123. Mo. — *Allen v. Ranson*, 44 Mo. 263. Mont. — *First Nat. Bank v. How*, 1 Mont. 604. Neb. — *Minton v. Palmer*, 79 Neb. 351, 112 N. W. 610; *Johnson v. Swayze*, 35 Neb. 117, 52 N. W. 835. N. Y. — *Meeks v. Meeks*, 79 App. Div. 49, 79 N. Y. Supp. 718; *Crooks v. Second Am. R. Co.*, 20 N. Y. Supp. 813, 49 N. Y. St. 376; *Noxon v. Glen*, 2 N. Y. St. 661. Wash. — *Balch v. Smith*, 4 Wash. 497, 30 Pac. 648. Wis. — *State v. Homey*, 44 Wis. 615.

Unless the court be informed in what particular the party desires to amend, there is nothing for the court to exercise its discretion upon. *Barker v. Walbridge*, 14 Minn. 469.

"If a party would amend his plead-

ing, he must, at least, state enough in his proposed amendment to show the materiality of the amendment." *State v. Homey*, 44 Wis. 615.

Where the appellate court is asked to review the refusal of the trial court to allow the filing of an additional answer after issue joined, the appellant must present a record showing that proper cause for the motion was brought before the trial court. *Hoffman v. Rothenberger*, 82 Ind. 474.

47. See *Jordan v. Greig*, 33 Colo. 360, 80 Pac. 1045.

48. *Wilcox v. Wilmington City R. Co.*, 2 Penne. (Del.) 157, 44 Atl. 686; *Robinson v. Thomas*, 131 App. Div. 894, 115 N. Y. Supp. 921.

In *Balch v. Smith*, 4 Wash. 497, 30 Pac. 648, the court said: "The plaintiffs, in their application to amend, did not present with their application the proposed amended pleading. If they had done this, so that the court could have seen that giving them leave to amend once more would have resulted in a pleading upon which a trial upon the merits could have been had, there would have been much stronger reason for holding that, in refusing to allow them to try once more, it had been guilty of an abuse of discretion. We see no reversible error in the action of the court in this regard. We have discussed this latter question in the light of a practice which seems to have grown up in the courts of this state to give leave to amend pleadings without the presentation with the application to amend of a copy of the proposed amendment."

In *Rosenberger v. Marsh*, 108 Iowa 47, 78 N. W. 837, after certain evidence offered by the defendant had been excluded the defendant's attorney said, "I desire to amend my answer to cover this," but no offer of the amendment



c. *Necessity of Showing Diligence*. — So, too, an applicant for leave to amend his pleading must show diligence, or at least facts excusing his apparent want of diligence.<sup>49</sup>

*Necessitating Continuance*. — Where the amendment, if allowed, will warrant a continuance, an application on the day of trial for permission to make it is properly refused where no showing is made why the request was not made sooner.<sup>50</sup>

d. *Affidavits*. — (1.) *Necessity*. — In many of the states the practice is that the applicant must also support his application by an affidavit showing that the granting of the leave would be a proper exercise of the discretion of the court, or, as it is sometimes stated, that the allowance of the amendment would be in furtherance of justice. Otherwise the refusal of such leave will be upheld.<sup>51</sup> But no affidavit

was made, and while the court did not so expressly hold, the implication was that the defendant should have tendered a written amendment.

49. *Colo.* — *People v. Barton*, 4 *Colo. App.* 455, 36 *Pac.* 299. *Ill.* — *Phoenix Ins. Co. v. Stocks*, 149 *Ill.* 319, 36 *N. E.* 408. *Ind.* — *Martin v. Noble*, 29 *Ind.* 216. *Kan.* — *Foote v. Sprague*, 13 *Kan.* 155. *Neb.* — *Johnson v. Swayze*, 35 *Neb.* 117, 52 *N. W.* 835. *N. Y.* — *Schreiber v. Village of Depew*, 121 *N. Y. Supp.* 757. *Ore.* — *Garrison v. Goodale*, 23 *Ore.* 307, 31 *Pac.* 709. *Wis.* — *Sweet v. Mitchell*, 19 *Wis.* 524.

In *Deline v. Michigan F. & M. Ins. Co.*, 70 *Mich.* 435, 38 *N. W.* 298, the court said: "Apart from the delay, and the fact that the case had been opened before the question was presented, the court was abundantly justified by the entire omission of defendant to make any showing whatever in support of the application. A party desiring such a favor must show in some way that he is entitled to it, and that it can be had without injustice. Sometimes this will appear from what comes out on the trial. But in this case the motion was not made on anything appearing upon the trial, and it proposed to introduce a new issue that the plaintiff could not be expected to meet. It is certain that allowing such a motion as was made here, which, for anything that appears, was not made on any new information, would operate very unjustly, and it was properly denied." And see *Royal Neighbors of America v. Simon*, 135 *Ill.* App. 599.

Leave to set up defensive matter disclosed by deposition of plaintiff's witness, asked because concealed by plaintiff, is properly refused where the facts were not within the exclusive knowl-

edge of plaintiff but were capable of being ascertained by reasonable investigation by any one, and the application was not made till nearly two years after the commencement of the action. *Minneapolis, St. P. & S. S. M. R. Co. v. Fireman's Ins. Co.*, 62 *Minn.* 315, 64 *N. W.* 902, where the court said the nature of the defense may be taken into account in determining the exercise of discretion.

Where the nature of the plea is not disclosed, or any reasonable excuse shown for the failure to file it sooner, leave to file an additional plea is properly denied. "Application for leave to file an additional plea, when made after a cause has proceeded to trial, is addressed to the sound discretion of the court, and such application should be supported by a showing of some reasonable excuse for not having interposed the plea as a defense before the cause was called for trial." *Byerly v. Wilson*, 120 *Ill.* App. 662. And see *Wilson v. Wilson*, 125 *Ill.* App. 385, where the cause had stood at issue for several years and leave was asked to file a plea of the statute of limitations, no excuse for the delay being shown.

It is not an abuse of discretion to refuse to allow the filing of a second amended answer if the affidavits do not show what the defense is and why it was not made before. *First Nat. Bank v. How*, 1 *Mont.* 604.

50. *Manha v. Union Fertilizer Co.*, 151 *Cal.* 581, 91 *Pac.* 393.

51. *Cal.* — *Canfield v. Bates*, 13 *Cal.* 606; *Todhunter v. Klemmer*, 134 *Cal.* 60, 66 *Pac.* 75. *Colo.* — *People v. Barton*, 4 *Colo. App.* 455, 36 *Pac.* 299; *Barton v. Laws*, 4 *Colo. App.* 212, 35 *Pac.* 284. *Kan.* — *Kansas F. Mut. F. Ins. Co. v. Amick*, 37 *Kan.* 73, 14 *Pac.* 454. *N. Y.*

is necessary when it appears from the case, as then before the court, that the amendment is material and in furtherance of justice,<sup>52</sup> as where the amendment is to conform the pleadings to the proof.<sup>53</sup>

(II.) By Whom To Be Made.—The usual practice requires that this affidavit, when necessary, must be made by the party himself and not by his attorney,<sup>54</sup> unless some good reason be assigned

*Pratt v. Tailer*, 99 App. Div. 236, 90 N. Y. Supp. 1023; *Diehl v. Robinson*, 35 Misc. 234, 71 N. Y. Supp. 752. Ore.—*Garrison v. Goodale*, 23 Ore. 307, 31 Pac. 709. S. C.—*Mullan v. Southern R. Co.*, 54 S. C. 485, 32 S. E. 539. Compare *Jennings v. Parr*, 54 S. C. 109, 32 S. E. 73.

Where the affidavit does not allege as a fact the matter proposed to be pleaded in the amendment, and it does not appear by inference from the facts stated, the application is properly denied. *Newman v. Springfield F. & M. Ins. Co.*, 17 Minn. 123.

Under the Georgia code it is within the trial court's discretion to allow an amendment to an answer without requiring the defendant to make the affidavit by that section required, where the allowance of the amendment does not necessitate a continuance or a reference of the case, or the introduction of further evidence. *Marsh v. Hix*, 110 Ga. 888, 36 S. E. 230; *Beacham v. Wrightsville & T. R. Co.*, 125 Ga. 362, 54 S. E. 157; *McCall v. Wilkes*, 121 Ga. 722, 49 S. E. 722. And the court may, within its discretion, allow an amendment without an affidavit when the circumstances of the case or substantial justice between the parties require that it be allowed. *Wynn v. Wynn*, 109 Ga. 255, 34 S. E. 341.

An amendment to a plea which is not purely precatory in character but avers new matter of defense, notice of which was not given in the original answer, is properly disallowed when the defendant fails to swear in the affidavit attached to the proffered amendment that such new matter was not omitted for the purpose of delay. *Gross v. Whitely*, 128 Ga. 79, 57 S. E. 94. See also *Thompson v. Rabun*, 131 Ga. 713, 63 S. E. 215.

In Georgia an affidavit that the proposed new matter was not omitted from the original, and is not now set up for purposes of delay, is required where an amendment averring new matter in defense of which the original answer gives no notice, is proposed (*Thompson*

*v. Rabun*, 131 Ga. 713, 63 S. E. 215; *Gross v. Whitely*, 128 Ga. 79, 57 S. E. 94); unless in the court's discretion the circumstances of the case or substantial justice require the allowance of the amendment without such affidavit.

52. Colo.—*Jordan v. Greig*, 33 Colo. 360, 80 Pac. 1045. Ind.—*Wabash & W. R. Co. v. Morgan*, 132 Ind. 430, 31 N. E. 661, 32 N. E. 85. S. C.—See *Millan v. Southern R. Co.*, 54 S. C. 485, 32 S. E. 539, holding it to be discretionary with the court whether to require an affidavit. Wis.—*Ball v. McGeoch*, 78 Wis. 355, 47 N. W. 610.

Where an amendment of the pleadings is made at the trial, merely to obviate the objection of a variance, there can be no necessity for an affidavit to such amendment (if such affidavit be necessary in any case), where the effect of it is not to produce a continuance. *Murdoch v. Finney*, 21 Mo. 138.

53. *Caldwell v. Mesheir*, 53 Ark. 263, 13 S. W. 761, where the court said: "It should never be permitted to the defeat of justice. Although a fact may appear by the evidence, still if it was not in issue, and the proof was not directed to it, the pleadings should not be amended to conform to it after the submission of the cause; to permit this would be to take as proved a matter which the parties had not considered in taking proof, and which might appear differently if they had directed the proof to it; but no injustice can be done when the parties have contested the matter and directed the proof to it." *Radeliffe v. Scruggs*, 46 Ark. 96. In this case it was obvious that the ends of justice required the amendment. See also *Jordan v. Greig*, 33 Colo. 360, 80 Pac. 1045.

54. *Ryan v. Duffy*, 54 App. Div. 199, 66 N. Y. Supp. 649; *Aborn v. Waite*, 63 N. Y. Supp. 399.

It is the party's knowledge and not that of his attorney that is material. *Treadwell v. Clark*, 45 Misc. 268, 92 N. Y. Supp. 166.

The application to amend a verified answer should be accompanied by the

why the affidavit was made by the attorney rather than by the client.<sup>55</sup>

e. *Notice of Motion*.—Ordinarily notice of a motion for leave to amend should be given to the opposite party in order that he may have opportunity to protect his rights in the premises.<sup>56</sup>

f. *Serving Proposed Amendment*.—So, too, the better practice requires upon motions for amendment of pleadings, or in cases where amendments are allowed, that the party amending serve a copy of the proposed amendment or amended pleadings.<sup>57</sup>

4. *In Respect of the Order Granting Leave*.—Of course, the order should be in such form as sufficiently to guard the rights of both parties.<sup>58</sup> It should not be too broad, but should specify

affidavit of the defendant who verified the answer, and by the affidavit of the one from whom the new information was acquired. *Barton v. Laws*, 4 Colo. App. 212, 35 Pac. 284.

55. *Dubroff v. North River Ins. Co.*, 121 N. Y. Supp. 227.

An affidavit by counsel setting forth the facts and alleging that the affidavit is made by him rather than by his client for the reason that the facts are peculiarly within his knowledge, is sufficient. *Mosseine v. Empire State Surety Co.*, 112 App. Div. 69, 98 N. Y. Supp. 144.

An affidavit by plaintiff's attorney in support of a motion to amend the complaint, which fails to show that the affiant had any knowledge of the additional facts sought to be incorporated in the complaint by the proposed amendment is insufficient. *Lent v. Title Ins. Co.*, 117 N. Y. Supp. 901.

Where the question as to the necessity of an amendment so as properly to present the defense is one to be determined by counsel, an affidavit by the party is unnecessary. *Murtagh v. Kingsland Brick Co.*, 119 App. Div. 286, 104 N. Y. Supp. 515.

56. *Cal.*—*Gharky v. Werner*, 66 Cal. 388, 5 Pac. 676. *Kan.*—*St. Louis & S. F. R. Co. v. McReynolds*, 24 Kan. 368. *Nev.*—*Keller v. Blasdel*, 2 Nev. 162. *Pa.*—*Comrey v. East Union Twp.*, 202 Pa. 442, 51 Atl. 1025.

*Compare Cal.*—*Benedict v. Cozzens*, 4 Cal. 381. *Fla.*—*Hartford Fire Ins. Co. v. Redding*, 47 Fla. 228, 37 So. 62, 110 Am. St. Rep. 118, 67 L. R. A. 518. *Ky.*—*Rittenhouse v. Swango*, 128 S. W. 299. *Tex.*—*Spencer v. McCarty*, 46 Tex. 213.

After the defendants have appeared and have filed and served their answer, no order amending the summons or

complaint can be granted except upon notice to defendants thus appearing. *Luckey v. Mockridge*, 112 App. Div. 199, 98 N. Y. Supp. 335; *s. c.*, 112 App. Div. 908, 98 N. Y. Supp. 337.

57. *Ala.*—*Evans Marble Co. v. McDonald*, 153 Ala. 583, 45 So. 213. *Cal.*—*Martin v. Thompson*, 62 Cal. 618. *N. Y.*—*Jenkins v. Warren*, 25 App. Div. 569, 50 N. Y. Supp. 957; *Shaw v. Grant*, 20 N. Y. Supp. 785, 49 N. Y. St. 404.

An affidavit in support of a motion for leave to amend, in order to be read on the hearing, must be served with the notice of motion. *Northrup v. Sidney*, 97 App. Div. 271, 90 N. Y. Supp. 23, quoting General Rule 21.

Where the plaintiff expressly disclaims any intention or desire to amend his cause of action, but merely to amend the prayer for relief, and with his motion papers and in his notice of motion states fully the exact language of the prayer for equitable relief which he desires to have inserted in place of prayer for money judgment, he need not serve a copy of the entire proposed amended complaint with his notice of motion. *McVey v. Security Mut. Life Ins. Co.*, 118 App. Div. 466, 103 N. Y. Supp. 1056.

58. *State v. Rodney*, 1 Houst. (Del.) 442; *Grafton Bank v. White*, 17 N. H. 389.

An order allowing an amendment irregular for having been granted without notice cannot be confirmed *nunc pro tunc*. *Luckey v. Mockridge*, 112 App. Div. 199, 98 N. Y. Supp. 335.

The New York special term in allowing an amendment to a complaint has the power to order that the service of the amended complaint shall be without prejudice to the position of the case on the general trial term calendar, and that the case retain its place upon the said



the amendment which the applicant desires should be made.<sup>59</sup>

**Conforming Amendment to Order.** — The amendment of course should

calendar. *Mossein v. Empire State Surety Co.*, 117 App. Div. 820, 102 N. Y. Supp. 1013.

An order of the special term denying a motion to amend the answer being of full force at the time of the trial is binding upon the trial court. *Roots Co. v. New York Foundry Co.*, 54 Misc. 635, 104 N. Y. Supp. 785.

Where failure to insert leave to plead over has been omitted inadvertently from an order sustaining a demurrer but awarding costs, the service of an amended complaint and payment of costs and their retention cures the omission. The parties may do by agreement what the court might have authorized in regard to the service of an amended complaint. *Schoenleber v. Burkhardt*, 94 Wis. 575, 69 N. W. 343.

An *ex parte* order permitting amendment is irregular if there is not annexed to it a copy of the amended pleading leave to serve which was applied for. *Luckey v. Mockridge*, 112 App. Div. 199, 98 N. Y. Supp. 335.

**Form of Order.** — In *Grant v. Pratt*, 110 App. Div. 149, 97 N. Y. Supp. 38, a motion to amend an answer was granted on condition that the defendant should within thirty days after the date of the order, "pay to the plaintiff, or his attorneys, the amount of the plaintiff's taxable costs herein to date, then and thereupon the said motion for permission to amend the defendant's answer in accordance with the terms of the said amended answer verified December 8, 1903, and for leave to serve such amended answer, be and it thereby is, granted."

59. "As He May Be Advised." — An order giving the applicant leave to "amend his answer as he may be advised" cannot be sustained. *Gaylord v. Beardsley*, 19 N. Y. Supp. 840, 49 N. Y. St. 852. See also *New v. Aland*, 62 How. Pr. (N. Y.) 185, where an order permitting a defendant to serve "an amended answer setting up such defenses as he may be advised," etc., was held erroneous.

*Contra*, *Wallace v. Columbia & G. R. Co.*, 37 S. C. 335, 16 S. E. 35. In this case the order attacked granted leave to amend "as amended for plaintiff" and "be advised." In sustaining the order

the court said: "Now, was the order sufficiently guarded in its leave to amend generally? We think so, for these reasons: The Circuit Judge required the plaintiff to make his amendments in twenty days after his order, and with leave to defendant to answer within twenty days after service of the amended complaint. Very much of the trouble in understanding the cases decided by this court on the subject of amendments arises from a failure to grasp their application to the particular cases wherein such decisions were rendered. In other words, there is a failure to distinguish between those cases where the plaintiff or defendant, as the case may be, is allowed to amend their respective pleadings *before trial*, on the one hand, and those cases where during *the pendency of the trial* such right is asked for, on the other hand. In the first class of cases, what difference is there if twenty days is allowed to answer an amended complaint, and an original complaint to be answered, the time for answering being the same in each case? If there be no difference, why should a plaintiff, when granted leave to amend his complaint, not be clothed with a general power of amendment? This is precisely what the Circuit Judge did. And the 'Case' here shows no abuse by the plaintiff of the privilege of amendment accorded to him by the generous provisions of the judge's order for that purpose, for the complaint states with distinctness and definiteness, by its allegations, the facts that this court pointed out as necessary. *Hall v. Woodward*, 30 S. C. 574, and cases there cited. But should the Circuit Court have required the payment of costs as a condition precedent? We do not think so. Terms were in his discretion. We regard his order as very fair and just to the defendant."

An order permitting in general terms an amendment of the complaint in a certain particular, "and otherwise as he may be advised to be material to his cause of action stated in said complaint," is not objectionable, as the words italicized limit the permission to such amendment as would not substantially change the claim. *Moore v. Christian*, 31 S. C. 337, 9 S. E. 981.

not differ radically from the order granting leave to file it.<sup>60</sup>

**5. In Respect of the Imposition of Terms and Conditions.** — a. *Power of Court.* — The power to impose such terms as may be just and proper as a condition to the allowance of an amendment to the pleadings is one not only recognized at common law as inherent in the court, but is one expressly conferred upon the court by statute in most of the states.<sup>61</sup> But the terms granted should not be so onerous as practically to amount to deprivation of the right.<sup>62</sup>

60. *Rowland v. Kellogg*, 26 Misc. 498, 57 N. Y. Supp. 893; *Pipe v. Spartansburg R. Co.*, 65 S. C. 409, 43 S. E. 869.

Under an order granting the plaintiff leave to "amend the complaint herein," he may change the existing paragraphs or add new ones or do both. *State v. Brown*, 80 Ind. 425.

61. Ark. — *Mohr v. Sherman*, 25 Ark.

7. Cal. — *Marr v. Rhodes*, 131 Cal. 267, 63 Pac. 364; *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786. N. H. — *McQueston v. Young*, 21 N. H. 462; *Smith v. Powers*, 15 N. H. 546. N. Y. — *People v. Munn*, 131 App. Div. 341, 115 N. Y. Supp. 803; *Baum v. Elias*, 64 Misc. 43, 117 N. Y. Supp. 935.

Although the statute gives a party the right to amend at any stage of the proceedings, the court may impose terms where he has been guilty of negligence in offering his amendment. *Savannah, F. & W. R. Co. v. Watson*, 86 Ga. 795, 13 S. E. 156 (by statute).

The plaintiff may be allowed to amend his declaration on such terms as may be allowed by the superior court. *Beers v. McGinnis*, 191 Mass. 279, 77 N. E. 768. See *Abrahams v. Finkelstein*, 49 Misc. 448, 97 N. Y. Supp. 987.

Although the merits will not be considered on a motion to amend the complaint, yet when defendant also moves to dismiss, the court can make it a condition of leave to amend that the motion to dismiss should be deemed to have been made with respect to the complaint as amended. *Jones v. Gould*, 130 App. Div. 451, 114 N. Y. Supp. 956.

Whether or not a motion for leave to serve an amended answer after trial should be granted, or whether terms should be imposed, depends upon whether the defendant, when he served his original answer, knew or could have known the facts he wished to plead in the amended answer. *Dubroff v. North River Ins. Co.*, 121 N. Y. Supp. 227.

In *Quimby v. Jay*, 196 Mass. 584, 82 N. E. 1084, plaintiff objected that there

was a violation of rule 5 of the superior court in allowing an amendment without the imposition of a double term fee. The court said that he doubted whether the rule applied, citing *Burton v. Frye*, 139 Mass. 131, 29 N. E. 476; *Goodrich v. Bodurtha*, 6 Gray (Mass.) 323; *Brickett v. Davis*, 21 Pick. (Mass.) 404.

Where, upon a hearing before a trial judge, of exceptions to an auditor's report, the defendant offers to amend his answer, and the trial judge puts his consent upon terms that he shall pay part of the costs before the amendment will be allowed, and he refuses to comply, the rejection of the amendment is not erroneous. *Jeter v. Johnston*, 110 Ga. 308, 35 S. E. 166.

Where a defendant is given leave to file an amended answer, on condition that special exceptions contained therein would be regarded as stricken out, and he declines to file the same under such conditions, the ruling of the court under the circumstances is not error. *International & G. N. R. Co. v. Biles* (Tex. Civ. App.), 120 S. W. 952.

In Connecticut the Act of 1794 allowed in the broadest terms amendments of the declaration in actions at law and the bill in equity, on payment of costs at the discretion of the court. *Dunnett v. Thornton*, 73 Conn. 1, 46 Atl. 158, pointing out that the phrase, "not changing the ground of action," in later revisions has been liberally construed.

A plea puis darrein continuance waives all former pleas, and if on demurrer it is adjudged bad, the judgment goes in chief unless the court allows a repleader on terms, which it may do. *Poland v. Davis*, 103 Me. 55, 68 Atl. 456.

62. *Misch v. McAlpine*, 78 Ill. 507, holding that it is error to require, as part of the terms, that the defendant will not ask for a continuance where it appears that he could not submit to such terms without abandoning his defense.

b. *Power Is Discretionary.*—The power is a discretionary one, if no statute interposes to prevent, to be exercised by the court in view of the particular facts and circumstances of the case before it; and the action of the court in this respect will not be disturbed except in case of a clear abuse of such discretion.<sup>63</sup> But, although this is true, in so far as the question of terms imposed in the order granting the amendment is concerned, this affects a substantial right and is subject to review by an appellate court; and there are cases where the terms imposed were held so contrary to the rules established by law and practice as to justify such a review.<sup>64</sup>

63. **Cal.**—*Gabriel v. Tonner*, 138 Cal. 63, 70 Pac. 1021; *Culverhouse v. Crosan*, 94 Cal. 544, 29 Pac. 1100. **Colo.**—*Coleman v. Davis*, 13 Colo. 98, 21 Pac. 1018. **Conn.**—*Richardson v. Hine*, 43 Conn. 201. **Ga.**—*Jones v. Grantham*, 80 Ga. 472, 5 S. E. 764; *Renew v. Redding*, 56 Ga. 311. **Idaho.**—*Lowe v. Long*, 5 Idaho 122, 47 Pac. 93. **Ill.**—*Jackson v. Warren*, 32 Ill. 331. **Ia.**—*Harrison v. Colton*, 31 Iowa 16. **Ind.**—*Burk v. Andis*, 98 Ind. 59. **Kan.**—*Stevens v. Matthewson*, 45 Kan. 594, 26 Pac. 38; *Wands v. School Dist. No. 17*, 19 Kan. 204. **Ky.**—*McClure v. Bigstaff*, 37 S. W. 294. **Mich.**—*Beneway v. Thorp*, 77 Mich. 181, 43 N. W. 863; *Borden v. Clark*, 26 Mich. 410. **Minn.**—*Caldwell v. Bruggerman*, 8 Minn. 252. **Neb.**—*Suckstorf v. Butterfield*, 4 Neb. (Unof.) 808, 96 N. W. 654. **N. Y.**—*Smith v. Rathbun*, 75 N. Y. 122; *People v. Minn*, 131 App. Div. 341, 115 N. Y. Supp. 803; *Lyall v. Wood*, 130 App. Div. 294, 114 N. Y. Supp. 272; *Bausch v. Ingersoll*, 16 N. Y. Supp. 336, 41 N. Y. St. 581. **N. C.**—*Anders v. Meredith*, 20 N. C. 199. **Okla.**—*Pappe v. Post*, 101 Pac. 1055. **S. C.**—*Stallings v. Barrett*, 26 S. C. 474, 2 S. E. 483. **Tex.**—*Turner v. Lambeth*, 2 Tex. 365; *Reagin v. Evans*, 2 Tex. Civ. App. 35, 21 S. W. 427. **Wis.**—*Franck v. Stout*, 139 Wis. 223, 120 N. W. 867; *Rahles v. J. Thompson & Sons Mfg. Co.*, 137 Wis. 506, 118 N. W. 350, 119 N. W. 289, 23 L. R. A. (U. S.) 296; *Withee v. Simon*, 104 Wis. 116, 80 N. W. 77; *McIlughan v. Barber*, 83 Wis. 500, 53 N. W. 289, 23 L. R. A. (N. S.) 296; *Withee* 27 N. W. 317.

The Wisconsin statute does not, under all circumstances, require an imposition of terms as a condition of granting leave to amend a pleading. The whole subject as to the justice of the amendment and whether it shall be granted upon condition, and if so what condition, is left to the sound discretion of

the trial judge. The imposition of terms has a two-fold object; the infliction of a penalty for the negligence requiring a remedy by amendment; and to give to the adverse party an equivalent for the injury to him by delay or increased expense because of the amendment. Where there is neither a reason for the infliction of a penalty, nor prejudice to the adverse party of any kind to be compensated for, it cannot be said on appeal that the failure of the trial court to impose terms was either an abuse of discretion or a violation of any rule of law. *Illinois Steel Co. v. Budzisz*, 106 Wis. 499, 81 N. W. 1027, 82 N. W. 534. In this case, an action of ejectment, the defendants were poor people, unacquainted with legal matters, and their attorney by mistake failed to plead the statute of limitations. After a lapse of some twenty-one months they employed other attorneys, who on the day of the trial, which took place shortly after the substitution of attorneys, offered an amended answer curing the omission. The only objection by the plaintiff was want of power in the court to permit it. It was held that the allowance of the amendment without the imposition of terms was not an abuse of discretion.

In *Kleimenhagen v. Dixon*, 122 Wis. 526, 100 N. W. 826, where the plaintiffs had been permitted to amend at the trial so as to conform his complaint to the evidence, it was held that as it did not appear but that if the amendment had been made before the trial the proceedings would have taken practically the course they took, it was proper to allow the amendment upon condition that plaintiffs pay \$10 costs and then to permit them to recover all costs of the trial against defendants.

64. *Dixon v. Risley*, 114 Cal. 204, 46 Pac. 5; *Rosenberg v. Feiering*, 124 App. Div. 522, 108 N. Y. Supp. 941, where it



**Amendment Without Terms.**— And there are cases in which the action of the court in permitting an amendment without terms has been upheld.<sup>65</sup>

c. *Effect of Accepting Terms*— A party who has amended in pursuance of an order imposing conditions cannot thereafter question the power of the court to impose the conditions.<sup>66</sup>

d. *Granting Continuance.*— If the court allowing a proposed amendment is satisfied that the adverse party is taken by surprise and requires further time in which to make suitable preparations for meeting the matter so interposed, it has the power to continue the case or postpone further hearing until such party shall have reasonable time to prepare himself, and, at the same time, to impose upon the party

was held that the terms imposed were inadequate.

**Mandamus.**— Where the supreme court on appeal has directed the superior court to permit the plaintiff to amend his complaint in certain particulars, he has the absolute right to make those amendments, and it is not within the province of the trial court to affix conditions as to the exercise of that right. *Dixon v. Risley*, 114 Cal. 204, 46 Pac. 5, where the trial court after the remittitur had been filed, undertook to modify the order allowing the amendments by requiring the plaintiff as a condition thereto to pay the costs of the appeal together with the accruing costs and ordered that all proceedings in the cause be stayed until such costs were paid. It was held that mandamus would lie to compel the court to allow the amendments ordered by the supreme court and to proceed with the trial of the case.

65. **Ark.**— *Brinkley v. Mooney*, 9 Ark. 445. **Colo.**— *Cooper v. McKeen*, 11 Colo. 41, 17 Pac. 97. **Del.**— *State v. Hancock*, 2 Penne. 252, 45 Atl. 851. **Ga.**— *Jones v. Grantham*, 80 Ga. 472, 5 S. E. 764. **Ia.**— *Harrison v. Colton*, 31 Iowa 16. **Me.**— *Bolster v. China*, 67 Me. 551. **Mass.**— *Hartwell v. Hemmenway*, 7 Pick. 117. **Mich.**— *Borden v. Clark*, 26 Mich. 410. **S. C.**— *Wallace v. Columbia & G. R. Co.*, 37 S. C. 335, 16 S. E. 35; *Green v. Iredell*, 31 S. E. 588, 10 S. E. 545. **Wis.**— *Wells v. American Exp. Co.*, 49 Wis. 224, 5 N. W. 333. Compare *Sullivan v. Collins*, 107 Wis. 291, 83 N. W. 310.

66. *Smith v. Rathbun*, 75 N. Y. 122, where the referee had imposed as a condition to allowing an amendment, the liberty of the adverse party to demur. The court in holding as stated in the text said: "By section 173 of the old

Code, which was in force when the proceedings before the referee took place, the court is authorized, before or after judgment or upon the trial, in furtherance of justice, and such terms as may be proper, to amend any pleading, by inserting other allegations material to the case; and section 272 declares that referees shall have the same power to grant adjournments and to allow amendments to any pleading, as the court upon the trial, and upon the same terms, and with like effect. The power to impose conditions, on allowing an amendment of the pleadings, upon the application of one of the parties, such as that the other party may amend his pleading, or withdraw it and interpose a demurrer, in place of an answer, is frequently exercised by courts, and is often essential in the administration of justice. The party applying for an amendment, in a case not coming within the cases where an amendment is allowed of course, is in the position of asking a favor, which the court may or may not grant, in its discretion; and its power to annex, as a condition of granting it, that the other party may modify or change his pleading, or substitute a demurrer for an answer, cannot, we think, be questioned. The immemorial practice of courts established the existence of the power, and it does not need a statute to confer it. The party asking to amend may reject the permission, if connected with terms which he does not wish to accept; but he cannot accept a conditional order, so far as it is for his benefit, and reject the rest. The same rule must apply, whether the order is made by the court or by a referee." See also *Me.*— *Simpson v. Norton*, 45 Me. 281. **N. Y.**— *Austin v. Waful*, 30 N. Y. St. 779, 13 N. Y. Supp. 184. **Tex.**— *Woods v. Durrett*, 28 Tex. 429.

proposing the amendment such terms as will compensate the adverse party for the expense and delay caused thereby.<sup>67</sup>

e. *Payment of Costs.*—The condition most usually and properly imposed in case of the allowance of an amendment, is the payment of costs to the date of the proposed amendment.<sup>68</sup> But disbursements

67. Cal.—McDougald v. Hulet, 132 Cal. 154, 64 Pac. 278; Marr v. Rhodes, 131 Cal. 267, 63 Pac. 364; Guidery v. Green, 95 Cal. 630, 30 Pac. 786. Kan.—School-Dist. No. 2 v. Boyer, 46 Kan. 54, 26 Pac. 484. Wash.—Bowers v. Good, 52 Wash. 384, 100 Pac. 848.

After amendment of complaint a continuance over the term may be refused where there is no showing by defendant, either by affidavit or by a statement to the court based on the pleadings apparently supporting such statement, that the defendant was unprepared to meet, and could not, with the evidence at hand or available, meet the issues raised by the amended complaint. Rahles v. J. Thompson & Sons Mfg. Co., 137 Wis. 506, 118 N. W. 350, 119 N. W. 289, 23 L. R. A. (N. S.) 296. And see Withee v. Simon, 104 Wis. 116, 80 N. W. 77, an action upon a promissory note, where the answer denying the making of the note was not sufficiently specific under the Wisconsin statute to put in issue the genuineness of the defendant's signature, and the trial court permitted the defendant to raise that issue by filing the required affidavit without granting a continuance asked for by plaintiff.

It is not error for the court, four or five days before the trial, to allow defendant to file a plea denying the execution of the instrument sued upon. If the filing of the plea at such time results in surprise to the plaintiff, the court may grant him a continuance. Great Western Tel. Co. v. Mears, 154 Ill. 437, 40 N. E. 298, affirming 54 Ill. App. 667.

Where the filing of an additional plea of *non est factum* would change the burden of proof, require additional evidence, and render a continuance necessary, its disallowance is proper, especially in view of the fact that the necessity therefor is due to the negligence of the defendant. McMakin v. Weston, 64 Ind. 270.

Adding Off-set or Counter-claim.—If during the trial it appears that the defendant is entitled to an off-set or counter-claim, of which he cannot avail himself without amending his plea or

answer, such amendment should be allowed, and if necessary, the plaintiff should be granted a continuance upon such terms as seem just to prepare himself for the new issues. McDougald v. Hulet, 132 Cal. 154, 64 Pac. 278; Marr v. Rhodes, 131 Cal. 267, 63 Pac. 364.

68. Colo.—Coleman v. Davis, 13 Colo. 98, 21 Pac. 1018. Ind.—Gaff v. Hutchinson, 38 Ind. 341. Kan.—Stevens v. Matthewson, 45 Kan. 594, 26 Pac. 38. N. J.—Condit v. Neighbor, 12 N. J. L. 320. N. Y.—Lyll v. Wood, 130 App. Div. 294, 114 N. Y. Supp. 272; Downer v. Thompson, 6 Hill 377. S. C. Green v. Iredell, 31 S. C. 588, 10 S. E. 545. Tex.—Lanes v. Squyres, 45 Tex. 382. Wis.—Franck v. Stout, 139 Wis. 223, 120 N. W. 867.

Where some reason is not shown moving the discretion of the court otherwise, the rule is well established that where material and substantial amendments are granted to a party after an unsuccessful trial, the other party should be reimbursed for taxable costs and disbursements made since the pleading to be amended was served. Lyll v. Wood, 130 App. Div. 294, 114 N. Y. Supp. 272.

An amendment setting up as a counterclaim upon which reformation of the contract is demanded, substantially the same matter set up as a defense in the original answer should be allowed, although the case has appeared on the day calendar, on payment by the defendant of all taxable costs and disbursements after the service of the summons and complaint, with the further condition that the action remain upon the day calendar and that the amended answer be served within one day after the entry of the order. Sackett v. Milholland, 49 Misc. 439, 99 N. Y. Supp. 948.

In Baum v. Elias, 64 Misc. 43, 117 N. Y. Supp. 935, the answer declared that the defendant had "no knowledge or information sufficient to form a belief as to the truth of the allegations contained" in certain paragraphs of the complaint, and the plaintiff moved for judgment on the pleadings because this was but a poor paraphrase of the Code of Civil Procedure requiring a denial

actually paid as a condition to an order allowing an amendment cannot again be taxed.<sup>69</sup>

**6. In Respect of Service of Amended Pleadings.**—In the absence of any statutory provision, service of an amended pleading on the opposite party is not necessary unless the order granting the leave so requires.<sup>70</sup> But in many jurisdictions such service is required by statute.<sup>71</sup>

“of any knowledge or information thereof sufficient to form a belief.” The trial court permitted the withdrawal of a juror on condition of the payment of \$30.00 trial fee and of the plaintiff’s taxable costs and properly allowed an amendment without further terms.

**Terms.**—If the right to impose terms upon the party applying for leave to amend depends wholly upon the question of negligence in the application, it is error for the court, in granting leave to amend, to require the payment of costs, where the application was made on the first day of the second term at or before the calling of the case for final disposition, this being due diligence. *Barrett v. Pascoe*, 90 Ga. 826, 17 S. E. 117.

An amendment changing the cause of action from one on contract to one for breach of the same contract, the end being substantially the same, should be allowed only upon condition that the plaintiff pay all costs up to the date of the amendment. *Dunham v. Hastings P. Co.*, 109 App. Div. 514, 96 N. Y. Supp. 313; *Rubin v. Maine S. Co.*, 51 Misc. 665, 101 N. Y. Supp. 30.

Upon new trial granted for improper amendment because the complaint did not state a cause of action, amendment should be allowed only on payment of all costs and disbursements of the action before the date of the relief. *Audley v. Townsend*, 131 App. Div. 79, 115 N. Y. Supp. 145. See also *Purcell v. Hoffman House*, 131 App. Div. 239, 115 N. Y. Supp. 778; *Palatine v. Canajoharie Water S. Co.*, 116 App. Div. 530, 101 N. Y. Supp. 810.

**After disagreement of the jury** an amendment setting up a new defense should be allowed only on conditions. *Bruns v. Brooklyn Citizen*, 98 App. Div. 316, 90 N. Y. Supp. 701; *Manhattan Rolling Mill v. Dellon*, 63 Misc. 48, 116 N. Y. Supp. 583.

In *Culverhouse v. Crosan*, 94 Cal. 544, 29 Pac. 1100, the case had been on the calendar for two years and the plaintiff and his attorney had come a considerable distance to attend the trial, and

it was held that the court did not abuse its discretion in refusing defendant leave to amend except upon payment to the plaintiff then and there of money thus expended.

**Cost of Deposition.**—So it is within the sound discretion of the court to impose as a condition to allowing defendant to amend his answer, payment of the probable expense to the adverse party of depositions made necessary by the amendment. *Gabriel v. Tonner*, 138 Cal. 63, 70 Pac. 1021.

An amendment to a complaint made at the close of the case and the withdrawal of a juror in order to enable the plaintiff to set up with more particularity the defects complained of should be allowed only on payment of the costs of the motion, and all taxable costs to the date thereof. *Palazzo v. Degnon MacLean Cont. Co.*, 115 App. Div. 172, 100 N. Y. Supp. 681.

69. *Grant v. Pratt*, 110 App. Div. 149, 97 N. Y. Supp. 38.

70. *Miller v. Georgia R. Bank*, 120 Ga. 17, 47 S. E. 525; *Perkins v. Wood*, 63 Tex. 396.

71. Cal.—*Linott v. Rowland*, 119 Cal. 452, 51 Pac. 687; *Reinhart v. Lugo*, 86 Cal. 395, 24 Pac. 1089. Kan.—*Alvey v. Wilson*, 9 Kan. 401. Mont.—*Schuttler v. King*, 12 Mont. 149, 30 Pac. 25. Pa. *Tyrrill v. Lamb*, 96 Pa. 464.

If the amendment in any particular changes or adds to the traversible allegation, or aids the cause of action or defense, the opposite party is entitled to be served with the amended plea. *Abrahams v. Finkelstein*, 49 Misc. 448, 97 N. Y. Supp. 987.

If notice of an action commenced against a firm is served on one of the members as such, and the petition is subsequently amended without notice so as to state a cause of action against the member so served as an individual, he need not appear and defend. *Ogle v. Miller*, 128 Iowa 474, 104 N. W. 502.

Where a party under the guise of leave to amend the pleading serves a pleading clearly not authorized by the



Service on the attorney of record is usually sufficient under the statute.

**III. MANNER AND SUFFICIENCY OF AMENDMENTS. — A. IMPLIED AMENDMENTS** — In some cases, although a formal amendment or amended pleading is not actually filed, the court is warranted by the conduct of the parties in treating the case as though the amendment were actually filed.<sup>73</sup>

leave granted, the party upon whom it is served may return it and on a motion to compel him to receive it, if it appears that the pleading was authorized, he will be required to accept it, and if it clearly appears that it was not authorized he will not be required to accept it. *Mann v. Press Pub. Co.*, 135 App. Div. 361, 120 N. Y. Supp. 534.

72. *Young v. Fink*, 19 Cal. 107, 50 Pac. 1060; *Mercier v. Pearlstone*, 7 Abb. Pr. (N. Y.) 325.

Compare *Peterson v. Chicago, M. & St. P. R. Co.*, 108 Fed. 561, where the attorney upon whom attempted service was made had not yet entered his appearance, and it was held that the service was insufficient, even though he afterward appeared as attorney for the party.

73. Ind. — *Hellyer v. Bowser*, 76 Ind. 35. Ia. — *Harbach v. Cohvin*, 73 Iowa 638, 35 N. W. 663. Kan. — *Excelsior Mfg. Co. v. Boyle*, 46 Kan. 202, 26 Pac. 408. Mass. — *Horne v. Meakin*, 115 Mass. 326. Mich. — *Phalen v. Detroit*, 126 Mich. 683, 86 N. W. 126. N. Y. — *Moders v. Whallon*, 26 N. Y. Supp. 614. Ore. — *Hammer v. Downing*, 39 Ore. 504, 64 Pac. 651, 65 Pac. 17, 990, 67 Pac. 30. R. I. — *Eaton v. Case*, 17 R. I. 429, 22 Atl. 943. Wis. — *Kretser v. Cary*, 52 Wis. 374, 9 N. W. 161.

A defendant, who is sued in justice's court as "John Doe," and who appears and defends, and appeals under his own name, and the record shows correctly and fully the identity of the parties, has no cause to complain of want of a formal amendment. *Moore v. Lewis*, 76 Mich. 300, 43 N. W. 11.

In *Brantz v. Marcus*, 73 Iowa 64, 35 N. W. 115, it was doubtful whether the amendment was marked "filed," and it was conceded that it was not; but it was certain it was in the hands of the judge, and counsel for the defendant had knowledge of this fact, and of its purport prior to the time the instructions were given. The court regarded it as filed, and gave the instructions in conformity thereto. When counsel for the defendant obtained knowledge of

the amendment, they made no objections thereto. It was held that the court was justified in believing, and in substance agreed, that the same might be regarded as being filed. "The supposition cannot be indulged that counsel did not have ample opportunity to object to the filing of the amendment, and their failure to do so precludes them from now, after verdict, making such objection. If the amendment was deemed material, and counsel were taken by surprise thereby, they should have applied for a continuance. They knew, when the instructions were made, the court regarded the amendment as filed. Objections could have been made; none were made, except in a motion for a new trial. This was too late."

In *Excelsior Mfg. Co. v. Boyle*, 46 Kan. 202, 26 Pac. 408, permission to amend was granted by the court, proof was offered and the parties proceeded with the trial as if the answer had actually been amended. It was held that under such circumstance the supreme court would treat the answer as having been amended to conform to the facts shown. See *Organ Co. v. Lasley*, 40 Kan. 521, 20 Pac. 228; *Wilkins v. Tourtellott*, 29 Kan. 513.

Failure to make an amendment formally upon the record does not necessitate a reversal of the judgment. The record can be corrected to conform with the order permitting the amendment. *French v. McCarthy*, 125 Cal. 508, 58 Pac. 154. So in *Alameda County v. Crocker*, 125 Cal. 101, 57 Pac. 766, certain defendants who had been served by fictitious names appeared and answered, but the complaint was not amended by inserting their true names. It was held that although the better practice was to amend the complaint by inserting the true names of the parties, yet inasmuch as the specific rights of the defendants had been ascertained and determined, a new trial need not be awarded but the trial court would be directed to amend the complaint as of date prior to judgment by inserting the true names.

**B. ACTUAL AMENDMENTS. — 1. In General.** — But the mere fact that leave to amend has been granted does not always and of itself operate as an amendment; the pleader should ordinarily make an actual amendment in some appropriate manner.<sup>74</sup>

**Order Operating as Amendment.** — It has been held, however, that an order granting leave to amend may operate as an amendment, although the actual change in the pleading is not made.<sup>75</sup>

**2. Interlineations.** — Where the amendment is in reality but a slight alteration,<sup>76</sup> or is to obviate a purely technical objection,<sup>77</sup> the amendment may be made by interlineation unless some statute or rule of court prohibits;<sup>78</sup> although it has been said that the practice of amending by interlineations should not be favored.<sup>79</sup>

**Demurrer.** — Mere brief amendments by way of interlineations in immaterial matters not vitally changing the issues or relieving the original pleading from the objections raised by the original de-

74. *Ala.* — *Keith v. Cliatt*, 59 *Ala.* 408. *Cal.* — *Kimball v. Carhart*, 12 *Cal.* 46. *Colo.* — *Briggs v. Bruce*, 9 *Colo.* 282, 11 *Pac.* 204. *Ill.* — *Condon v. Schoenfeld*, 214 *Ill.* 226, 73 *N. E.* 333; *Sinsheimer v. Skinner Mfg. Co.*, 165 *Ill.* 116, 46 *N. E.* 262. *Md.* — *Lohrfink v. Still*, 10 *Md.* 530. *N. D.* — *Satterlund v. Beal*, 12 *N. D.* 122, 95 *N. W.* 518.

*Compare*, *Seitz v. Buffum*, 14 *Pa.* 69; *Moffett-West Drug Co. v. Byrd*, 1 *Ind. Ter.* 612, 43 *S. W.* 864.

Where counsel for plaintiff orally announces in open court that he abandons any claim to proceed for an injunction, and will only proceed for damages, on proper motion, the presiding judge will probably require such election or abandonment to be put in writing as an amendment or a part of the record, or will, by order, strike from the petition the proceeding for an injunction. *James & Cordell v. Saunders*, 127 *Ga.* 336, 56 *S. E.* 491.

Two defendants cannot unite in amending the independent answer of one of them. *Equitable B. & L. Assn. v. Holloway*, 114 *Ga.* 780, 784, 40 *S. E.* 742.

It is the better, although not the universal, practice to require an amendment to a pleading at the trial to be made specific and clear by putting on the minutes a statement as to exactly what words are stricken out and what inserted. This is especially important when there is to be a trial on the amended pleadings. *Wyckoff, Church & Partridge v. Huggins*, 121 *N. Y. Supp.* 382.

75. As where the record furnishes the data to so apply the order as to

show the effect of the amendment. *Bal-lou v. Hill*, 23 *Mich.* 60. See also *Palmer v. Lesne*, 3 *Ala.* 741; *Michigan Cent. R. Co. v. Harville*, 136 *Ill. App.* 243.

An order of the court directing that the true name of a party be inserted in the complaint in place of the fictitious name by which he is sued, is a sufficient amendment. *Hoffman v. Keeton*, 132 *Cal.* 195, 64 *Pac.* 264.

76. *Cal.* — *Chamberlain v. Loewenthal*, 138 *Cal.* 47, 70 *Pac.* 932. See also *Doane v. Houghton*, 75 *Cal.* 360, 17 *Pac.* 426. *Fla.* — *Hyer v. Vaughn*, 18 *Fla.* 647. *Ind.* — *Fleenor v. Taggart*, 116 *Ind.* 189, 18 *N. E.* 606. *Kan.* — *Hastie v. Burrage*, 69 *Kan.* 560, 77 *Pac.* 268; *Fitzpatrick v. Gebhart*, 7 *Kan.* 35. *Md.* — *Scarlett v. Academy of Music*, 43 *Md.* 203. *Mo.* — *South Joplin L. Co. v. Case*, 104 *Mo.* 572, 16 *S. W.* 390, holding it discretionary with the court to allow an interlineation. *Utah.* — *Billings v. Parsons*, 17 *Utah* 22, 53 *Pac.* 730.

77. *Meshke v. Van Doren*, 16 *Wis.* 319.

78. *Simmons v. Rust*, 39 *Iowa* 241. And see *Ortiz v. Navarro*, 10 *Tex. Civ. App.* 195, 30 *S. W.* 581.

To allow an amendment by interlineation is discretionary. *South Joplin L. Co. v. Case*, 104 *Mo.* 572, 16 *S. W.* 390.

79. *Western Trav. Acc. Assn. v. Tomson*, 72 *Neb.* 661, 101 *N. W.* 341, 103 *N. W.* 695, 105 *N. W.* 293.

In *Board of Supervisors v. Mississippi & W. R. Co.*, 21 *Ill.* 338, 365, it was said that the original answer should not be changed by evasions, interlineations or in any other manner except for scandalous or impertinent matter, but an entirely new document should be filed.

murrer thereto. are not sufficient to constitute an amended pleading so as to necessitate a new demurrer thereto.<sup>80</sup>

**3. New and Separate Pleading.**—Where the effect of the amendment is to change the entire structure of the pleading, the usual practice is to file an entirely new and separate pleading embracing the amendment.<sup>81</sup> And sometimes this is expressly required by statute.<sup>82</sup>

**4. Reference to Original Pleading.**—In many cases, however, an entirely new and separate pleading is not considered necessary; the pleader may by appropriate reference to the original pleading designate what, and where, the amendatory matter may be considered as inserted, and what stricken out.<sup>83</sup>

**C. SUFFICIENCY OF AMENDED PLEADING.—1. In General.**—Where the amended pleading is a new and separate pleading, it should of course set out all the facts necessary to constitute a cause of action or defense.<sup>84</sup> And it is proper to refuse leave to file an amended

**30.** *Flood v. Templeton*, 148 Cal. 374, 83 Pac. 148. *Compare Payne v. Crawford*, 97 Ala. 604, 11 So. 725.

**81.** *Birmingham R. & Elec. Co. v. Allen*, 99 Ala. 359, 13 So. 8; *Hill v. Road Dist.*, 10 Ohio 621. See also *Fleenor v. Taggart*, 116 Ind. 189, 18 N. E. 606.

A paper filed by the plaintiff which appears to be a full statement of his cause of action without any reference to any prior pleading, and which is designated by the defendant in his answer as the "second amended petition," will be considered as a complete new, amended petition although the plaintiff styles it as "amendment to the amended petition." *Deere Plow Co. v. Jones*, 68 Kan. 650, 76 Pac. 750. The court said: "However inapt for the purpose, the phrase 'amendment to the amended petition' was obviously used by the plaintiff to designate an amendment of the amended petition by changing its entire structure—recasting of the pleading. This appears from the fact that its subject-matter clearly shows that it is intended to be in itself a complete statement of the cause of action, without reference to any prior pleading. Moreover the two answers to this very pleading, although called by the plaintiff who prepared the case-made answers to 'the amendment to the amended petition' are designated by the defendants themselves as answers to the 'second amended petition,' and throughout these answers this pleading to which they respond is called the 'second amended petition,' although the plaintiff in his

reply continues to refer to it as the 'amendment to the amended petition.' The pleading was in fact just what the defendants themselves aptly entitled it, a second amended petition. With the answers and replies, it constituted the pleadings on which the case was tried, and any omission from the record of an earlier petition is immaterial."

**82.** As in Missouri, where the statute requires every pleading, amendatory or supplemental, to set forth in one entire pleading everything which may be necessary to the proper determination of the action or defense; and the parties cannot agree that the original and amended answer shall be considered together as one pleading, the amended answer must be sufficient in itself. *Bayse v. Ambrose*, 28 Mo. 39.

**83.** *Ind.—Eigenman v. Rockport Assn.*, 79 Ind. 41. *Ia.—Mahaska Co. Sav. Bank v. Crist*, 54 N. W. 450. *Wyo. Turner v. Hamilton*, 13 Wyo. 408, 80 Pac. 664.

*Compare Birmingham R. Co. v. Allen*, 99 Ala. 359, 13 So. 8, 20 L. R. A. 457. See *Welsh v. Bardshar*, 137 Cal. 154, 69 Pac. 977, where references in an amended answer were held to be to its own preceding paragraphs and not to those of the original answer.

**84.** *Manhattan Life Ins. Co. v. Verneuille*, 156 Ala. 592, 47 So. 72; *Hagood v. Hutton*, 33 Mo. 244.

Where the proposed amendment is so uncertain and insufficient as to be unintelligible, it is properly disallowed. *Byrd v. Campbell Ptg. Press & Mfg. Co.*, 90 Ga. 542, 16 S. E. 267.



answer which does not present any new issue or any defense of the action not embraced in the original answer.<sup>85</sup>

**2. Signature by Attorney.**—It has been held that an amended pleading which is not signed by the attorney serving it may be disregarded.<sup>86</sup>

**3. Verification.**—Where a pleading is required by statute to be verified, an amendment thereto should also be verified.<sup>87</sup>

**IV. CHARACTER AND SUBJECT-MATTER OF AMENDMENTS.**—A. IN RESPECT OF MATTERS NOT PERTAINING TO CLAIM OR DEFENSE.—**1. In General.**—Merely formal defects, that is to say, such portions of the pleadings as do not pertain to the substance of the claim or defense, are generally susceptible of amendment.<sup>88</sup>

**85.** *Duff v. Duff*, 101 Cal. 1, 35 Pac. 437.

**86.** *Duval v. Busch*, 13 N. Y. Civ. Proc. 366.

**87.** *Foy v. Foy*, 35 N. C. 90. See also *McCabe v. Porter*, 73 Ill. 244.

**88.** *Ark.*—*McLeran v. Morgan*, 27 Ark. 148. *Kan.*—*Hastie v. Burrage*, 69 Kan. 560, 77 Pac. 268. *Ky.*—*Arthurs v. Thompson*, 97 Ky. 218, 30 S. W. 628. *Me.*—*Bates v. Androscoggin R. Co.*, 49 Me. 491. *Mo.*—*Glasscock v. Glasscock*, 8 Mo. 577. *Neb.*—*Rosewater v. Horton*, 4 Neb. (Unof.) 205, 93 N. W. 681. *N. H.*—*Berry v. Osborn*, 28 N. H. 279. *N. Y.*—*Harrower v. Heath*, 19 Barb. 321; *Teal v. Tinney*, 2 How Pr. 94. *Pa.*—*Trego v. Lewis*, 58 Pa. 463. *Tenn.*—*Finley v. Acme Kitchen Furn. Co.*, 119 Tenn. 698, 109 S. W. 504. *Wis.*—*Ballston Spa Bank v. Marine Bank*, 16 Wis. 120.

The title to an answer is amendable, as where entitled in the wrong court. *McMurtry v. State*, 19 Neb. 147, 26 N. W. 915.

In *Hastie v. Burrage*, 69 Kan. 560, 77 Pac. 268, the petition filed in the district court did not recite in its caption the names of the court and the county in which the action was brought, as required by law, although on the outside of the petition was endorsed "No. 9019, District Court, Sumner County, Kansas." A præcipe properly entitled was issued and summons in due form was issued and served. Pending the consideration of the motion to quash the summons and set aside the service, the plaintiff was permitted to amend the petition by inserting in its caption the names of the court and county in which the action was pending, and this was held proper inasmuch as the court had jurisdiction of the subject-matter and

obtained jurisdiction of the subject-matter by the service of the summons.

In *Bradley v. Pinney*, 77 Kan. 763, 93 Pac. 585, the original petition recited that a copy of the note sued upon was attached but by mistake the original note was attached. The plaintiff was permitted to amend by striking out from the recital the words "a copy of" and inserting the words "said original." Thereupon the defendant demurred to the amended petition on the ground that it failed to state a cause of action in that it showed on its face that the pretended cause of action was barred by the statute of limitations. This demurrer was overruled. The court in holding this proper said: "When the action was commenced it was not barred although if it had been commenced at the date of the amendment it would have been too late. The contention that the amendment should be treated as a new cause of action is without merit."

The transaction as set forth in a petition speaks for itself, regardless of the terminology employed by the pleader, and he will be allowed to amend his pleading in order to correct any looseness of phraseology that it may contain. *City of Albany v. Cameron Co.*, 121 Ga. 794, 49 S. E. 798.

In *Martin v. Jesse French Piano & Organ Co.*, 151 Ala. 289, 44 So. 112, the summons called the defendant into court to answer the complaint of the Jesse French P. & O. Co., a corporation, and the title or caption of the complaint showed that the Jesse French P. & O. Co. was the plaintiff. The plaintiff with leave of court amended the complaint, and in making the amendment omitted to write the word plaintiff between the words "the" and "claims." The court said that obviously the omission was a

**2. Signature of Party or Counsel.**—So, too, where the party pleading or his counsel has omitted to sign the pleading, such omission may be corrected by amendment.<sup>89</sup>

**3. Verification.**—Where the verification to a pleading has been omitted,<sup>90</sup> or is insufficient, the defect is amendable.<sup>91</sup>

**Necessity for Application for Leave.**—In both such cases, however, timely application for leave to amend in the particular desired is held to be necessary.<sup>92</sup>

**4. Jurisdictional Matters.**—Where matter which would show jurisdiction on the part of the court of the subject-matter or the parties has been omitted, such omission may ordinarily be corrected by amendment.<sup>93</sup>

self-correcting, clerical error, and that the insistence that the complaint failed to show that any party claimed the amount sued for in the complaint, and therefore that the complaint did not support the judgment, could not prevail.

**Numbering Paragraphs.**—Where a petition does not set forth the cause of action in orderly and distinct paragraphs, numbered consecutively, this defect in form may be cured by amendment. *Montgomery v. King*, 123 Ga. 14, 50 S. E. 963.

**Under the Massachusetts statutes** amendments may be allowed in the matter of form or of substance "which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought," and "the allowance by the court of an amendment shall be conclusive evidence of the identity of the cause of action." *Com. v. National Contract Co.*, 201 Mass. 248, 87 N. E. 590, *citing* Rev. Laws, c. 173, §§ 48, 121.

In Massachusetts the superior court has the same power (Pub. St., c. 167, § 42), to allow new matter to be pleaded by amendment on appeal from a municipal court as it would have if the case had begun there. The statute (Pub. St., c. 155, § 35) is not intended to limit the power of the superior court to allow amendments in cases brought to it by appeal. *Hall v. Rosenfeld*, 177 Mass. 397, 59 N. E. 68.

**A mistake made in alleging the date** on which an instrument is executed may ordinarily be cured by appropriate amendment. *Quillian v. Johnson*, 122 Ga. 49, 49 S. E. 801.

**89. Ark.**—*Simpson & W. Furn. Co. v. Moore*, 126 S. W. 1074. **Fla.**—*Crawford v. Feder*, 34 Fla. 397, 16 So. 287. **Ind.**—*Sims v. Dame*, 113 Ind. 127, 15 N. E. 217; *Harris v. Osenback*, 13 Ind. 445.

**Kan.**—*Missouri R. F. S. & G. R. Co. v. Owen*, 8 Kan. 409; *Manspeaker v. Bank of Topeka*, 4 Kan. App. 768, 46 Pac. 1012. **N. Y.**—*Laimbeer v. Allen*, 2 Sandf. 648. **Tex.**—*Boren v. Billington*, 82 Tex. 137, 18 S. W. 101. **Va.**—*McIntyre v. Smyth*, 108 Va. 736, 62 S. E. 930.

*Compare Carrington v. Hamilton*, 3 Ark. 416.

**90. Cal.**—*Lathimer v. Ryan*, 20 Cal. 628; *Angiers v. Masterson*, 6 Cal. 61. **Fla.**—*Green v. King*, 17 Fla. 452. **Ga.**—*Ward v. Frick Co.*, 95 Ga. 804, 22 S. E. 899; *Phoenix v. Chapman*, 143 Ill. App. 286. **Ill.**—*Enor v. Hodson*, 28 Ill. App. 445. **Kan.**—*Chinberg v. Gale Sulky H. Mfg. Co.*, 38 Kan. 228, 16 Pac. 462; *Hargrove v. Woolf*, 34 Kan. 101, 8 Pac. 192. **Mo.**—*Anderson v. Hance*, 49 Mo. 159. **N. Y.**—*Bragg v. Bickford*, 4 How. Pr. 21. **Ohio.**—*Meace v. Thorne*, 2 Ohio 289. **Tex.**—*Dyer v. Winston*, 33 Tex. Civ. App. 412, 77 S. W. 227.

Where a plaintiff verifies his petition in conformity with the provisions of the code, the omission of the defendant to likewise verify a plea interposed by him is an amendable defect. *Rodgers v. Caldwell*, 122 Ga. 279, 50 S. E. 95. See also *Neal v. Davis Fdy. & Mach. Wks.*, 131 Ga. 701, 63 S. E. 221.

**91. Cantwell v. Herring**, 127 N. C. 81, 37 S. E. 140.

**92. Moore v. Emmert**, 21 Kan. 1; *Lee v. Hamilton*, 12 Tex. 413.

**93. U. S.**—*Halsted v. Buster*, 119 U. S. 341, 7 Sup. Ct. 276, 30 L. ed. 462; *Maddox v. Thorn*, 60 Fed. 217, 8 C. C. A. 574. **Ark.**—*Frizzell v. Duffer*, 58 Ark. 612, 25 S. W. 1111. **Colo.**—*Southwestern Land Co. v. Hickory Jackson Ditch Co.*, 18 Colo. 489, 33 Pac. 275. **Minn.**—*Berryhill v. Healey*, 89 Minn. 444, 95 N. W. 314. **Mo.**—*Mitchell v.*

**Residence.**—Thus a pleading may be amended so as to show that a party resides within the jurisdiction of the court.<sup>94</sup>

**5. Variance Between Writ and Declaration.**—A variance between the writ and the declaration may be corrected by amendment at any time before judgment if substantial justice may be done thereby.<sup>95</sup>

**B. IN RESPECT OF THE PARTIES.**—**1. Misnomer.**—At common law, an amendment of the name of a party which merely cured a mistake in his name was proper.<sup>96</sup>

Under the modern practice, especially in view of the statutory provisions in the various states, it is a generally well recognized rule that in the case of misnomer as to the plaintiff, as where he sues by the wrong christian name, or by the initials, he may amend by inserting the true or full name.<sup>97</sup>

Missouri P. R. Co., 82 Mo. 106; *Mier v. St. Louis In. & S. R. Co.*, 56 Mo. App. 655. **N. Y.**—*Meeks v. Meeks*, 79 App. Div. 49, 79 N. Y. Supp. 718. **S. C.**—*Chafee v. Postal Tel. C. Co.*, 35 S. C. 372, 14 S. E. 764. **Tex.**—*Evans v. Mills*, 16 Tex. 196.

Where a petition with the heading "Georgia, Bryan County," but not addressed to any court, in the first paragraph set forth as the plaintiff S. F. Davis, Administrator of J. F. Davis, and as the defendant, F. E. Parish, and in the second paragraph averred that F. E. Parish was indebted to petitioner, as administrator, J. F. Parish, in a stated sum on two notes, copies of which are attached to the petition; and in the third paragraph prayed for process requiring the defendant to appear "at the next term of said superior court to be held in and for said county," etc., such a petition was amendable by addressing it to the superior court of Bryan County and changing J. F. Parish to J. F. Davis in the second paragraph. *Parish v. Davis*, 126 Ga. 840, 55 S. E. 1032; citing Civil Code, §§ 5098-5107.

Under the Illinois statute, leave to amend a plea to the jurisdiction of the person, may properly be granted. *Midland Pac. R. Co. v. McDermid*, 91 Ill. 170.

**94. Ga.**—*Hall v. Mobley*, 13 Ga. 318. **La.**—*Lowery v. Kline*, 6 La. 380. **N. Y.**—*Henneke v. Schmidt*, 121 App. Div. 516, 106 N. Y. Supp. 138; *Hogan v. Glueck*, 2 App. Div. 82, 37 N. Y. Supp. 522; *Jenkins v. Hall*, 85 Hun 619, 32 N. Y. Supp. 883. **S. C.**—*Chafee v. Postal Tel. Co.*, 35 S. C. 372, 14 S. E. 764.

In an action in the county court, the court having acquired jurisdiction of the action by the summons, if the de-

fendant was a resident of the county in fact, may permit the plaintiff to amend the complaint by alleging that defendant resided in the county at the commencement of the action. *Henneke v. Schmidt*, 121 App. Div. 516, 106 N. Y. Supp. 138.

**95. Colo.**—*Gilpin v. Ebert*, 2 Colo. 23. **N. Y.**—*Fallmer v. Steele*, 1 Caines 22. **R. I.**—*Barlow v. Tierney*, 26 R. I. 557, 59 Atl. 930, *distinguishing Slater v. Fehlberg*, 24 R. I. 574, 54 Atl. 383. **Tex.**—*Ft. Worth Pub. Co. v. Hitson*, 80 Tex. 216, 14 S. W. 843, 16 S. W. 551. **W. Va.**—*Courson v. Parker*, 39 W. Va. 521, 20 S. E. 583.

**96. Ky.**—*Hume v. Langston*, 6 J. J. Marsh. 254. **N. Y.**—*Waterbury v. Mather*, 16 Wend. 611. **Eng.**—*Croft v. Coggs*, 4 J. B. Moore 65, 16 E. C. L. 363.

In *Elliott v. Clark*, 18 N. H. 421, the court said: "We are of opinion that the power to amend depends not upon the question whether the amendment changes the name, but whether or not it really changes the party. If it only cures a mistake in the name of the party in fact prosecuting the writ, it may be made. But if it introduces a different party, it is inadmissible."

For a full treatment of the subject of this section see the title "Parties."

**97. Ala.**—*South & N. A. R. Co. v. Small*, 70 Ala. 499. **Ga.**—*Woodson v. Law*, 7 Ga. 105. **Ind.**—*Reed v. Cheney*, 111 Ind. 387, 12 N. E. 717; *Abshire v. Mather*, 27 Ind. 381. **Kan.**—*Weaver v. Young*, 37 Kan. 70, 14 Pac. 458; *Dewey v. McLain*, 7 Kan. 126. **Mich.**—*Berrien Co. Treasurer v. Bunbury*, 45 Mich. 79, 7 N. W. 704; *Merrill v. Kalamazoo*, 35 Mich. 211. **Minn.**—*McEvoy v. Bock*, 37 Minn. 402, 34 N. W. 740. **Neb.**—*Real v. Honey*, 39 Neb. 516, 58 N. W.



And in the case of misnomer as to parties defendant, the mistake may be corrected by amendment.<sup>98</sup>

**Joint Defendants.** — Where one of two joint defendants has filed an answer, the other cannot join with such answering defendant in an amendment to the answer.<sup>99</sup>

**Corporation.** — So, too, in the case of a corporation as party to the action as to which there is a misnomer, the mistake may be amended.<sup>1</sup>

**2. Substitution.** — a. *Changing Nominal Party Plaintiff.* — In the case of mis-description of a party plaintiff, the mistake may be cured by an amendment inserting the proper party as plaintiff.<sup>2</sup>

136. **N. Y.** — *Mitterwallner v. Supreme Lodge*, 90 N. Y. Supp. 1076; *Merriam v. Wolcott*, 61 How. Pr. 377. **Pa.** — *Wilson v. Mechanics Sav. Bk.*, 45 Pa. 488; *Wood v. Philadelphia*, 27 Pa. 502. **Wash.** *Lee v. Lee*, 3 Wash. 236, 28 Pac. 355. See the title "Complaint and Petition in Code Pleading."

98. **Ala.** — *Singer Mfg. Co. v. Greenleaf*, 100 Ala. 272, 14 So. 109. **Cal.** — *McDonald v. Swett*, 76 Cal. 257, 18 Pac. 224; *Farris v. Merritt*, 63 Cal. 118. **Ga.** *Cheshire v. Milburn Wagon Co.*, 89 Ga. 249, 15 S. E. 311. **Ill.** — *Heslep v. Peters*, 4 Ill. 45. **Ia.** — *Thomson v. Wilson*, 26 Iowa 120. **Me.** — *Fogg v. Greene*, 16 Me. 282. **Mich.** — *Fuller v. Ginsbury*, 99 Mich. 137, 57 N. W. 1099; *Welsh v. Hull*, 73 Mich. 47, 40 N. W. 797. **Minn.** — *Casper v. Klippen*, 61 Minn. 353, 63 N. W. 737. **Miss.** — *Maxey v. Strong*, 53 Miss. 280. **Mo.** — *Parry v. Woodson*, 33 Mo. 347. **Neb.** — *Davis v. Jennings*, 111 N. W. 128. **N. Y.** — *Herman v. Bailey*, 20 Misc. 94, 45 N. Y. Supp. 88. **Pa.** — *Porter v. Hildebrand*, 14 Pa. 129.

99. *Equitable Bldg. & L. Assn. v. Holloway*, 114 Ga. 780, 40 S. E. 742. And see *Burch v. Swift*, 116 Ga. 595, 43 S. E. 64.

See the title "Answer in Code Pleading."

1. **Ala.** — *Western R. Co. v. McCall*, 89 Ala. 375, 7 So. 650; *Propst v. Georgia P. R. Co.*, 83 Ala. 518, 3 So. 764. **Ga.** — *Chattanooga R. Co. v. Jackson*, 86 Ga. 676, 13 S. E. 109; *Johnson v. Central R.*, 74 Ga. 397. **Tenn.** — *East Tennessee V. & G. R. Co. v. Mohoney*, 89 Tenn. 311, 15 S. W. 652.

In *American Bonding Co. v. Dickey*, 74 Kan. 791, 88 Pac. 66, where words in the petition descriptive of the plaintiff by mistake used in the title designating the plaintiff as "W. S. Dickey Clay Manufacturing Co." and alleging that such plaintiff was a corporation, it was

held proper to permit the petition to be amended by striking out the words "Clay Manufacturing Co." and the allegation in the petition that the plaintiff was a corporation and substituting therefor an allegation that W. S. Dickey operated his business under the trade name of "W. S. Dickey Clay Manufacturing Co.;" that although the amendment was made at a time when the action would have been barred, yet inasmuch as the original petition was filed within the time, the amendment related back to the filing of the original petition and thereby avoided the plea of the statute of limitations.

Where an original complaint describes the defendant as "Stowers Furniture Co.," without any averment to show whether it was a partnership or a corporation, the plaintiff is properly allowed to amend by showing that defendant is a corporation. *Stowers Furn. Co. v. Brake*, 158 Ala. 639, 48 So. 89.

2. **Colo.** — *Hamill v. Ashley*, 11 Colo. 180, 17 Pac. 502. **Fla.** — *Neal v. Spooner*, 20 Fla. 38. **Ill.** — *Challenor v. Niles*, 78 Ill. 78; *Teutonia L. Ins. Co. v. Mueller*, 77 Ill. 22. **Ind.** — *Lake E. & W. R. Co. v. Boswell*, 137 Ind. 336, 36 N. E. 1103. **Kan.** — *Atchison v. Twine*, 9 Kan. 350. **Mass.** — *Lewis v. Austin*, 144 Mass. 383, 11 N. E. 538; *Winch v. Hosmer*, 122 Mass. 438. **Mich.** *Wood v. Lenawee Circuit Judge*, 84 Mich. 521, 47 N. W. 1103. **Mo.** — *Lilly v. Tobein*, 103 Mo. 477, 15 S. W. 618. **N. J.** — *Farrier v. Shroeder*, 40 N. J. L. 601. **N. C.** — *Bullard v. Johnson*, 65 N. C. 436; *Heckemann v. Young*, 18 Abb. N. C. 196. **Tex.** — *Price v. Wiley*, 19 Tex. 142. **Vt.** — *Lewis v. Locke*, 41 Vt. 11.

In *Dixon v. Dixon*, 19 Iowa 512, an action on a cause of action belonging to a copartnership, brought in the name of one of the partners only, against the other partner, it was held proper to

b. *Substituting Real Party in Interest.*—Thus the name of the real party in interest may be substituted for that of the nominal party.<sup>3</sup>

c. *Representative Capacity.*—So too where a party brings an action in his own right, he may amend so as to show that he is suing in a representative capacity.<sup>4</sup> And one suing in a representative capacity may amend so as to show that the action is in fact brought in his individual capacity.<sup>5</sup> So, too, a complaint may be amended

permit the petition to be amended by inserting the name of the firm as plaintiff. The court said: "In this case it is evident from the finding of the jury that the claim of the plaintiff against the defendant is a meritorious and valid one. The jury found that the defendant justly owed the money; but in the opinion of the court below, the technical right to recover was not in the plaintiff, and thereupon the plaintiff, being interested, sought to amend, by adding the name of the partner, or firm name, and thus bring his right to recover within technical law as well as resting it upon broad justice. There is one fact of controlling influence in the determination of this case, and that is, it appears from the papers in the case, that unless the plaintiff is permitted to amend and continue the prosecution of the claim in this suit, it will be barred by the statute of limitations. The jury have found that the defendant justly owes the claim, and to permit the plaintiff to amend and recover such just claim will be very evidently more in the furtherance of justice than to refuse the amendment and dismiss the action as did the court below, and thereby defeat the recovery of a claim, the justice of which has already been established." See also *Hodges & Co. v. Kimball*, 49 Iowa 577.

3. Fla.—*Hamburg v. Liverpool T. & G. Inst. Co.*, 42 Fla. 86, 27 So. 872. Mass.—*Buckland v. Green*, 133 Mass. 421. Miss.—*Montague v. King*, 37 Miss. 441.

A petition in an action brought by a going partnership to recover damages for the conversion of property belonging to it cannot be so amended after the dissolution of the partnership, as wholly to abandon that cause of action and to substitute a member of the firm as plaintiff, and state a cause of action in his favor for an accounting of the partnership business between such member and such defendant. *Thompson v. Beeler*, 69 Kan. 462, 77 Pac. 100.

A complaint in an action to recover

possession of real estate formerly owned by a decedent, alleging ownership in the widow and heirs and right of possession in the administrator, may be amended, within the court's discretion, by substituting a complaint proceeding upon the theory, and alleging that the right of possession was, at the time of the alleged dispossession and is, in the widow and heirs, the present plaintiffs, and not in the administrator. *Thomas v. Young*, 81 Conn. 702, 71 Atl. 1100.

4. Ala.—*Shepherd v. Parker*, 157 Ala. 493, 47 So. 1027. Ga.—*Gate City Cotton Mills v. Cherokee Mills*, 123 Ga. 170, 57 S. E. 320. Kan.—*Reed v. Cooper*, 30 Kan. 574, 1 Pac. 822. Mich.—*Smith v. Pinney*, 86 Mich. 484, 49 N. W. 305. N. J.—*Cosgrove v. Metropolitan Const. Co.*, 71 N. J. L. 106, 58 Atl. 82. S. C.—*Glenn v. Gerald*, 64 S. C. 236, 42 S. E. 155.

The fact that in an amended petition the plaintiffs sue in their individual capacity does not change the cause of action asserted by them in their original petition in which they sue as a firm. *Mayes v. Magill*, 48 Tex. Civ. App. 548, 107 S. W. 363.

In *La Pierre v. Webb*, 113 Ga. 820, 39 S. E. 344, it was held that an amendment to a petition brought by one in his individual capacity, making allegations and asking for relief which would be appropriate to the plaintiff in a representative capacity but not as an individual, is properly disallowed when there is no offer to amend the petition by making the same one in the name of the plaintiff in a representative capacity, which it seems might have been done, the code declaring that in an action by or against an individual the pleadings may be amended by inserting his representative capacity.

5. Ga.—*Swilley v. Hooker*, 126 Ga. 353, 55 S. E. 31. Me.—*Bragden v. Harmon*, 69 Me. 29. Neb.—*Burlington Vol. Relief Dept. v. Moore*, 52 Neb. 719, 73 N. W. 15.

*Contra*, *Lower v. Segal*, 60 N. J. L. 99, 36 Atl. 777.

to charge the defendant in the capacity in which he is liable.<sup>6</sup>

**3. Adding Parties Plaintiff.**—*At common law* the declaration or complaint could not be amended by adding new parties plaintiff.<sup>7</sup>

But under the modern practice, especially in view of recent statutory provisions, when it becomes necessary to add parties plaintiff in order that a full and complete adjudication of the controversy may be had, this may be done by amendment.<sup>8</sup>

**4. Adding Parties Defendant.**—*At common law* new defendants could not be added by amendment.<sup>9</sup>

But under the modern statutory practice, when it appears that the addition of new parties is necessary to a complete adjudication of the issues, as by joint liability or otherwise, the amendment is proper.<sup>10</sup>

In *Henry v. Frohlichstein*, 149 Ala. 330, 43 So. 126, a statutory action of ejectment brought by a co-tenant, where the complaint alleged that the plaintiff brought the action "individually and as guardian of F. F., a lunatic, and for said lunatic's use," the complaint was held amendable by striking out the quoted words, thus converting the action into the suit of the plaintiff alone in her individual capacity. This did not introduce a new cause of action, the fact that the plaintiff is entitled to only an undivided interest of the property not changing the cause of action within the statute of amendments.

**6. Baldwin Fertilizer Co. v. Carmichael**, 116 Ga. 762, 42 S. E. 1002 (changing suit against defendant a "guarantor" to "indorser"); *Alker v. Rhoads*, 73 App. Div. 158, 76 N. Y. Supp. 808.

**7. Ga.**—*McWilliams v. Anderson*, 68 Ga. 772. **Me.**—*Ayer v. Gleason*, 60 Me. 207. **Mo.**—*Chouteau v. Hawitt*, 10 Mo. 131. **N. H.**—*Pitkin v. Roby*, 43 N. H. 138. **N. Y.**—*Willink v. Renwick*, 22 Wend. 608. **Pa.**—*Carskadden v. McGhee*, 7 Watts & S. 140.

**8. Ark.**—*Boles v. Jessup*, 57 Ark. 469, 21 S. W. 880. **Cal.**—*Cerf v. Ashley*, 68 Cal. 419, 9 Pac. 658. **Ind.**—*Hubler v. Pullen*, 9 Ind. 273. **Kan.**—*Hamlin v. Baxter*, 20 Kan. 134. **Mo.**—*Wellman v. Dismukes*, 42 Mo. 101. **N. J.**—*Hasbrouck v. Winkler*, 48 N. J. L. 431, 6 Atl. 22. **N. C.**—*Reynolds v. Smathers*, 87 N. C. 24. **Pa.**—*Shaffer v. Eichert*, 132 Pa. 285, 19 Atl. 81. **Tex.**—*Reagan v. Copeland*, 78 Tex. 551, 14 S. W. 1031; *Galveston H. & S. A. R. Co. v. House*, 4 Tex. Civ. App. 263, 23 S. W. 232.

In Alabama, § 3331 of the Code of 1896 has been construed to allow any amendment by striking out or adding parties,

or otherwise, with the only limitations that "there must not be an entire departure from the process, an entire change of parties, or the introduction of an entirely new cause of action." *Montgomery Traction Co. v. Fitzpatrick*, 149 Ala. 511, 43 So. 136; *Henry v. Frohlichstein*, 149 Ala. 330, 43 So. 126.

The adding of new parties plaintiff by an amended petition, does not change the cause of action. The test of identity is whether the same evidence is required to support and the same judgment is to be rendered in the one as in the other. *Grigsby v. Barton County*, 169 Mo. 221, 69 S. W. 296.

**9. Me.**—*Ayer v. Gleason*, 60 Me. 207. **N. H.**—*Gore v. Lawrence*, 24 N. H. 128. **N. Y.**—*Commission Co. v. Russ*, 8 Cow. 122.

**10. Ala.**—*McKissack v. Witz*, 120 Ala. 412, 25 So. 21. **Colo.**—*Jordan v. Greig*, 33 Colo. 360, 80 Pac. 1045. **Kan.**—*Beecher v. Ireland*, 8 Kan. App. 10, 54 Pac. 9. **Mo.**—*Fears v. Riley*, 148 Mo. 49, 49 S. W. 836. **Ore.**—*Good v. Smith*, 44 Ore. 578, 76 Pac. 354. **Tex.**—*Palmer v. Spandenbergh*, 110 S. W. 760.

In *Leonard v. Parker*, 72 Pa. 236, an action against three, the court being satisfied that the name of a fourth defendant was omitted by mistake, it was held that on motion of plaintiff the fourth was added without notice to him. The court said: "The only question in such an application is whether an omission or mistake has occurred, and of course this inquiry would necessarily extend to the ascertainment of the fact whether the name proposed to be added appeared to have a connection with the subject of the suit. If so, and omitted by mistake, then the amendment would be proper, and no considerations of superior right or title to the thing in controversy in the party can prevent it."



**5. Striking Out Parties Plaintiff.**—*Under the rule at common law, an amendment striking out parties plaintiff was not permitted.*<sup>11</sup>

Under the modern practice, however, such amendments are very generally allowed.<sup>12</sup>

**6. Striking Out Parties Defendant.**—*At common law, an amendment striking any of the parties defendant in an action of contract was not allowed.*<sup>13</sup>

Under the modern practice, however, it is proper to strike out by amendment any defendant who has been improperly joined.<sup>14</sup>

**7. Changing Parties Entirely.**—But an entire change of parties plaintiff with a new or independent cause of action cannot be effected by amendment.<sup>15</sup>

**C. IN RESPECT OF THE CAUSE OF ACTION OR DEFENSE.**—**1. Matters Common to All Pleadings.**—*a. Unnecessary Amendments.*—Where the amendment proposed is unnecessary, the court may properly refuse it,<sup>16</sup> as in the case of an amendment to an answer which is but a

11. *Roach v. Randall*, 45 Me. 438; *Kelly v. Eichman*, 3 Whart. (Pa.) 419. *Compare Treat v. Strickland*, 23 Me. 234.

12. *Ala.*—*Lowery v. Rowland*, 104 Ala. 420, 16 So. 88. *Kan.*—*Kansas City v. King*, 65 Kan. 64, 68 Pac. 1093. *N. M.*—*Neher v. Armijo*, 9 N. M. 325, 54 Pac. 236. *N. Y.*—*Lapham v. Rice*, 55 N. Y. 472. *Ore.*—*York v. Nash*, 42 Ore. 321, 71 Pac. 59. *S. C.*—*McDaniel v. Atlantic Coast L. R. Co.*, 76 S. C. 15, 56 S. E. 543.

In Georgia the statute expressly authorizes the striking of a plaintiff improperly joined. *Georgia R. & Bk. Co. v. Tice*, 124 Ga. 459, 52 S. E. 916.

13. *Redington v. Farrar*, 5 Me. 379.

14. *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626.

The plaintiff has a right at any time, by amendment, to strike the name of one or more defendants, provided a co-defendant has not prayed for any relief against such defendant, or cross-relief has not been prayed against the plaintiff, but in so amending the plaintiff must abide the consequences. *Pearson v. Courson*, 129 Ga. 656, 59 S. E. 903.

If a joint liability is alleged, and there is evidence going to the discharge of one of the defendants only, the complaint can be amended and a recovery had against the other defendant. *Lord v. Calhoun (Ala.)*, 50 So. 402. See also *Lippincott & Co. v. Behre*, 122 Ga. 543, 50 S. E. 467, where it was held that where suit is brought against defendants who are jointly liable, the plaintiff cannot dismiss as to one and proceed against the other except in cases pro-

vided for by statute, but that where a plaintiff sues defendants on the theory that they are jointly liable, and the evidence or the pleading discloses that some are not liable at all, or that some cannot be joined in the same action, a case is presented which comes directly without the purview of the saving statute of the amendments.

15. *Ala.*—*Townes v. Dallas Mfg. Co.*, 154 Ala. 612, 45 So. 696. *Conn.*—*Miles v. Strong*, 60 Conn. 393, 22 Atl. 959. *Idaho.*—*Hallett v. Larcom*, 5 Idaho 492, 51 Pac. 108. *Mich.*—*Wood v. Metropolitan L. Ins. Co.*, 96 Mich. 437, 56 N. W. 8. *R. I.*—*Thayer v. Farrell*, 11 R. I. 305.

See generally the title "Complaint and Petition in Code Pleading."

A petition in an action brought against a partnership described as the firm of A. & B. and alleged to be composed of the individuals A. and B., is not amendable so as to make the action one against a partnership described as the firm of C. & B. and composed of the individuals C. and B. A partnership being an entity, one described as the firm of C. & B. and composed of the individuals C. and V., is necessarily a different entity from a partnership described as the firm of A. & B. and composed of the individuals A. and B. *Greer v. Waxelbaum*, 115 Ga. 866, 42 S. E. 266.

16. *Ala.*—*U. S. Fidelity & C. Co. v. Damskibsaktieselskabet Habil*, 138 Ala. 348, 35 So. 344. *Ark.*—*White River R. Co. v. Batesville Tel. Co.*, 81 Ark. 195, 98 S. W. 721. *Cal.*—*Mono County v.*

substantial repetition of, and adds nothing to, the answer already on file.<sup>17</sup>

b. *Immaterial Amendments*.—So too, where the amendment proposed is immaterial, the court may properly refuse it.<sup>18</sup>

c. *Ineffectual Amendments*.—So too, where the proposed amendment would be ineffectual to accomplish the purpose intended, its rejection is proper.<sup>19</sup>

Flannigan, 130 Cal. 105, 62 Pac. 293. Conn.—Fogil v. Boody, 76 Conn. 194, 56 Atl. 526. Ga.—Cone v. Augusta, 120 Ga. 80, 47 S. E. 633. Ill.—Phenix Ins. Co. v. Stocks, 149 Ill. 319, 36 N. E. 408. Ia.—Murphy v. Hiltibridge, 132 Iowa 114, 109 N. W. 471. Neb.—Commercial Nat. Bank v. Gibson, 37 Neb. 750, 56 N. W. 616. Pa.—Mulhearn v. Roach, 24 Pa. Super. Ct. 483.

Where a petition is amended to make it more definite and certain and some of the matter thus added has been stricken out on motion of the defendant as redundant and irrelevant, if the petition thus amended does not state any new matter or change the cause of action, the court, without objection from the plaintiff, may refuse the defendant the statutory time in which to plead thereto where his original answer contains a full and complete defense, and will enable him to prove all his case. Cherokee & P. Coal & Min. Co. v. Britton, 3 Kan. App. 292, 45 Pac. 100.

Compare Thompson v. Brown, 106 Iowa 367, 76 N. W. 819, holding that a party cannot claim surprise because of an amended petition, filed on the day of the trial, which contains nothing of which evidence might not have been given under the original petition.

17. Cal.—Dorn v. Baker, 96 Cal. 206, 31 Pac. 37; Heilbron v. Kings River & F. C. Co., 76 Cal. 11, 17 Pac. 933. Ga.—Equitable B. & L. Assn. v. Holloway, 114 Ga. 780, 40 S. E. 742. Ia.—Mayer v. Woodbury, 14 Iowa 57. Mo.—Frazier v. Harrison, 137 Mo. App. 375, 118 S. W. 108.

A defendant may be refused leave to file additional pleas where he has had full benefit of all matter contained therein. Dow v. Blake, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156, where the application was made three days before the trial and more than seventeen months after the issues had been made up.

New Matter.—Matter embraced in the issue raised, or which could be raised under a general denial, is not new

matter. And so an amended answer setting up as a second defence a recital of the evidences that might have been given under the general denial already pleaded will not be permitted. Schultz v. Greenwood Cemetery, 46 Misc. 299, 93 N. Y. Supp. 180. So an amendment which is no more than a voluminous amplification of the averments of the answer, should be refused. Kahn v. Thomson, 113 Ga. 957, 39 S. E. 322.

18. Cal.—Kirsch v. Smith, 64 Cal. 13, 27 Pac. 942. Colo.—Van Duer v. Towne, 12 Colo. App. 4, 55 Pac. 13. Ga.—White v. Southern R. Co., 123 Ga. 353, 51 S. E. 411. Ia.—American Life Ins. Co. v. Melcher, 132 Iowa 324, 109 N. W. 805. Ky.—Blalock v. Copeland, 23 Ky. L. R. 1455, 65 S. W. 349. Mo.—Steinhausen v. Spraul, 114 Mo. 551, 21 S. W. 515, 859. Mont.—Baxter v. Hamilton, 20 Mont. 327, 51 Pac. 265. Wash.—Price Baking P. Co. v. Rinear, 17 Wash. 95, 49 Pac. 223.

An amendment which would not in any way alter the situation of the parties is properly refused. Friedman v. Erste Kaiser Franz, etc., 104 N. Y. Supp. 908.

19. U. S.—Salisbury v. Bennett, 72 Fed. 743. Ark.—Cleveland v. Cozart, 72 Ark. 514, 83 S. W. 316. Cal.—Kern Island Irrig. Co. v. Bakersfield, 151 Cal. 403, 90 Pac. 1052. Ga.—Gould v. Glass, 120 Ga. 50, 47 S. E. 505. Ill.—McDonald v. People, 214 Ill. 83, 73 N. E. 444. Ky.—Davidson v. Dishman, 22 Ky. L. Rep. 940, 59 S. W. 326. Mich.—Kilby Mfg. Co. v. Menominee C. J., 138 Mich. 277, 101 N. W. 522. Neb.—Harrington v. Connor, 51 Neb. 214, 70 N. W. 911. N. Y.—Johnson v. Brooklyn Hts. R. Co., 63 App. Div. 374, 71 N. Y. Supp. 568. N. D.—Satterlund v. Beal, 12 N. D. 122, 95 N. W. 518. Ore.—Hume v. Kelley, 28 Ore. 398, 43 Pac. 380. Pa.—Peterson v. Pennsylvania R. Co., 195 Pa. 494, 46 Atl. 112. Tex.—Troy Buggy Wks. Co. v. Fife, 74 S. W. 956. Wash.—Price v. Scott, 13 Wash. 574, 43 Pac. 634.

d. *Demurrable Amendments.* — Nor is it error to refuse leave to file an amendment which is demurrable,<sup>20</sup> or which would be open to a motion to make more definite and certain.<sup>21</sup>

e. *Impossible Allegations.* — Where the proposed amendment avers what is impossible in view of the other allegations of the answer, it is properly disallowed.<sup>22</sup>

f. *Legal Conclusion.* — So too an amendment adding a mere legal conclusion is properly denied.<sup>23</sup>

g. *To Obviate Variance.* — Where evidence is objected to on the ground of variance, and it appears that the variance is not material, it is the usual practice to allow an amendment of the pleading so as to obviate the objection.<sup>24</sup>

If a plaintiff has had three opportunities to make a good complaint and has failed, he may be refused a fourth, especially when the proposed amendment is not tendered to the court for inspection. Three failures would seem fairly to indicate that a fourth attempt would be unavailing. The failure probably arises in a lack of facts. *Dukes v. Kellog*, 127 Cal. 563, 60 Pac. 44.

An amendment to a petition alleging an estoppel because of defendant's statements inducing forbearance to institute bankruptcy proceedings until too late to do so, if it fail to allege facts which would have sustained involuntary bankruptcy proceedings, is properly stricken. *Rock Island Plow Co. v. Maynard Sav. Bank*, 123 Iowa 640, 99 N. W. 298.

20. *Ala.* — *Nash v. Southern R. Co.*, 136 Ala. 177, 33 So. 932. *Colo.* — *Klipfel v. Oppenstein*, 8 Colo. App. 187, 45 Pac. 224. *Neb.* — *Bartlett v. Scott*, 55 Neb. 477, 75 N. W. 1102. *Tex.* — *Ray v. Pecos R. Co.*, 40 Tex. Civ. App. 99, 88 S. W. 466.

Compare *Pratt v. Stoner*, 78 Conn. 310, 61 Atl. 1009.

Where the Amendment Sets Up No Defense. — *Cal.* — *Fiske v. Casey*, 119 Cal. 643, 51 Pac. 1077; *Duff v. Duff*, 101 Cal. 1, 35 Pac. 437; *Dorn v. Baker*, 96 Cal. 206, 31 Pac. 37. *Colo.* — *Bransford v. Norwich Union F. Ins. Soc.*, 21 Colo. 34, 39 Pac. 419. *Ga.* — *National Computing Scale Co. v. Eaves*, 116 Ga. 511, 42 S. E. 783. *Idaho.* — *Palmer v. Utah & N. R. Co.*, 2 Idaho 315, 13 Pac. 425. *Ind.* — *Gardner v. Case*, 111 Ind. 494, 13 N. E. 36.

Where the proposed amendment is evasive and tenders no material issue, its disallowance is not error. *Shepard v. McNeil*, 38 Cal. 72.

That an amendment is so framed

that, if demurred to, it might be held insufficient, is not necessarily fatal to its allowance. *Pratt v. Stoner*, 78 Conn. 310, 61 Atl. 1009.

21. *Haupt v. Independent Tel. Mess. Co.*, 25 Mont. 122, 63 Pac. 1033.

22. *Townsend v. Sullivan*, 3 Cal. App. 115, 84 Pac. 435.

23. *Levinson v. Schwartz*, 22 Cal. 229.

24. *Ala.* — *Western Union Tel. Co. v. Louisell*, 50 So. 87. *Cal.* — *Hart v. Marine Ins. Co.*, 80 Cal. 440, 22 Pac. 302; *Bell v. Knowles*, 45 Cal. 193; *Clark v. Phoenix Ins. Co.*, 36 Cal. 168; *Carpentier v. Small*, 35 Cal. 346. *Ga.* — *Western U. T. Co. v. Shotter*, 71 Ga. 760. *Ind.* — *Wright v. Johnson*, 50 Ind. 454; *McDonald v. Yeager*, 42 Ind. 388; *Perdue v. Aldridge*, 19 Ind. 290. *Ia.* — *Avery v. Wilson*, 26 Iowa 573. *Me.* — *Colton v. Stanwood*, 67 Me. 25. *Mich.* — *Warders v. Gibbs*, 92 Mich. 29, 52 N. W. 73. *Mo.* — *Murdoch v. Finney*, 21 Mo. 138. *N. J.* — *Williamson v. Updike*, 14 N. J. L. 270. *N. Y.* — *Ballou v. Parsons*, 11 Hun 602. *Ohio.* — *Fallis v. Howarth*, *Wright* 303. *S. C.* — *Tarrant v. Gittelsohn*, 16 S. C. 231. *Wis.* — *Bowman v. Van Kuren*, 29 Wis. 209; *Rublee v. Tibbetts*, 26 Wis. 399.

Plaintiff has a legal right to amend his complaint during the progress of the trial so as to prevent a variance between the complaint and any part of the evidence in the matters merely descriptive of the original cause of action. *Tapscott v. Gibson*, 129 Ala. 503, 514, 30 So. 23, citing Code § 3331.

A provision that in all cases of any material variance between allegation and proof, an amendment shall be permitted at any stage of the trial, must be read in connection with another provision that all courts shall have power to restrain the amendment and



The materiality of the variance in such case is to be determined, not upon the inconsistency between the pleading and the evidence, but upon proof that the party has been misled to his prejudice by the incorrect version of the facts stated in the other's pleading.<sup>25</sup>

*h. To Conform to Proof. — (I.) Statement of Rule. —* Not only at common law, and independent of any statutory provision, but also by express statutory provision in most of the states, it is a well recognized rule, subject to certain limitations hereinafter discussed,<sup>26</sup> that where the evidence has been directed to a particular issue not within the allegations of the pleadings, but consistent with the cause of action or defense, it is proper to allow the pleadings to be so amended as to conform to the facts proved.<sup>27</sup>

alteration of the pleadings so far as may be necessary to compel the parties to join issue in a reasonable time for trial. *Gulliver v. Fowler*, 64 Conn. 556, 30 Atl. 852, holding the refusal to allow the amendment of an answer during the trial was not error. "An amendment of the pleadings when the case is on trial and the evidence partly in is never a matter of absolute right."

An amendment correcting a variance between the allegations and proof destroys the right to a non-suit, if it existed, and the overruling of a motion to that end based upon such variance is not erroneous. *Georgia R. & Elec. Co. v. Reeves*, 123 Ga. 697, 51 S. E. 610.

25. *Gaty v. Sack*, 19 Mo. App. 470; *Place v. Minster*, 65 N. Y. 89.

26. See the following sections.

27. **U. S.** — *Bamberger v. Terry*, 103 U. S. 40, 26 L. ed. 317. **Ala.** — *Floyd v. Wilson*, 50 So. 122; *Tapscott v. Gibson*, 129 Ala. 503, 30 So. 23; *Englehardt v. Clanton*, 83 Ala. 336, 3 So. 680; *Burkham v. Mastin*, 54 Ala. 122. **Ark.** — *McMurray v. Boyd*, 58 Ark. 504, 25 S. W. 505; *Caldwell v. Meshew*, 53 Ark. 263, 13 S. W. 761. **Cal.** — *Hancock v. Board of Education*, 140 Cal. 554, 74 Pac. 44; *Firebaugh v. Burbank*, 121 Cal. 186, 53 Pac. 560; *Jackson v. Jackson*, 94 Cal. 446, 29 Pac. 957; *Kamm v. California Bank*, 74 Cal. 191, 15 Pac. 765; *Pico v. Pico*, 56 Cal. 453. **Colo.** — *Gwynn v. Butler*, 17 Colo. 114, 28 Pac. 866; *Martin v. Simmons*, 11 Colo. 411, 18 Pac. 535; *Cooper v. Wood*, 1 Colo. App. 101, 27 Pac. 884. **Conn.** — *Fenton v. Mansfield*, 82 Conn. 343, 73 Atl. 770. **Ga.** — *Armour v. Ross*, 110 Ga. 403, 35 S. E. 787; *Hudgins v. Bloodworth & Co.*, 109 Ga. 197, 34 S. E. 364; *Lathrop v. Adkisson*, 87 Ga. 339, 13 S. E. 517. **Ill.** — *Carpenter v. First Nat. Bk.*, 19 Ill. App. 549. **Ind.** — *Levy v. Chittenden*, 120 Ind. 37,

22 N. E. 92; *Leib v. Butterick*, 68 Ind. 199; *Sipe v. Sipe*, 14 Ind. 477. **Ia.** — *Hambro Dist. Co. v. Price*, 141 Iowa 169, 119 N. W. 541; *Tyler v. Bowen*, 124 Iowa 452, 100 N. W. 505; *Larkin v. McManus*, 81 Iowa 723, 45 N. W. 1061; *Blandon v. Glover*, 67 Iowa 615, 25 N. W. 135; *Tiffany v. Henderson*, 57 Iowa 490, 10 N. W. 884; *Iowa Brick Co. v. Campbell*, 82 N. W. 772. **Kan.** — *Fitzgerald v. Hollan*, 44 Kan. 499, 24 Pac. 957; *School Dist. v. Dudley*, 28 Kan. 160. **Ky.** — *Carter v. West*, 93 Ky. 211, 19 S. W. 592. **Mass.** — *Deming v. Darling*, 148 Mass. 504, 20 N. E. 107; *Cleaves v. Lord*, 3 Gray 66; *Hill v. Haskins*, 8 Pick. 83. **Mich.** — *Shearer v. Middleton*, 88 Mich. 621, 50 N. W. 737; *Foley v. Riverside Storage Co.*, 85 Mich. 7, 48 N. W. 154; *Johnson v. Spear*, 82 Mich. 453, 46 N. W. 733. **Minn.** — *Dougan v. Turner*, 51 Minn. 330, 53 N. W. 650; *Cairncross v. McGrann*, 37 Minn. 130, 33 N. W. 548. **Mo.** — *Goldsmith v. Holland Bldg. Co.*, 182 Mo. 597, 81 S. W. 1112; *Stephens v. Framp-ton*, 29 Mo. 263; *Collins v. Glass*, 46 Mo. App. 297. **Miss.** — *Miller v. Northern Bk.*, 34 Miss. 412. **Mont.** — *Williston v. Camp*, 9 Mont. 88, 22 Pac. 501. **Neb.** — *Whipple v. Fowler*, 41 Neb. 675, 60 N. W. 15; *Ward v. Parlin*, 30 Neb. 376, 46 N. W. 529. **Nev.** — *McCausland v. Ralston*, 12 Nev. 195. **N. H.** — *Lyman v. Brown*, 73 N. H. 411, 62 Atl. 650; *Peaslee v. Dudley*, 63 N. H. 220. **N. J.** — *Finegan v. Moore*, 46 N. J. L. 602; *Westervelt v. Demarest*, 46 N. J. L. 37; *Willis v. Fernald*, 33 N. J. L. 206. **N. M.** — *Berry v. Hull*, 6 N. M. 643, 30 Pac. 936. **N. Y.** — *Fallon v. Lawlor*, 102 N. Y. 228, 6 N. E. 392; *Parsons v. Sutton*, 66 N. Y. 92; *Ronginsky v. Freudenthal*, 134 App. Div. 422, 119 N. Y. Supp. 409; *Candee & Smith v. Fordham Stove Ren. Co.*, 126 App. Div. 15, 110 N. Y. Supp.

A material variance does not exist unless the party has been misled to his prejudice in maintaining his action or defense; and if he has been misled he must prove that fact to the satisfaction of the court, and also show the particulars in which he has been misled.<sup>28</sup>

**Referee.** — A referee who has equal power with the court to allow amendments at the trial, may allow the pleadings to be amended to conform to the proof.<sup>29</sup>

355; *Ladrick v. Green Island*, 103 App. Div. 71, 92 N. Y. Supp. 622; *Eltling v. Dayton*, 67 Hun 425, 22 N. Y. Supp. 154; *Newerf v. Jebb*, 52 Hun 162, 6 N. Y. Supp. 581; *Moran v. Brown*, 113 N. Y. Supp. 1038; *Lepinsky v. Colish*, 113 N. Y. Supp. 733; *Flower's Exrs. v. Garr*, 20 Wend. 668; *Clayes v. Hooker*, 4 Hun 231. N. C. — *Brown v. Mitchell*, 102 N. C. 347, 9 S. E. 702. Ohio. — *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; *Spice & Son v. Steinruck*, 14 Ohio St. 213. Ore. — *Cook v. Croisan*, 25 Ore. 475, 36 Pac. 532. S. C. *Aherns v. State Bank*, 3 S. C. 401. S. D. — *Yetzer v. Young*, 3 S. D. 263, 52 N. W. 1054. Utah. — *Walton v. Jones*, 7 Utah 462, 27 Pac. 580. W. Va. — *Travis v. Peabody Ins. Co.*, 28 W. Va. 583. Wis. *Maxwell v. Wellington*, 138 Wis. 607, 120 N. W. 505; *Dexter v. Witte*, 138 Wis. 74, 119 N. W. 891; *Rahles v. Thompson & Sons Mfg. Co.*, 137 Wis. 506, 118 N. W. 350, 119 N. W. 289; *Kleimenhagen v. Dixon*, 122 Wis. 526, 100 N. W. 826; *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 99 N. W. 603; *McWhinnie v. Martin*, 77 Wis. 182, 46 N. W. 118; *Charmley v. Honig*, 74 Wis. 163, 42 N. W. 220; *Stacy v. Bryant*, 73 Wis. 14, 40 N. W. 632; *Muzz v. Lealie*, 23 Wis. 445; *Edson v. Hayden*, 18 Wis. 627.

A complaint that is insufficient for failing to allege that notice of the dishonor of the check was given to the drawer (the defendant), as required by law, should be amended to conform to the proof that the drawer countermanded payment, which made notice of dishonor unnecessary. *Scanlon v. Wallach*, 102 N. Y. Supp. 1090.

*Piper v. Seager*, 111 App. Div. 113, 97 N. Y. Supp. 634, as the proof showed, was an action to recover for coal sold by a firm having the same name as the plaintiff, and which firm was the predecessor of the plaintiff; it was held that the defendant should have been allowed to amend his answer by pleading as a defense the breach of the contract under which such coal was purchased. The contract was made with an entirely

different party, and the judgment in favor of plaintiff would not be a bar to an action brought by the old firm.

In *Missouri Pacific R. Co. v. McCally*, 41 Kan. 639, 655, 21 Pac. 574, after trial the plaintiff asked and was permitted by the court to amend his petition so as to make it conform to the facts proved. It was held that this order to amend was equivalent to a finding of fact by the court and that the judgment would not be reversed on the ground that it was apparently against the weight of the evidence produced at the trial, there being some evidence to sustain it.

In *Wise v. Wakefield*, 118 Cal. 107, 50 Pac. 310, an action upon a mutual and open account, near the close of the trial the plaintiffs applied for leave to file an amended complaint setting forth various additional items claimed to have been proved in the course of the evidence and by which the balance in plaintiff's favor was materially augmented, and it was held proper for the court to permit the amendment proposed on condition that an offer by defendant to allow judgment in a certain sum be deemed increased to correspond with the increased demand of the complaint.

After an appeal and remand for a new trial, the plaintiff should be allowed to amend his petition to conform it to the proof at the former trial. *Hanson v. Cline*, 142 Iowa 187, 118 N. W. 754.

28. *Carlisle v. Barnes*, 102 App. Div. 582, 92 N. Y. Supp. 924, where counsel was not willing to state to the court that the allowance of the amendment surprised him. And see *Watkins v. Delahunty*, 133 App. Div. 422, 117 N. Y. Supp. 885; *Deering v. Schreyer*, 110 App. Div. 200, 97 N. Y. Supp. 14.

29. *Crismon v. Deck*, 84 Iowa 344, 51 N. W. 55; *McLaughlin v. Webster*, 141 N. Y. 76, 35 N. E. 1081; *Chapin v. Dobson*, 78 N. Y. 74; *Knapp v. Fowler*, 30 Hun (N. Y.) 512.

(II.) **Liberality of Allowance.** — Amendments for the purpose of conforming the pleadings to the proofs are liberally allowed.<sup>30</sup>

(III.) **Furtherance of Justice.** — But while liberality is the rule, the court in allowing amendments for this purpose should have regard for the furtherance of justice.<sup>31</sup> And where it appears that the opposite party will be surprised or misled to his prejudice, the amendment should not be allowed.<sup>32</sup>

The surprise applicable to the action of the court in allowing the amendment of the complaint to conform to the proof can only mean the inability to produce evidence otherwise available,<sup>33</sup> and is no ground for setting aside a judgment where it appears that the defendant was in court and testified as a witness and had ample opportunity to claim such surprise, but made no suggestion whatever in respect thereto.<sup>34</sup>

(IV.) **Discretion of Court.** — While the matter of allowing amendments to conform the pleadings to the proof is discretionary with the court, and its action in that respect will not be disturbed unless it is

30. *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786; *Bedford v. Terhune*, 30 N. Y. 453.

31. *McSween v. McCown*, 23 S. C. 342.

The power of allowing amendments under N. Y. Code Civ. Proc. § 723, "may be exercised by the court at the trial in furtherance of justice and the statute which confers it has always received a liberal rather than a narrow construction. When names were given to actions, it may be that the cause of action originally pleaded and that substituted at the trial would not now be embraced in the same general classification. But that circumstance is not now very important. When a cause of action however stated is sustained by the same proof, the power of the court under this section to conform statements in the pleadings to the facts proved is undoubtable." *Martin v. Home Bank*, 160 N. Y. 190, 54 N. E. 717. See also *Cullen v. Battle Island Paper Co.*, 124 App. Div. 113, 108 N. Y. Supp. 921.

In an action on an insurance policy there was evidence showing that the cause of action had been assigned, and the assignee in open court offered to renounce his claim. Plaintiff should have been allowed to amend his pleadings so as to bring the merits of the controversy between the parties fairly to trial, and to submit the real issue. *Kellev v. Continental Cas. Co.*, 87 Miss. 438, 40 So. 1, citing Code 1892, § 717.

An amendment simply conforming the petition to the proof already offered

is proper where the defendant does not ask to reopen the case, for a postponement or for a continuance to present additional evidence. *Taylor v. Star Coal Co.*, 110 Iowa 40, 81 N. W. 249.

**Set-off and Counter-claim** — In *Marr v. Rhodes*, 131 Cal. 267, 63 Pac. 364, an action to recover the proceeds of property alleged to have been taken and sold by the defendant, it developed during the progress of the trial by the testimony of the defendant that he had paid out money for labor and supplies on the property, and it was held error for the court to refuse to permit the defendant to amend his answer pleading such sum of money as a set-off or counter-claim. If plaintiff were surprised he could continue.

32. *Dunsford v. Brown*, 19 S. C. 560.

33. *Leslie v. Grover*, 132 App. Div. 448, 116 N. Y. Supp. 868.

An amendment to conform the pleadings to the proof does not entitle the plaintiff to claim surprise and ask for a continuance where before trial he had notice that he would be called upon to meet this matter. *Tyler v. Bowen*, 124 Iowa 452, 100 N. W. 505.

An amendment offered after the close of the evidence which does not involve a change of front, but is designed to obviate a supposed variance between the pleading and the proof, should be allowed where there is no showing by the opposite party that he has been misled to his prejudice. *Pace v. Webster City*, 128 Iowa 167, 115 N. W. 883.

34. *Carlisle v. Barnes*, 45 Misc. 6, 90 N. Y. Supp. 810.



made to appear that such discretion has been abused,<sup>35</sup> nevertheless this discretion is a legal one and should always be exercised with a view to substantial justice.<sup>36</sup>

(V.) Evidence Objected to. — An amendment to conform the pleadings to the proofs should not be allowed where the evidence was objected to when offered, on the ground of variance,<sup>37</sup> even although the opposite party was probably not misled.<sup>38</sup>

It has been held, however, that although a pleading cannot ordinarily be amended after a verdict to conform to the proof that was admitted over objection, such an amendment may nevertheless be allowed for the purpose of preventing the rendition of a final judgment against the party because of a defect in his pleading which has been supplied by his evidence.<sup>39</sup>

(VI.) Time for Amendment. — No hard and fast rule as to the time when an amendment of the pleadings to conform to the proofs is to be allowed can be stated. Ordinarily the amendment is made after the evidence is closed.<sup>40</sup> But there are many cases when it has been

35. *Ia.* — *Mansfield v. Mallory*, 140 Iowa 206, 118 N. W. 290. *Kan.* — *Matson v. Chicago, R. I. & P. R. Co.*, 80 Kan. 272, 102 Pac. 254; *Excelsior Mfg. Co. v. Boyle*, 46 Kan. 202, 26 Pac. 408. *Wis.* — *Palmer v. Schultz*, 138 Wis. 455, 120 N. W. 348; *Durbin v. Knox*, 132 Wis. 608, 112 N. W. 1094.

36. *Cole v. Laird*, 121 Iowa 146, 96 N. W. 774, where the denial of leave may have the effect of obligating the defendant to pay for property which he never purchased and of which he may never receive any benefit.

37. *Colo.* — *Seymour v. Fisher*, 16 Colo. 188, 27 Pac. 240. *Mass.* — *Cunningham v. Hobart*, 7 Gray 423. *N. Y.* — *Romeyn v. Sickels*, 108 N. Y. 650, 15 N. E. 698; *Barnes v. Seligman*, 55 Hun 339, 8 N. Y. Supp. 834; *Bjorkegren v. Kirk*, 53 Misc. 560, 103 N. Y. Supp. 994. *Wis.* — *Genger v. Westphal*, 128 Wis. 426, 107 N. W. 330.

Where a petition omits an averment necessary to show a right of action in the plaintiff, and the defendant at every proper and available opportunity throughout the trial objects to it, and to the reception of evidence under it because of such omission, it is too late after verdict in plaintiff's favor and the filing of a motion for new trial by defendant, to cure the defective petition and the error of receiving evidence under it, by amending it to conform to the facts proved. *Walker v. O'Connell*, 59 Kan. 306, 52 Pac. 894.

38. *Hill v. Weidinger*, 110 App. Div. 683, 97 N. Y. Supp. 473. See also *Reed*

*v. McConnell*, 133 N. Y. 425, 31 N. E. 22; *Southwick v. First Nat. Bank*, 84 N. Y. 420; *Davis v. Broadalbin Knitting Co.*, 90 App. Div. 567, 86 N. Y. Supp. 127.

39. *Sutter v. International Harv. Co.*, 81 Kan. 452, 106 Pac. 29, the court said: "Where evidence outside of the pleadings has been admitted over the objection of a party, and a verdict against him is based thereon, it is ordinarily unjust that an amendment to conform to the proof should be allowed or be considered as made, after it is too late for him to offer testimony in his own behalf. But when the effect of allowing the amendment, or of considering it made, is not to abridge the right to a full hearing but to extend it, a very different situation is presented. And that is the case here. The effect in the plaintiff's petition is serious enough to prevent him obtaining judgment himself, but does not require a final judgment against him."

40. *Ariz.* — *Consolidated Canal Co. v. Peters*, 5 Ariz. 80, 46 Pac. 74. *Cal.* — *Carter v. Lothian*, 133 Cal. 451, 65 Pac. 962; *Ennis Brown Co. v. Hurst*, 1 Cal. App. 752, 82 Pac. 1056. *Ia.* — *Tyler v. Bowen*, 124 Iowa 452, 100 N. W. 505. *Kan.* — *Minneapolis Thresh. Mach. Co. v. Currey*, 75 Kan. 365, 89 Pac. 688. *Mich.* — *Rathbun v. Parker*, 113 Mich. 594, 72 N. W. 31. *Mo.* — *Howard v. Shirley*, 75 Mo. App. 150. *Pa.* — *Wall v. Royal Soc. Good Fellows*, 179 Pa. 355, 36 Atl. 748.

"When a petition claiming damages

allowed during and after the argument of counsel,<sup>41</sup> and even after verdict,<sup>42</sup> or after judgment.<sup>43</sup> But in the latter case it must be allowed only for the purpose of sustaining the judgment.<sup>44</sup> And even in the appellate court amendments are frequently regarded as having

is not demurrable for insufficiency in its statements of fact to constitute a cause of action, but is only subject to a motion to make it more definite and certain as to the allegations of damages sustained, and upon it a first trial is had in the course of which plaintiff makes a full disclosure of the several items constituting his demand, it is not error, upon a second trial and at the close of the plaintiff's evidence, during which the same disclosures are made, to allow the petition to be amended by setting out the various items of damages claimed so as to conform to the evidence given." *Tullock v. Mulvane*, 61 Kan. 650, 60 Pac. 749, *distinguishing* *Walker v. O'Connell*, 59 Kan. 306, 52 Pac. 894, in that in the latter case, the petition lacked an essential averment—one without which the petition was demurrable for insufficiency of facts to constitute a cause of action.

After the filing of an auditor's report on a submitted case, an issue having been made by pleadings and evidence, an amendment is properly allowed submitting no new issue but merely adjusting the prayer of the petition more specifically to the finding of the auditor and the evidence submitted to him. *McConnell v. Stubbs*, 124 Ga. 1038, 53 S. E. 698; *Sterling Elec. Co. v. Augusta Tel. Co.*, 124 Ga. 371, 52 S. E. 541.

41. *Cal.*—*Jackson v. Jackson*, 94 Cal. 446, 29 Pac. 957. *Ga.*—*Hudgins v. Bloodworth*, 109 Ga. 197, 34 S. E. 364. *Ia.*—*Larkin v. McManus*, 81 Iowa 723, 45 N. W. 1061; *Tiffany v. Henderson*, 57 Iowa 490, 10 N. W. 884; *Correll v. Glasscock*, 26 Iowa 83.

See also *Maul v. Steele*, 95 Minn. 292, 104 N. W. 4; *German Ins. Co. v. Fredrick*, 57 Neb. 538, 77 N. W. 1106.

After the evidence has been introduced and argument commenced, it is not error for the court to refuse the defendant leave to amend his answer by striking therefrom an admission so as to conform it to the proof. *McIntosh v. Coulthard* (Iowa), 88 N. W. 1069.

42. *U. S.*—*Baker v. Barber Asphalt Pav. Co.*, 92 Fed. 117. *Ark.*—*Tripp v. Duval*, 33 Ark. 811. *Ia.*—*Davis v.*

*Chicago R. & F. R. Co.*, 83 Iowa 744, 49 N. W. 77. *Me.*—*Russell v. Turner*, 62 Me. 496. *Mass.*—*Beers v. McGinnis*, 191 Mass. 279, 77 N. E. 768; *Denham v. Bryant*, 139 Mass. 110, 28 N. E. 691. *Neb.*—*Evarts v. Smucker*, 19 Neb. 50, 26 N. W. 596. *N. Y.*—*Everts v. United States Mut. Acc. Assn.*, 61 Hun 624, 16 N. Y. Supp. 27; *Emerson v. Bleakley*, 5 Abb. Pr. (N. S.) 350. *N. C.*—*Brown v. Mitchell*, 102 N. C. 347, 9 S. E. 702. *Vt.*—*Kimball v. Ladd*, 42 Vt. 747. *Wis.*—*Bowe v. Gage*, 132 Wis. 441, 112 N. W. 419; *Thomas v. Hatch*, 53 Wis. 296, 10 N. W. 393.

Where in a negligence case brought by an administrator to recover for the death of his intestate, the declaration failed to state what was a condition precedent under the statute, namely that the deceased left either a widow or dependent next of kin, and there was evidence of the existence of next of kin so dependent, the trial court had power after verdict for plaintiff to allow an amendment. *Bartley v. Boston and Northern St. R.*, 198 Mass. 163, 83 N. E. 1093.

43. *Ark.*—*McNutt v. McNutt*, 78 Ark. 346, 95 S. W. 778. *Ky.*—*Carter v. West*, 93 Ky. 211, 19 S. W. 92. *N. Y.*—*Bedford v. Terhune*, 30 N. Y. 453. *Wis.*—*City Bk. v. McClellan*, 21 Wis. 112.

Amendments after trial are allowed in order to conform the pleadings to the facts proved. *Chaffee v. Rutland R. Co.*, 71 Vt. 384, 45 Atl. 750.

In *Hansen v. Allen*, 117 Wis. 61, 93 N. W. 805, the court some two or three months after the filing of the findings and the judgment entered, on hearing of order to show cause, ordered that the complaint be amended so as to conform it to the proofs in certain particulars in that a certain finding be added, which had been actually found by the court from the undisputed evidence, but inadvertently omitted from the written findings of fact, and it was held that this action on the part of the court was no abuse of discretion.

44. *Weems v. Shaughnessy*, 70 Hun 175, 24 N. Y. Supp. 271.

been made, or, without doubt, the appellate court can so amend.<sup>45</sup>

(VII.) Necessity of Evidence To Support Amendment. — An amendment for the purpose of conforming the pleadings to the proof must have evidence to support it, otherwise it should be refused.<sup>46</sup>

(VIII.) Necessity of Amendment Conformig to Proof. — Amendments to the complaint and for the purpose of making it conform to the proof must rest upon such proof and cannot go beyond it. They are not made for the purpose of framing issues for the trial, but to supply some technical defect and perhaps upon the supposition that certain issues have been tried which are different from those framed by the pleadings. The supposition is that they have been tried as though such issue had been made.<sup>47</sup>

45. *Martin v. Flahive*, 112 App. Div. 347, 98 N. Y. Supp. 577.

Where a civil action is tried before a judge without a jury who makes and files special findings, even if there be a variance between the allegations of the answer and the facts proven upon the trial, yet if it be a cause where an amendment to the answer ought to have been allowed to conform it to the facts proved, the judgment will not be reversed on account of such variance, but instead, the answer will be considered as amended. *Wilcox & White Organ Co. v. Lasley*, 40 Kan. 521, 20 Pac. 228.

If a good cause of action is established upon the trial and all controversies in reference to the matter are fully tried without objection and the case is within the jurisdiction of the court and might have been but was not fully pleaded or was not the particular cause of action the pleader had in mind at the outset, though the facts are fairly stated, the complaint may be amended to correspond with the cause proved either before or after verdict, saving the substantial rights of the adverse party; or if need be, to sustain the judgment, the complaint will, on appeal, be deemed amended in accordance with the judgment. *Bieri v. Fonger*, 139 Wis. 150, 120 N. W. 862, citing *Hopkins v. Chicago, M. & St. P. R. Co.*, 128 Wis. 403, 107 N. W. 330; *Kleimenhagen v. Dixon*, 122 Wis. 526, 100 N. W. 826; *McKinney v. Jones*, 55 Wis. 39, 11 N. W. 606, 12 N. W. 381.

In *Rein v. Brooklyn Heights R. Co.*, 47 Misc. 675, 94 N. Y. Supp. 636, an action brought in the municipal court for an alleged assault upon the plaintiff by the defendants, it appeared that under the statute the municipal court was without jurisdiction of such an action,

but on the trial the evidence showed that plaintiff while a passenger on defendant's car was assaulted by the defendant's conductor; and it was held that as a complaint could have been framed according to this evidence against the defendants for damages for breach of contract, and of such action the municipal court would have had jurisdiction, the appellate court would amend the complaint so as to conform it to the proofs and support the judgment.

46. Ala. — *Huggins v. Southern R. Co.*, 148 Ala. 153, 41 So. 856. Mo. — *The Muff v. Cameron*, 134 Mo. App. 607, 114 S. W. 1125, 117 S. W. 116. N. Y. — *Wyckoff, Church & Partridge v. Huggins*, 121 N. Y. Supp. 382. Wis. — *Dickinson v. Pritchard*, 111 Wis. 310, 87 N. W. 292.

Where accord and satisfaction is not pleaded, the admission of evidence appropriate to the pleadings, but inconsistent with accord and satisfaction, under such circumstances as to exclude the idea that it was offered to support a defense or cause of action not set up by the pleadings, does not justify amendment of pleadings at the close of the trial to bring in such new issue. *Mowatt v. Wilkinson*, 110 Wis. 176, 85 N. W. 661.

47. *McDougald v. Argonaut L. & D. Co.*, 117 Cal. 87, 48 Pac. 1021, holding further that failure on the part of the defendant to answer to an amendment does not constitute an admission of facts alleged therein.

Where, at the close of the evidence, a party obtains leave to amend his pleadings to conform to the proof, he can go no farther than to present by additional pleadings such fact averments as the evidence already in the record tends to



And in so far as the averments of the amended pleadings go beyond the evidence adduced, they may be considered gratuitous if not impertinent and should be stricken out if timely motion is made, otherwise they should be ignored by the court.<sup>48</sup>

**Total Failure of Proof.** — A distinction, however, is to be noted between a variance between the pleading and proof and a total failure of proof; and in the latter case the rule permitting the pleadings to be amended does not obtain.<sup>49</sup>

(IX.) **Changing Claim or Defense.** — Amendments to conform the pleadings to the proofs must be confined to the claim or defense intended to be set up originally; and when the effect of such an amendment is to introduce a change in such claim or defense it should not be allowed.<sup>50</sup>

establish. More than this is gratuitous and should be ignored, or, on motion, stricken out. *Warner v. Norwegian Cem. Assn.*, 139 Iowa 115, 117 N. W. 39.

48. *Warner v. Norwegian Cem. Assn.*, 139 Iowa 115, 117 N. W. 39.

49. *Cal.* — *Rogers v. Byers*, 1 Cal. App. 284, 81 Pac. 1123. *Mo.* — *Pruett v. Warren*, 71 Mo. App. 84. *Neb.* — *Dietz v. City Nat. Bank*, 42 Neb. 584, 60 N. W. 896. *N. Y.* — *Reed v. McConnell*, 133 N. Y. 425, 31 N. E. 22; *Rockmore v. Kramer*, 108 N. Y. Supp. 553. *Wis.* — *Hollister v. Bell*, 107 Wis. 198, 83 N. W. 297.

Where the complaint alleges that a certain amount was to be paid for services during a period up to the death of the employer, and the evidence shows that such amount was to be paid for services during the lives of the employer and sister, if it appears that the services were rendered up to the death of the latter, this discrepancy does not amount to a total failure of proof of the alleged cause of action, and mere variance though material may be cured by amendment in the trial court. *Fenton v. Mansfield*, 82 Conn. 343, 73 Atl. 770, citing *Practice Book*, 1908, p. 245, § 109.

50. *Ark.* — *St. Louis, I. & S. R. Co. v. Holmes*, 88 Ark. 181, 114 S. W. 221. *Colo.* — *Anderson v. Groesbeck*, 26 Colo. 3, 55 Pac. 1086. *Conn.* — *Moran v. Bentley*, 69 Conn. 392, 37 Atl. 1092. *Ind.* — *Levy v. Chittenden*, 120 Ind. 37, 22 N. E. 92. *Ia.* — *Shawayer v. Chamberlain*, 113 Iowa 742, 84 N. W. 661; *Sturman v. Sturman*, 118 Iowa 620, 92 N. W. 886; *Dentzler v. Rieckhoff*, 97 Iowa 75, 66 N. W. 147; *McNider v. Sirrine*, 84 Iowa 58, 50 N. W. 200. *Kan.* — *Matson v. Chicago, R. I. & P. R. Co.*, 80

*Kan.* 272, 102 Pac. 254; *State v. Krause*, 58 Kan. 651, 50 Pac. 882. *Mich.* — *Van Cleve v. Radford*, 149 Mich. 106, 112 N. W. 754. *Minn.* — *Byard v. Palace Clothing Co.*, 85 Minn. 363, 88 N. W. 998. *Mo.* — *Clark v. St. Louis Transfer R. Co.*, 127 Mo. 255, 30 S. W. 121. *Neb.* — *Murray v. Loushman*, 47 Neb. 256, 66 N. W. 413. *N. Y.* — *Freeman v. Grant*, 132 N. Y. 22, 30 N. E. 247; *Johnson v. Phoenix B. Co.*, 133 App. Div. 807, 118 N. Y. Supp. 88; *New York v. Knickerbocker Trust Co.*, 121 App. Div. 740, 106 N. Y. Supp. 506; *Fraenkel v. Friedman*, 58 Misc. 451, 111 N. Y. Supp. 436; *Rockmore v. Kramer*, 108 N. Y. Supp. 553. *N. D.* — *Mares v. Wormington*, 8 N. D. 329, 79 N. W. 441. *Ore.* — *Foste v. Standard L. & A. Ins. Co.*, 26 Ore. 449, 38 Pac. 617. *S. C.* — *Robert v. Ellis*, 59 S. C. 137, 37 S. E. 250. *Utah.* — *Grand Cent. Min. Co. v. Mammoth Min. Co.*, 29 Utah 490, 83 Pac. 648. *Wis.* — *Brooklyn Creamery Co. v. Friday*, 137 Wis. 461, 119 N. W. 126; *Brillion Lumb. Co. v. Barnard*, 131 Wis. 284, 111 N. W. 483. *Allen v. Brooks*, 88 Wis. 265, 60 N. W. 253.

Where upon the final hearing it clearly appears from the evidence that the complainant has a case which entitles him to relief but which by reason of some defect or omission in the allegations of the bill is not brought fairly within the issue he will generally be permitted to amend the bill and adapt its allegations to the case proved; but when the proposed amendment would change the issue or introduce new issues or materially vary the grounds of relief generally, an amendment of the bill is not permissible. *Griffin v. Societe A. L. F.*, 53 Fla. 801, 44 So. 342.

A complaint in tort cannot be

So, an amendment to the complaint for the ostensible purpose of conforming it to the proofs is properly denied where it is apparent that if the complaint were amended as requested it would bring the cause of action alleged within the bar of the statute of limitations.<sup>51</sup>

But the court has power to direct an amendment of a complaint to conform to the proofs, although it may change the cause of action and substitute another belonging to a different class, where the result sought to be reached is the same and the amendment does not effect the substantial purpose of the action.<sup>52</sup>

**2. Matters Peculiar to Cause of Action.**—At Common Law.—The rule was settled at common law that the court had no power to permit the plaintiff to amend his declaration by introducing a new cause of action.<sup>53</sup>

**Under Modern Statutes.**—As has been previously shown, the power of the court to allow, and the right of the parties to make, amendments is the subject of statutory regulation in most of the states.<sup>54</sup>

**Matter Germane to Subject-Matter of Controversy.**—In some of the states it is permissible under the statute to amend before the trial by setting

changed by amendment to one in contract. *Zeiser v. Cohn*, 44 Misc. 462, 90 N. Y. Supp. 66, a suit to set aside certain conveyances as fraudulent, where evidence was introduced, against the objection of defendant, showing an agreement on the part of the grantee to pay the grantor's debts.

Allowing the plaintiff after the evidence has been taken and the cause submitted to file an amended complaint is not error where the additional facts and circumstances alleged in the amended complaint do not involve any change in the nature of the cause of action. *Hancock v. Board of Education*, 140 Cal. 554, 74 Pac. 44.

An amendment to a complaint to conform it to proofs should not be allowed where the amendment is inconsistent with the allegations of the original complaint and the cause of action therein averred, and materially changes by enlargement the character of the action. *Connell v. New York, O. & W. R. Co.*, 134 App. Div. 231, 118 N. Y. Supp. 944, where the complaint alleged that while plaintiff was a passenger and was lawfully upon one of defendant's cars the defendant maliciously and violently assaulted and ejected her, and the amendment alleged that the defendant failed and neglected to protect the plaintiff from assault and violence caused by others while the plaintiff was a passenger.

In an action of partition, an amend-

ment to the complaint, supplying an omission therein, showing how the parties received the interests it was claimed they had, the action being still one for partition of the same property, between the same parties, having the same interests as alleged in the original complaint, in no sense changes the cause of action. *Perkins v. Storrs*, 114 App. Div. 322, 99 N. Y. Supp. 849.

In *Miller v. Kenosha Electric R. Co.*, 135 Wis. 68, 115 N. W. 355, the issues raised by the pleadings, and to which the proofs had been directed, related to the negligence of the defendant in not properly safeguarding or removing a charged wire which had fallen in the street, resulting in the plaintiff's personal injury, and an amendment stating a cause of action against the defendant for maintaining a nuisance in the public streets was properly refused.

51. *Teipner v. Teipner*, 135 Wis. 380, 115 N. W. 1092.

52. *Rubin v. Maine S. S. Co.*, 51 Misc. 665, 101 N. Y. Supp. 30.

53. U. S.—*Watts v. Weston*, 62 Fed. 136, 10 C. C. A. 302. Ind.—*Falkner v. Iams*, 5 Ind. 200. Mass.—*Ball v. Claffin*, 5 Pick. 303. Pa.—*Wright v. Hart's Admr.*, 44 Pa. 454; *Swiegart v. Lowmarter*, 14 Serg. & R. 200.

For a full treatment of this subject, see the title "Complaint and Petition in Code Pleading."

54. See *supra*, II. Compare also the various statutes.

up a new cause of action, provided the amendatory matter is germane to the subject-matter of the controversy.<sup>55</sup>

**Amendments Allowed Subject to Qualifications.**—In other states, under the statutes as they are construed and applied, amendments setting up a new cause of action are allowed subject to certain qualifications.<sup>56</sup>

55. **Ind.**—*Levy v. Chittenden*, 120 Ind. 37, 22 N. E. 92; *Indianapolis St. R. Co. v. Fearnought*, 40 Ind. App. 333, 82 N. E. 102. **Minn.**—*Myrick v. Purcell*, 99 Minn. 457, 109 N. W. 995. **Mo.**—*Shannon v. Mastin*, 108 S. W. 1116. **N. Y.**—*Hatch v. Central Nat. Bank*, 78 N. Y. 487; *Pratt, Hurst & Co. v. Tailer*, 99 App. Div. 236, 90 N. Y. Supp. 1023; *Devery v. Winton Motor C. Co.*, 49 Misc. 626, 97 N. Y. Supp. 392; *Sturges v. Newcombe*, 12 Misc. 371, 33 N. Y. Supp. 558; *Thilemann v. New York*, 76 N. Y. Supp. 132. **Ore.**—*Lieualten v. Mosgrove*, 37 Ore. 446, 61 Pac. 1022; *Osmun v. Winters*, 30 Ore. 177, 46 Pac. 780. **S. C.**—*Kennedy v. Hill*, 79 S. C. 270, 60 S. E. 689; *Pickett v. Southern R. Co.*, 74 S. C. 236, 54 S. E. 375. **S. D.**—*Driskill v. Rebbe*, 22 S. D. 242, 117 N. W. 135.

Where an original petition seeks to enjoin the sale of a lot to satisfy a deed of trust if a new ground for obtaining the injunction arises before the suit comes on for trial this may be added by amendment, the relief sought being confined to the same subject-matter and the purpose being the same. *Cohn v. Souders*, 175 Mo. 455, 75 S. W. 413.

A complaint in an action for personal injuries setting forth a good cause of action at common law may be amended by adding allegations bringing the case within the purview of the employer's liability act. *Mulligan v. Erie R. Co.*, 99 App. Div. 499, 91 N. Y. Supp. 60.

*Parker, P. J.*, in *Banta v. Banta*, 103 App. Div. 172, 93 N. Y. Supp. 393, held that in an action for breach of an oral contract by which plaintiff was to have defendant's farm and certain money in consideration of plaintiff's moving onto the farm and rendering certain services, to which the statute of frauds, which was interposed, was a complete defense, the plaintiff could have confessed his inability to recover damages for the breach and amended his complaint so as to avail himself of his right to recover for the services which he had rendered.

**Changing Form of Action.**—A com-

plaint in an action for money had and received, proceeding on the theory that the defendant had received plaintiff's goods and collected the proceeds of their sale, cannot be amended so as to change the action to one for conversion or for an accounting which would completely change the form of the action, raise different issues and call for different proofs. *Kinston Cotton Mills v. Kuhne*, 129 App. Div. 250, 113 N. Y. Supp. 779.

56. **Alabama.**—Under the Alabama statute any amendment may be allowed which does not make an "entirely" new cause of action. *J. E. Hough & Sons v. Styles (Ala.)*, 50 So. 349; *Bentley v. Barnes*, 155 Ala. 659, 47 So. 159; *Alabama Consol. C. & I. Co. v. Heald*, 154 Ala. 580, 45 So. 686; *Southern R. Co. v. Dickens*, 153 Ala. 283, 45 So. 215; *Hughes v. Howell*, 152 Ala. 295, 44 So. 410; *Montgomery Traction Co. v. Fitzpatrick*, 149 Ala. 511, 43 So. 136.

Where an original count charges a trespass upon plaintiff's land the amendment is bad which seeks in the same count to recover damages for interfering with travel to and from the plaintiff's land by the erection of an embankment (not on plaintiff's land) upon the street near to plaintiff's property, the complaint not alleging that plaintiff was in possession of the street. *Southern R. Co. v. McIntyre*, 152 Ala. 223, 44 So. 624.

Where the counts of a complaint as first filed declare on a cause of action as one which had accrued to a third person, and which had subsequent to its accrual become the property of the plaintiff, an amendment to the complaint which declared as upon an account stated immediately between plaintiff and defendant independent of any transaction with such third person, is properly stricken out, since the cause of action so introduced is apparently different and distinct from any originally described in the complaint. *Ivy Coal & Coke Co. v. Long*, 139 Ala. 535, 36 So. 722.



**Common Law Rule Adhered to.**—In other jurisdictions, however, and indeed in the majority of jurisdictions, the common law rule is adhered to, and amendments setting up a new cause of action are not permitted at any stage of the cause.<sup>57</sup>

**Illinois.**—Under the Illinois statute, the plaintiff may amend at any time before final judgment so as to "sustain the action for the claim for which it was intended to be brought." *Fame Ins. Co. v. Thomas*, 10 Ill. App. 545. *Compare Chicago Virden Coal Co. v. Bradley*, 134 Ill. App. 234.

**Massachusetts.**—The rule in Massachusetts is the same as in Illinois. *Cogswell v. Hall*, 185 Mass. 455, 70 N. E. 461; *H. C. Miner Litho. Co. v. Wagner*, 177 Mass. 404, 58 N. E. 1020; *Stewart v. Thayer*, 170 Mass. 560, 49 N. E. 1020; *Haupt v. Rogers*, 170 Mass. 71, 48 N. E. 1080. But the court has no power to allow an amendment which will introduce a new cause of action not intended at the time the writ was sued out. *Herlihy v. Little*, 200 Mass. 284, 86 N. E. 294.

Where in a tort case, one of the counts is, under a statute, for causing the death of the plaintiff's intestate, and another is at common law for conscious suffering on the part of plaintiff's intestate, it is within the discretion of the court to allow the plaintiff to amend his declaration by striking out the latter count. It is a matter for the consideration of the trial court whether the defendant was harmed by the introduction of evidence of conscious suffering. *Manning v. Conway*, 192 Mass. 122, 78 N. E. 401. This case was tried before the decision of this court in *Brennan v. Standard Oil Co.*, 187 Mass. 376, 73 N. E. 472, which held that a count at common law could not be joined with the counts under the statute. See also *Murphy v. Russell*, 202 Mass. 480, 89 N. E. 107; *Herlihy v. Little*, 200 Mass. 284, 86 N. E. 294.

**Nebraska.**—An amendment, in order to be allowable under the Nebraska statute, must note substantially the nature of the claim. *Johnson v. American Smelt. & Ref. Co.*, 80 Neb. 255, 116 N. W. 517; *Scott v. Spencer*, 44 Neb. 93, 62 N. W. 312.

**New Jersey.**—In New Jersey the statutes (Practice Act, § 126) authorize amendments which are necessary for the purpose of bringing to a determination in the present action the real ques-

tion in controversy. *Hoboken v. Gear*, 27 N. J. L. 265.

In view of the limitation imposed by § 2830 of the Wisconsin statutes that amendments to complaints shall not substantially change the claim, the right of the plaintiff to amend before the time for answering has expired, is subject to the limitation that the inherent difference between tort and contract and between law and equity cannot be ignored. *Northside Loan & Bldg. Soc. v. Nakielski*, 127 Wis. 539, 106 N. W. 1097. See also *Gates v. Paul*, 117 Wis. 170, 94 N. W. 55; *Post v. Campbell*, 110 Wis. 378, 85 N. W. 1032.

In *Segelke & Koughhouse Mfg. Co. v. Hulberg*, 94 Wis. 106, 68 N. W. 653, an action to foreclose a subcontractor's lien for building materials, it was held proper to refuse to permit the complaint to be amended into an action to foreclose a principal contractor's lien after the time in which he could have filed a claim for a lien.

57. **Cal.**—*Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712; *Peiser v. Griffin*, 125 Cal. 9, 57 Pac. 690; *Rose v. Doe*, 4 Cal. App. 680, 89 Pac. 135. **Colo.**—*Anderson v. Groesbeck*, 26 Colo. 3, 55 Pac. 1086; *Johnson v. Cummings*, 12 Colo. App. 17, 55 Pac. 269. **Conn.**—*Dunnett v. Thornton*, 73 Conn. 1, 46 Atl. 158; *Moran v. Bentley*, 71 Conn. 623, 42 Atl. 1013; *Goodrich v. Stanton*, 71 Conn. 418, 42 Atl. 74. **Del.**—*Collins v. Watson*, 1 Penne. 397, 41 Atl. 158. **Idaho.**—*Hallett v. Larcom*, 5 Idaho 492, 51 Pac. 108. **Ia.**—*Cole v. Thompson*, 134 Iowa 685, 112 N. W. 178; *Kettering v. Eastlack*, 130 Iowa 498, 107 N. W. 177. **Kan.**—*Kansas City v. King*, 65 Kan. 64, 68 Pac. 1093; *Emporia Nat. Bank v. Layfeth*, 63 Kan. 17, 64 Pac. 973; *Jewett v. Malott*, 60 Kan. 509, 57 Pac. 100. **Ky.**—*Asher v. Uhl*, 122 Ky. 114, 87 N. W. 307, 93 N. W. 29; *Simpson v. Carr*, 25 Ky. L. R. 849, 76 S. W. 346. **Me.**—*Anderson v. Wetler*, 103 Me. 257, 69 Atl. 105; *Thomaston v. Friendship*, 95 Me. 201, 49 Atl. 1056; *Willoughby v. Atkinson Co.*, 93 Me. 185, 44 Atl. 612; *Jordan v. McAllister*, 91 Me. 481, 40 Atl. 324; *Knight v. Trim*, 89 Me. 469, 36 Atl. 912. **Md.**—*Hamil-*

But not every amendment of a pleading which substantially changes a cause of action is erroneous. It is only when such amend-

ton *v.* Thirston, 94 Md. 253, 51 Atl. 42. **Mich.**—Arnold *v.* White, 153 Mich. 607, 117 N. W. 164; Walker *v.* Detroit, 136 Mich. 6, 98 N. W. 744; Nugent *v.* Adsit, 93 Mich. 462, 53 N. W. 620. **Miss.**—Belzoni Oil Co. *v.* Yazoo & M. V. R. Co., 47 So. 468. **Nev.**—Schwartz *v.* Stock, 26 Nev. 128, 65 Pac. 351. **N. H.**—Wood *v.* Folsom, 42 N. H. 70. **N. M.**—Bremen Min. Co. *v.* Bremen, 13 N. M. 111, 79 Pac. 806. **N. C.**—Bonner *v.* Stotesbury, 139 N. C. 31, 51 S. E. 781; Whitehead *v.* Spivey, 103 N. C. 66, 9 S. E. 319. **Pa.**—Stoner *v.* Erisman, 206 Pa. 600, 56 Atl. 77; Wildermuth *v.* Long, 196 Pa. 541, 46 Atl. 927. **R. I.**—Haskins *v.* Glezen, 55 Atl. 639. **Tex.**—Houston F. & M. Ins. Co. *v.* Swain (Tex. Civ. App.), 114 S. W. 149; Palmer *v.* Spandenberg (Tex. Civ. App.), 110 S. W. 760; Booth *v.* Houston Pkg. Co. (Tex. Civ. App.), 105 S. W. 46; Sullivan *v.* Owens (Tex. Civ. App.), 90 S. W. 690; Schmidt *v.* Brittain (Tex. Civ. App.), 84 S. W. 677; Missouri P. R. Co. *v.* Foreman (Tex. Civ. App.), 46 S. W. 834. **Vt.**—Chaffee *v.* Rutland R. Co., 71 Vt. 384, 45 Atl. 750. **W. Va.**—Hanson *v.* Blake, 63 W. Va. 560, 60 S. E. 589.

In a suit for breach of contract, the petition cannot be amended by abandoning the contract first alleged and setting up another and different contract. Lamar *v.* Lamar, T. & R. Drug Co., 118 Ga. 850, 45 S. E. 671.

A plaintiff cannot declare upon the special contract with a carrier, and then, by amendment, claim that he is not bound by the terms of such special contract and add a new and distinct cause of action. Southern R. Co. *v.* Parramore, 119 Ga. 690, 46 S. E. 822.

A declaration sounding in tort, seeking to recover from the defendant as a carrier for the breach of its duty to furnish a suitable car for the transportation of live-stock, cannot be amended by setting up as the basis of recovery the special contract between the parties for the equipment of the car. The effect of this amendment would have been to change the suit from an action in tort to one for damages for breach of a special contract for the equipment of the car. It is therefore properly re-

fused. Gilleland *v.* Louisville & N. R. Co., 119 Ga. 789, 47 S. E. 336.

Where suit is brought seeking to enforce a common law liability, an amendment seeking to enforce a statutory liability adds a new cause of action. See McCandless *v.* Inland Acid Co., 115 Ga. 968, 42 S. E. 449.

In Box *v.* Chicago, R. I. & P. R. Co., 107 Iowa 660, 78 N. W. 694, an action for negligence against a railway company for personal injuries, the plaintiff alleged negligence in using different systems of draw-bars or bumpers in coupling trains instead of the ordinary improved draw-bar or bumper, and it was held that an amendment charging negligence in having the bumpers loose and out of repair was not allowable for the reason that the amendment stated a new cause of action barred by the statute of limitations. To the same effect, see Brinkmeier *v.* Missouri Pac. R. Co., 81 Kan. 101, 105 Pac. 221, so holding on authority of the Atchison, T. & S. F. R. Co. *v.* Schroeder, 56 Kan. 731, 44 Pac. 1093.

In Railway Co. *v.* Moffatt, 60 Kan. 113, 55 Pac. 837, it was alleged in the original petition that the defendant was guilty of negligence in failing to give the proper signals and due warnings of the approach of its trains. On a new trial, and several years after the cause of action had accrued, the court permitted the plaintiff to amend his petition by alleging that the railway company was negligent in failing to give signals other than those required by the statute, and in failing to have a gate, flagman or electric alarm at the highway crossing.

Where an action for personal injuries is brought, the declaration alleging a collision between the defendant's car and the plaintiff's buggy, caused, as alleged, by the careless driving at an excessive speed of the defendant's car, an amendment of the declaration showing a difference in the description of the plaintiff's position and the direction in which her carriage was proceeding, cannot in any sense be considered as a statement of a different case. Butler *v.* Rhode Island Co. (R. I.), 68 Atl. 425.

ments are made as to affect the substantial rights of the adverse party that they constitute error.<sup>58</sup>

**Tests.** — There are many tests, more or less satisfactory, applied by the courts in determining whether or not the amendment in question is subject to the objection that it introduces a new cause.<sup>59</sup>

58. *Steven v. Matthewson*, 45 Kan. 594, 26 Pac. 38.

**Suit to Quiet Title Changed to Ejectment.** — It is not error for the court to permit a petition in a suit to quiet title to be amended before answer so as to change the action to one in ejectment, where no prejudice to the defendant results. *Curtis v. Schmehr*, 69 Kan. 124, 76 Pac. 434.

59. **Brief Statement of Tests.** — One test applied for determining whether a new cause of action is stated in the amendment, is put thus: "The two causes of action are so distinct and separate that either could be established without reference to a fact of negligence alleged in the other." *Box v. Chicago, R. I. & P. R. Co.*, 107 Iowa 660, 78 N. W. 694, discussing the meaning of the term cause of action as applied to negligence cases.

**Same Plea.** — One test so applied is whether the amended pleading is subject to the same plea as the original. **Ill.** — *Baumgartner v. Hoeft*, 64 Ill. App. 449. **Mass.** — *Ball v. Claffin*, 5 Pick. 303. **N. H.** — *Goddard v. Perkins*, 9 N. H. 488. **Tex.** — *Phoenix Lumb. Co. v. Houston Water Co.*, 94 Tex. 456, 61 S. W. 707.

**Compare Ga.** — *City of Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318. **Ia.** — *Van Patten v. Waugh*, 122 Iowa 302, 98 N. W. 119. **N. H.** — *Downer v. Shaw*, 23 N. H. 125. **Tex.** — *Booth v. Houston Pkg. Co. (Tex. Civ. App.)*, 105 S. W. 46.

Probably the most useful test is whether the amended pleading has preserved the identity of the cause of action. **U. S.** — *Hall v. Louisville & N. R. Co.*, 157 Fed. 464. **Ala.** — *Springfield F. & M. Ins. Co. v. De Jarnett*, 111 Ala. 248, 19 So. 995. **Ga.** — *Armour v. Ross*, 110 Ga. 403, 35 S. E. 787. **Ill.** — *Chicago Gen. R. Co. v. Carroll*, 189 Ill. 273, 59 N. E. 551. **Neb.** — *Myers v. Moore*, 78 Neb. 448, 110 N. W. 989. **Vt.** — *Davis v. Rutland R. Co.*, 82 Vt. 24, 71 Atl. 724.

Different facts may be alleged separately or accumulatively to show the same wrong and the number and variety of the facts alleged will not make more than one cause of action so long as but

one wrong is shown. So long as the facts added by the amendment, however different they may be from those alleged in the original petition, show substantially the same wrong in respect to the same transaction, the amendment is not objectionable as adding a new and distinct cause of action. *City of Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318, *overruling* *Central R. Co. v. Wood*, 51 Ga. 515; *Georgia R. & B. Co. v. Houghton*, 109 Ga. 604, 34 S. E. 1026; *Cox v. Murphey*, 82 Ga. 623, 9 S. E. 604; *Henderson v. Central R. Co.*, 73 Ga. 718; *Skidaway S. R. Co. v. O'Brien*, 73 Ga. 655. The court said that this ruling put the court back in line with its earlier decisions, among them *Harris v. Central R. Co.*, 78 Ga. 525, 3 S. E. 355; *Augusta & S. R. Co. v. Dorsey*, 68 Ga. 228; *Maxwell v. Harrison*, 8 Ga. 61. More fully, as to what constitutes a new cause of action, see the title "Complaint and Petition in Code Pleading."

**Same Evidence to Support Both Pleadings.** — One of the tests as to whether or not an amendment is to be allowed or denied under the statute or rule permitting an amendment in furtherance of justice when it does not change substantially the claim, is whether or not the same kind of evidence would be competent and sufficient to establish the right of recovery under the amended pleading as would be competent and sufficient to sustain a recovery under the original pleading. **Ga.** — *City of Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318. **Ia.** — *Van Patten v. Waugh*, 122 Iowa 302, 98 N. W. 119. **Mo.** — *Scovill v. Glasner*, 79 Mo. 449; *Bick v. Vaughn*, 140 Mo. App. 595, 120 S. W. 618. **Tex.** — *Booth v. Houston Pack. Co. (Tex. Civ. App.)*, 105 S. W. 46; *Schneider-Dans Co. v. Brown (Tex. Civ. App.)*, 46 S. W. 108.

**Judgment on One Bar to Recovery on Other.** — Another test to determine whether a new cause of action is alleged in the amended complaint or petition, is that a recovery had upon the original complaint would have been a bar to any recovery under the amended complaint or petition. **Ala.** — *Alabama*



These will be fully considered in a more appropriate place.<sup>60</sup>

**Particular Amendments.** — The discussion of these rules is of necessity a general one, and to the particular appropriate titles must be left the treatment of their application.

**3. Matters Peculiar to Defense.** — A discussion of the cases falling under this head will be found elsewhere.<sup>61</sup>

**D. IN RESPECT OF THE FORM OF THE ACTION.** — In some jurisdictions the allowance or refusal of amendments having the effect of changing the form of the action is in a large measure within the discretion of the trial court.<sup>62</sup>

In other jurisdictions, while of course the court has a discretionary power, yet in the exercise of that power, whether or not the proposed amendment changes the original cause of action or claim, is to be considered.<sup>63</sup>

*Consol. C. & I. Co. v. Heald*, 154 Ala. 589, 45 So. 689. Ga. — *McCandless v. Inland Acid Co.*, 115 Ga. 968, 42 S. E. 449. Ia. — *Thayer v. Smoky Hollow Coal Co.*, 129 Iowa 550, 102 N. W. 1024; *Van Patten v. Waugh*, 122 Iowa 302, 98 N. W. 119. Mo. — *Bick v. Vaughn*, 140 Mo. App. 595, 120 S. W. 618.

In *St. Louis & S. F. R. Co. v. Ludlum*, 63 Kan. 719, 66 Pac. 1045, the wrong complained of in the original petition was the negligence of the plaintiff in error in so operating its line of railway that damage resulted to defendant in error. The original petition stated that the fire was communicated from one of the defendant's engines to the grass growing along, upon and near the track of said company by reason of the defective engine and the negligent manner in which it was handled. The amended petition stated that the plaintiff in error negligently permitted dry grass, weeds, leaves and vegetation to accumulate and remain on its right of way where said fire mentioned in plaintiff's original petition was set out by one of its passing engines. This was only amplifying the negligence charged in the original petition, which contributed to or caused the fire to start that resulted in damage to plaintiff below. It was a more definite allegation as to the condition of the "grass growing along, upon and near the defendant's right of way," as described in the original petition, and that the defendant negligently permitted such dry grass, weeds, leaves, and vegetation to accumulate and remain on its right of way.

This comes back at last to the question whether the cause of action is the same. *City of Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318.

**Same Measure of Damages.** — Another test sometimes applied for the determination of whether the amended complaint states a new cause of action is whether the same measure of damages is applicable to both. U. S. — *Union Pac. R. Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. ed. 938. Ga. — *City of Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318. Mich. — *Hurst v. Detroit City Railway Co.*, 84 Mich. 539, 48 N. W. 44. Mo. — *Bick v. Vaughn*, 140 Mo. App. 595, 120 S. W. 618.

**How Determined.** — Whether the cause of action sued on originally is the same as that set out in an amended petition is to be determined by the averments of the pleadings, and not by testimony of what the pleader intended the pleadings should contain. *Kansas v. Hart*, 60 Kan. 684, 57 Pac. 938.

60. See the title "Complaint and Petition in Code Pleading."

61. See the title "Answers in Code Pleading"; "Answers in Equity."

62. *Me. — Googins v. Gilmore*, 47 Me. 9. Compare *Lawry v. Lawry*, 88 Me. 482, 34 Atl. 273. Md. — *Hamilton v. Thirston*, 94 Md. 253, 51 Atl. 42. N. H. — *Jaquith v. Benoit*, 70 N. H. 1, 45 Atl. 714; *Johnson v. White Mt. Creamery Assn.*, 68 N. H. 437, 36 Atl. 13; *Morse v. Glover*, 68 N. H. 119, 40 Atl. 396; *Morgan v. Joyce*, 66 N. H. 476, 30 Atl. 1119; *Stibbins v. Lancashire Ins. Co.*, 59 N. H. 143.

In *New Hampshire* when the parties have had a full and fair trial of the facts the court will not stop to consider whether or not the remedy chosen was appropriate; the difficulty may be solved by amendment. *Fellows v. Judge*, 72 N. H. 466, 57 Atl. 653.

63. Ala. — *Central of Ga. R. Co. v. Vol. I*

**Statutes.**—And in still other jurisdictions, the question is regulated by express statutory provision.<sup>64</sup>

Foshee, 125 Ala. 199, 27 So. 1006. Cal. St. Clair v. San Francisco & S. J. V. R. Co., 142 Cal. 647, 76 Pac. 453. Ind. Ter.—Crawford v. Alexander, 5 Ind. Ter. 161, 82 S. W. 707. Kan.—Curtis v. Schmehr, 69 Kan. 124, 76 Pac. 434. Mo. Parker v. Rhodes, 79 Mo. 88. Neb.—Homan v. Hellman, 35 Neb. 414, 53 N. W. 369. N. Y.—Kingston Cotton Mills v. Kuhne (App. Div.), 113 N. Y. Supp. 779; Rowland v. Kellogg, 26 Misc. 498, 57 N. Y. Supp. 893; Shafarman v. Jacobs, 36 N. Y. Supp. 428. N. C. Craren v. Russell, 118 N. C. 564, 24 S. E. 361. Ohio.—Spice v. Steinruck, 14 Ohio St. 213. Okla.—Limerick v. Lee, 17 Okla. 165, 87 Pac. 859.

In Wisconsin "the only limitation of judicial power under § 2830, Stats. 1898, as to allowing a complaint to be amended, is that the 'claim' of the plaintiff shall not be substantially changed, and sound judicial discretion in the matter shall not be overstepped.

. . . It may be that it was a mistake to hold, as this court did, very early after the Code was adopted here, that a change in the form of the action is a substantial change in the claim within the meaning of the statute. Carmichael v. Argard, 52 Wis. 607, 9 N. W. 470. Certainly that is out of harmony with New York, the home of our Code, as we have seen. But it is too late to change the practice now. It seems clear, however, that if the framers of the Code had intended that, in a general sense, a complaint should not be amended under § 2830 changing the cause of action therein, language would have been used to that effect, instead of language merely preventing the court from allowing the plaintiff, by amending his pleading, to go substantially outside the scope of his claim disclosed in such pleading. In most cases a change of the form of an action within the scope of the controversy set forth in the complaint would violate the law as to the binding effect in shaping the judicial policy of this court that such a change is within the inhibition of the statute. In any event, subject to the one limitation mentioned in Carmichael v. Argard, in harmony with the practice in New York, the power of amendment as to a complaint under § 2830 within the scope of the claim disclosed in the

pleading is without any limit except that of judicial discretion. Fischer v. Laack, 76 Wis. 313, 45 N. W. 104; Post v. Campbell, 110 Wis. 378, 85 N. W. 1032. Notwithstanding, this court, by adhering to the view indicated, has subjected itself to criticism by text-writers as giving less heed to the real purpose of the Code to enable parties to end their litigation speedily regardless of mere technicalities and mistakes that do not substantially vary the course of justice as regards the right of the matter at the end than is given elsewhere (Bliss, Code Pl. § 429; Pomeroy, Code Rem. § 566; Hepburn, Development of Code Pl. § 306), it is believed that the broad scope here given to the statutes on the subject, as a whole, leaves little ground for just criticism." Gates v. Paul, 117 Wis. 170, 94 N. W. 55. See also Charmley v. Charmley, 125 Wis. 297, 103 N. W. 1106.

64. III.—May v. Gesellschaft, 211 Ill. 310, 71 N. E. 1001; Garrity v. Hamburger Co., 136 Ill. 499, 27 N. E. 11. Mass.—Merrill v. Bullock, 105 Mass. 486; Fay v. Taft, 12 Cush. 448. N. J. Hasbrouck v. Winkler, 48 N. J. L. 431, 6 Atl. 22. Pa.—Collins v. Barnes, 130 Pa. 356, 18 Atl. 645.

The Rhode Island statute relating to amendments is not sufficiently broad to enable the court to permit the form of action to be changed. Slater v. Fehlborg, 24 R. I. 574, 54 Atl. 383.

Where the statute under which an action is brought permits the bringing of either trespass or case, if the action is in case but the declaration sounds in trespass, the plaintiff may properly be permitted to amend his declaration by striking out the allegations of "force and arms" and "against the peace," which will change the declaration from a declaration in trespass to one in case. Barker v. Almy, 20 R. I. 367, 39 Atl. 185.

So in this state, where the statute provides that a traveler when bitten by a dog while on the highway may maintain either trespass or case, the mere fact that the pleader omits to state that the bite of the dog was *vi et armis et contra pacem*, will not invalidate the entire proceeding in view of the broad powers of amendments which are conferred upon the courts. On appeal from a judgment for plaintiff the supreme

**E. IN RESPECT OF THE PRAYER FOR RELIEF.**—Amendments of the prayer for relief are not generally considered as coming within the rule against introducing a new cause of action, and are liberally allowed.<sup>65</sup>

**V. EFFECT OF AMENDMENTS.**—**A. ON ORIGINAL PLEADING.** Where an amended pleading complete in itself is filed, the original pleading is thereby superseded and its effect as a pleading destroyed.<sup>66</sup>

court may direct the trial court to permit the proper amendment to be made and to enter judgment on the decision. *Barlow v. Tierney*, 26 R. I. 557, 59 Atl. 930.

For a full treatment of the subject of this section see the title "Complaint and Petition in Code Pleading."

65. Colo.—*Baldwin Coal Co. v. Davis* (Colo. App.), 62 Pac. 1041. Ia.—*Pedley v. Freeman*, 132 Iowa 356, 109 N. W. 890. Mass.—*Luddington v. Goodnow*, 168 Mass. 223, 46 N. E. 627. Minn.—*McOmber v. Balow*, 40 Minn. 388, 42 N. W. 83. N. Y.—*Reed v. New York*, 97 N. Y. 620. Tex.—*Raleigh v. Cook*, 60 Tex. 438.

An amendment changing the conclusion of the pleader upon the facts stated or praying a different relief is proper. *Belzoni Oil Co. v. Yazoo & M. V. R. Co.* (Miss.), 47 So. 468.

Where a complaint states a situation arousing the power and duty of a court of equity the prayer may be amended, within the time limited by appropriate statute, to demand other and further relief consistent with the cause of action originally described in the allegation of facts. *North Side L. & Bldg. Soc. v. Nakielski*, 127 Wis. 539, 106 N. W. 1097. And see *Hogueland v. Arts*, 113 Iowa 634, 85 N. W. 818, where the petition asked that a deed be set aside and that the property be delivered, and the amendment asked that if the deed were found valid, there should be specific performance, this was not inconsistent.

Where an equitable petition is filed by wards for the purpose of tracing trust funds which their guardian wrongfully invested in certain lands, and the prayer of the petition is for the recovery of the land, an amendment striking this prayer and substituting therefor a prayer for account and for money judgment with a special lien on the land, does not set up a new and distinct

cause of action. *Jordan v. Downs*, 118 Ga. 544, 45 S. E. 439.

If an action of account is referred to an auditor, money not mentioned in the declaration should not be allowed, but the plaintiff may be permitted, on motion, to amend his declaration in respect to the sums so allowed. *Prefontaine v. Roberg*, 20 R. I. 418, 39 Atl. 892.

If an original petition claims \$200 as exemplary damages, charged to consist of mental distress and of unlawful and malicious acts of seizure, an amended petition separating the damage by claiming \$100 for mental anguish and \$100 for exemplary damages does not introduce any new cause of action. *Smith v. Connor* (Tex. Civ. App.), 46 S. W. 267.

Under subd. 3 of § 481, N. Y. Code Civ. Proc., providing that a complaint must contain a demand of the judgment to which the plaintiff supposes himself entitled, a prayer for relief, while no part of the cause of action, is a part of the complaint, and a motion to amend the prayer is one to amend the complaint. *McVey v. Security Mut. Life Ins. Co.*, 118 App. Div. 466, 103 N. Y. Supp. 1056.

A full treatment of this subject will be found in the title "Complaint and Petition in Code Pleading."

66. U. S.—*United States v. Gentry*, 119 Fed. 70, 55 C. C. A. 658. Cal.—*Welsh v. Barshar*, 137 Cal. 154, 69 Pac. 977; *Kuhland v. Sedgwick*, 17 Cal. 123. Conn.—*Mitchell v. Smith*, 74 Conn. 125, 49 Atl. 909. Idaho.—*People v. Hunt*, 1 Idaho 433. Ind.—*Hedrick v. Whitehorn*, 145 Ind. 642, 43 N. E. 942; *Britz v. Johnson*, 65 Ind. 561; *Specht v. Williamson*, 46 Ind. 599. Ia.—*Mowry v. Wareham*, 101 Iowa 28, 69 N. W. 1128; *White v. Hampton*, 9 Iowa 181. Kan.—*Kansas City Long Dist. Tel. Co. v. Paola Tel. Co.*, 81 Kan. 470, 106 Pac. 200; *Reihl v. Lekowski*, 33 Kan. 5, 15 Pac. 886. Minn.—*Hanscom v. Herrick*,



But where an amendment does not take the place of the original pleading, the two will be considered together.<sup>67</sup>

An amended demurrer supersedes the original demurrer.<sup>68</sup>

B. EARLIER ERROR WAIVED.—An amended pleading filed after demurrer to the original pleading has been sustained supersedes the original pleading, and error, if any, on the part of the court committed in sustaining the demurrer is thereby waived.<sup>69</sup>

And by procuring leave to have a plea reinstated and stand as originally filed before amendment, the defendant waives the right to assign error on the refusal of the court to permit it to be further amended.<sup>70</sup>

C. RELATING BACK TO ORIGINAL PLEADING.—1. In General.—An amended complaint, whether by the insertion of amendatory matter or by an entirely new pleading, for the same cause of action is re-

21 Minn. 9; *Ollson v. Newell*, 12 Minn. 114. Mo.—*Kortzenhofer v. St. Louis*, 52 Mo. 204; *Ticknor v. Voorhies*, 46 Mo. 110; *Young v. Norfolk*, 33 Mo. 110. Neb.—*Woodworth v. Thompson*, 44 Neb. 311, 62 N. W. 450; *Smith v. Wigton*, 35 Neb. 460, 53 N. W. 374. N. Y.—*Ullman v. Tanner*, 127 App. Div. 808, 111 N. Y. Supp. 844; *Keller v. Morton*, 63 Misc. 340, 117 N. Y. Supp. 200; *Bobb v. Bobb*, 3 Bosw. 200. Ohio.—*Raymond v. Toledo, St. L. & K. C. R. Co.*, 57 Ohio St. 271, 48 N. E. 1093. Tex.—*Keith v. Keith*, 39 Tex. Civ. App. 363, 87 S. W. 384. Wash.—*Ward v. Naro*, 14 Wash. 640, 45 Pac. 312.

An amended answer supersedes the original as a pleading; and the fact that the findings are contradictory and contrary to certain admissions in the original answer does not invalidate them. *Welsh v. Barshar*, 137 Cal. 154, 69 Pac. 977.

Where a demurrer to the original petition is sustained and the plaintiff submits to the ruling and files a new petition, the original petition is superseded, and the trial court would not be concerned with it even if the appellate court were to conclude that it stated a cause of action. *Kansas City Long Dist. Tel. Co. v. Paola Tel. Co.*, 81 Kan. 470, 106 Pac. 290.

Where an amendment is filed the summons, issued thereafter, should refer to the complaint on file and not in terms to the amended complaint. *Dowling v. Comerford*, 99 Cal. 204, 33 Pac. 853.

Amended and Supplemental Pleadings. As it takes the place of all previous, original and amended answers, an

amended answer is required to contain within itself all of the defenses relied on to the plaintiff's petition or amended petition; supplemental answers, proper, being allowed by the rules only for a different purpose. Hence the plaintiff has the right to go into a trial under the assumption that no defense is relied on but those set up in the last amendment. *Chicago, R. I. & T. R. Co. v. Hallsell*, 98 Tex. 244, 83 S. W. 15.

67. *Pharo v. Johnson*, 15 Iowa 560. And see *Becker v. Sandusky City Bank*, 1 Minn. 311.

68. In *Estudillo v. Security L. & T. Co.*, 149 Cal. 556, 87 Pac. 19, where the court said: "A demurrer is none the less a demurrer because it has been amended, and the last amended demurrer being the only demurrer is properly designated as 'the demurrer.'"

69. Cal.—*Walsh v. McKeen*, 75 Cal. 519, 17 Pac. 673; *Loveland v. Garner*, 71 Cal. 541, 12 Pac. 616. Colo.—*Hurd v. Smith*, 5 Colo. 233. Conn.—*Allen v. Chase*, 81 Conn. 474, 71 Atl. 367. Fla.—*Sanford v. Cloud*, 17 Fla. 532. Ill.—*Spencer v. Aetna Ind. Co.*, 231 Ill. 82, 83 N. E. 102. Ind.—*Kennedy v. Anderson*, 98 Ind. 151; *State v. Hay*, 88 Ind. 74. Ia.—*Martin v. Capital Ins. Co.*, 85 Iowa 643, 52 N. W. 534; *Lane v. Burlington & S. W. R. Co.*, 52 Iowa 18, 2 N. W. 531; *Muscatine v. Keokuk*, 47 Iowa 350.

Error, if any, in striking out certain portions of the original complaint is waived where an amended complaint is filed subsequently. *Collins v. Scott*, 100 Cal. 446, 34 Pac. 1085.

70. *Royal Neighbors of America v. Sinon*, 135 Ill. App. 599.

garded as relating back to the date of filing the original and as the continuation thereof.<sup>71</sup>

**2. Arresting Running of Statute of Limitations.**—This question of the retroactive effect of an amended complaint generally arises upon the objection that the amendatory matter states a new cause of action as to which the statute of limitations has run. And where a new cause of action is thus introduced, the statute of limitations will be regarded as having been arrested only as of the date of filing the amended complaint.<sup>72</sup>

But where no new cause of action is introduced by the amendment, the statute of limitations will be regarded as having been arrested as of the date of the filing of the original complaint.<sup>73</sup>

71. *Ala.*—*Birmingham R. L. & P. Co. v. Jung*, 49 So. 434. *Ark.*—*Brockaway v. Thomas*, 32 Ark. 311. *Cal.*—*White v. Soto*, 82 Cal. 654, 23 Pac. 210. *Fla.*—*State v. Jacksonville P. & M. R. Co.*, 15 Fla. 201. *Ga.*—*Verdery v. Barrett*, 89 Ga. 349, 15 S. E. 476. *Me.*—*Heath v. Whidden*, 29 Me. 108. *Mont.*—*Lanusse v. Massicott*, 3 Mont. 40. *R. I.*—*Clark v. Delaware C. Co.*, 11 R. I. 36. *Tex.*—*Littlefield v. Fry*, 39 Tex. 299; *Gray v. Fuller* (Tex. Civ. App.), 117 S. W. 919. *Vt.*—*Dana v. McClure*, 39 Vt. 197.

An amended plea of privilege is filed in due order when filed after a supplemental petition. *San Antonio & A. P. R. Co. v. Barnett* (Tex. Civ. App.), 57 S. W. 600.

An amendment to a petition when allowed relates back to the beginning of the original suit, and does not change the trial term thereof. That a party is surprised or less ready for trial by reason of an amendment is not cause for a demurrer thereto. If the defendant is surprised by the amendment and less prepared for trial in consequence thereof, he should move for a continuance under the provisions of the civil code. *Wells v. Wells*, 118 Ga. 812, 45 S. E. 669.

As a general rule an amendment to a petition relates back to the time of the filing of the original petition, which is the only date to be considered relatively to the pleadings on the question as to whether an action is barred by the statute of limitations. *Southern R. Co. v. Horine*, 121 Ga. 386, 49 S. E. 285.

**Statute of Limitations.**—If the original petition suit is filed within the statutory period an amendment thereto must be considered to be in time. *Ferguson v. Morrison* (Tex. Civ. App.), 81

S. W. 1240. And see *Towns v. Dallas Mfg. Co.*, 154 Ala. 612, 45 So. 696; *Alabama Consol. C. & I. Co. v. Heald*, 154 Ala. 580, 45 So. 686; *Curry v. Southern R. Co.*, 148 Ala. 57, 42 So. 447.

72. If an amendment to a petition states a new and independent cause of action, it is to be treated as the commencement of a new action and if the period of limitation upon such cause of action has intervened, the amendment is demurrable. *Gordon v. Chicago, R. I. & P. R. Co.*, 129 Iowa 747, 106 N. W. 177.

If an original complaint is brought under the common law, and an amendment is under a statute, and there is a change from "law to law," this does not prevent the amendment from relating back. *Alabama Consol. C. & I. Co. v. Heald*, 154 Ala. 580, 45 So. 686.

73. *Ala.*—*Louisville & N. R. Co. v. Hall*, 91 Ala. 112, 8 So. 371. *Cal.*—*Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. 100. *Ga.*—*South Carolina R. Co. v. Nix*, 68 Ga. 572. *Ill.*—*Blanchard v. Lake M. & S. R. Co.*, 126 Ill. 416, 18 N. E. 799. *Ind.*—*Chicago, St. L. & R. Co. v. Bills*, 118 Ind. 221, 20 N. E. 775. *Ia.*—*Sachra v. Manila*, 120 Iowa 562, 95 N. W. 198; *Case v. Blood*, 71 Iowa 632, 33 N. W. 144. *Mich.*—*Wood v. Lenawee*, 84 Mich. 521, 47 N. W. 1103. *Minn.*—*Bruns v. Schreiber*, 48 Minn. 366, 51 N. W. 420. *Mo.*—*Lilly v. Tobbein*, 103 Mo. 477, 15 S. W. 618. *Neb.*—*McKeigham v. Hopkins*, 19 Neb. 33, 26 N. W. 614. *N. J.*—*Guild v. Parker*, 43 N. J. L. 430. *N. C.*—*Ely v. Early*, 94 N. C. 1. *Ohio.*—*Baltimore & O. R. Co. v. Gibson*, 41 Ohio St. 145. *S. C.*—*Bryce v. Massey*, 35 S. C. 127, 14 S. E. 768. *Tex.*—*Mayer v. Walker*,

D. ORIGINAL PLEADING AS EVIDENCE. — The rule that the effect of filing an amended pleading is to supersede the original pleading in no way destroys or detracts from the effect of the original pleading as evidence against the party where it is otherwise competent.<sup>74</sup> But it cannot be read to the jury or commented upon in argument without being first offered in evidence.<sup>75</sup>

E. EFFECT OF FAILURE TO ANSWER AMENDMENT. — Matter added by way of an amendment to which the defendant makes no opposition, must be deemed to be admitted where the adverse party omits to move to amend his answer so as to deny it.<sup>76</sup>

F. EFFECT OF WITHDRAWAL OF AMENDMENT. — Where an amendment has been withdrawn, the defendant is not thereby barred from relying on a counter claim set up in the original answer.<sup>77</sup>

82 Tex. 222, 17 S. W. 505; *Tribbey v. Wokee*, 74 Tex. 142, 11 S. W. 1089. W. Va. — *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. 519.

For a full discussion of the application of these rules, see the title "Limitation of Actions."

74. *Keller v. Morton*, 63 Misc. 340, 117 N. Y. Supp. 200.

75. *Longley v. McVey*, 109 Iowa 666, 81 N. W. 150; *Woodworth v. Thompson*, 44 Neb. 311, 62 N. W. 450.

76. *McCloskey v. Goldman*, 62 Misc. 462, 115 N. Y. Supp. 189.

In Iowa if an amendment is filed by leave of court after verdict and pending motion in arrest, and is not denied or

confessed, a failure to move to strike it out or to respond thereto amounts to an admission of the facts stated. *Beard v. Guild*, 107 Iowa 476, 78 N. W. 201.

In *Willetts v. Ida County Sav. Bank*, 117 Iowa 386, 90 N. W. 729, an action for an accounting, a formal amendment to the petition was filed without leave after the testimony was all in, setting up several claimed credits so as to correct a supposed variance between the pleadings and the proof. The trial court properly refused to recognize the failure to respond to this formal amendment as an admission.

77. *Kassing v. Walter* (Iowa), 65 N. W. 832.



# AMICABLE ACTIONS

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### CROSS-REFERENCES:

Agreed Case;

Appeal.

**I. DEFINITIONS.** — An amicable action is one instituted in a court of justice seriously, but in a friendly spirit, in order that some matter in controversy may, by a judicial decree, be settled definitely, cheaply and speedily.<sup>1</sup>

**II. THE AGREEMENT.** — A. WHO MAY AGREE TO AN AMICABLE ACTION. — An attorney or agent of a litigating party may agree to an amicable action, and confess judgment.<sup>2</sup>

B. DESIGNATION OF AGREEMENT. — The agreement is not effected by the designation.<sup>3</sup>

C. SEAL NOT REQUIRED. — An agreement to enter an amicable action and confess judgment need not be under seal.<sup>4</sup>

1. *Ilseley, J.*, in *Thompson v. Moulton*, 20 La. Ann. 535. In *Lord v. Veazie*, 8 How. (U. S.) 251, 12 L. ed. 1067, Chief Justice Taney said: "It sometimes happens, that, for the purpose of obtaining a decision of the controversy, without incurring needless expense and trouble, they agree to conduct the suit in an amicable manner, that is to say, that they will not embarrass each other with unnecessary forms or technicalities and will mutually admit facts which they know to be true and without requiring proof, and will bring the point in dispute before the court for decision, without subjecting each other to unnecessary expense or delay."

**Arbitration and Amicable Action Distinguished.** — In *Thompson & Co. v. Moultrie*, 20 La. Ann. 535, 537, *Ilseley, J.*, said in construing the statute providing for settlement of disputes in this way: "The words arbitration and amicable lawsuit were not used as convertible terms, nor does the word amicable, prefixed to the word lawsuit, convey the idea of arbitration. . . . By the terms arbitration and amicable lawsuit, as understood in their common and usual signification, the former means a reference or submission of a matter in dispute to the decision of one or more persons as arbitrators."

In Pennsylvania, the Act of June 13, 1836, P. L. 568, provides as follows: "It shall be lawful for any persons willing to become parties to an amicable action, to enter into an agreement in writing for that purpose, either in their proper persons, or by their respective agents or attorneys; and on the production of such agreement to the prothonotary of any court having jurisdiction of the subject-matter, he shall enter the same on his docket, and from

the time of such entry, the action shall be deemed to be pending in like manner as if the defendant had appeared to a summons issued against him by the plaintiff." *Miller v. Cambria County*, 25 Pa. Super. Ct. 591.

The amicable action and confession of judgment is according to ancient and established practice, existing before the Act of 1806 as well as since. *Flanigen v. Philadelphia*, 51 Pa. 491.

2. *Kissick v. Hunter*, 184 Pa. 174, 39 Atl. 83. See *Van Beil v. Shive*, 17 Phila. 104, under a warrant of attorney to confess judgment.

3. In *Miller v. Cambria County*, 25 Pa. Super. Ct. 591, the caption of a paper showed that the parties assumed the positions of plaintiff and defendant, and that the same was to be entered in the records of the court, and it was produced to the prothonotary for the purpose of having him enter the cause upon the docket, which he accordingly did. In the body of the agreement it was stipulated that the cause should be tried by the court without a jury, that if under the law and the facts admitted and those that should be established by evidence it should be determined by the court that the plaintiff was entitled to receive compensation for the services upon which he based his claim, then judgment should be entered in his favor for the proper sum; but if not, that judgment should be entered for the defendant, and, finally, that each party reserved the right to appeal. It was held that this was an agreement for an amicable action, and that the designation of the paper as a case stated did not destroy its effect.

4. *Cook v. Gilbert*, 8 Serg. & R. (Pa.) 567.

**III. BY WHOM ACTION MAY BE BROUGHT.**—Amicable suits contemplate adversary parties. When a suit is brought for the purpose of obtaining the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, the suit ceases to be adversary, becomes collusive, and will not be entertained.<sup>5</sup> But an amicable action relating to a real cause of action existing between the litigating parties must be decided by the court.<sup>6</sup>

**IV. BY WHOM ACTION MAY BE ENTERED.**—Independently of statute an amicable action may be entered by attorney.<sup>7</sup>

**V. STATEMENT OF CAUSE OF ACTION.**—In an agreement for an amicable suit with confession of judgment, the cause of action must be stated.<sup>8</sup>

**VI. NECESSITY FOR WRIT.**—An amicable action may be entered without writ. The issuing of the writ is dispensed with, but it is considered as having been issued, and may be filed at any time.<sup>9</sup>

5. **U. S.**—*Cleveland v. Chamberlain*, 1 Black 419, 17 L. ed. 93; *Lord v. Veazie*, 8 How. 251, 12 L. ed. 1067; *Van Horn v. Kittitas Co.*, 112 Fed. 1. **Mo.**—*Meeker v. Straat*, 38 Mo. App. 239. **Pa.** *Berks County v. Jones*, 21 Pa. 413. **Eng.**—*Doe v. Duntze*, 6 Man. G. & G. S. 100, 60 E. C. L. 99; *In re Elsam*, 3 Barn. & C. 597, 10 E. C. L. 193.

See also, *Smith v. Junction R. Co.*, 29 Ind. 546; *Brewington v. Lowe*, 1 Ind. 21, 48 Am. Dec. 349; *Randon v. Becher*, 3 Cl. & F. 479, 511 6 Eng. Reprint 1517.

"An amicable action, in the sense in which these words are used in courts of justice, presupposes that there is a real dispute between the parties concerning some matter of right. . . . There must be an actual controversy, and adverse interests. The amity consists in the manner in which it is brought to issue before the court. And such amicable actions, so far from being objects of censure, are always approved and encouraged, because they facilitate greatly the administration of justice between the parties." *Lord v. Veazie*, 8 How. (U. S.) 251, 12 L. ed. 1067.

6. **Com. v. Cleveland, etc. R. Co.**, 29 Pa. 370.

7. *Flanigen v. Philadelphia*, 51 Pa. 491; *Cook v. Gilbert*, 8 Serg. & R. (Pa.) 567.

8. **Cause of Action Sufficiently Stated.**—If, at the head of an agreement to enter an amicable action, with a confession of judgment against C. &

B., there is an account by the plaintiff against C. & J. for goods sold, it is a sufficient statement of the cause of action. *Cook v. Gilbert*, 8 Serg. & R. (Pa.) 567.

**Sufficient Description of Premises in Ejectment.**—In an amicable action of ejectment, the description of the premises involved by number is sufficiently definite, it appearing that the city in which the premises were located had a known system of notation, regulated by municipal laws and acted upon by every one. *Flanigen v. Philadelphia*, 51 Pa. 491.

**Forms—Agreement for Amicable Action.**—"The City of Philadelphia v. Joseph R. Flanigen. In the District Court. It is hereby agreed that an amicable action of ejectment be entered for the premises situated No. 136 south Third street in the city of Philadelphia, and that judgment be entered thereon against Joseph R. Flanigen, without any stay of execution." *Approved in Flanigen v. Philadelphia*, 51 Pa. 491.

In *Miller v. Cambria County*, 25 Pa. Super. Ct. 591, the agreement was held to contain every essential element, though not a model form.

9. *Morris v. Buckley*, 11 Serg. & R. (Pa.) 168.

Where an amicable action of *scire facias*, upon a mortgage, is entered by the agreement of the parties, it is not error that the cause has been tried, without writ, declaration or statement; particularly if the agreement contains



**VII. NECESSITY FOR PLEADINGS.**—In an amicable action by way of arbitration, neither declaration nor pleadings are necessary.<sup>10</sup>

**VIII. BY WHOM JUDGMENT MAY BE ENTERED.**—In amicable actions judgment may be entered up by the prothonotary upon a written order, sent to him by defendant, confessing judgment and directing the entry of judgment.<sup>11</sup>

**Attestation.**—It is not necessary that a written order authorizing the prothonotary to enter judgment in an amicable action should be attested.<sup>12</sup>

**IX. APPEALS.**—Appeals may be taken in amicable actions, as in others.<sup>13</sup>

a description of the mortgage. *Morris v. Buckley*, 11 Serg. & R. (Pa.) 168.

In an amicable action of ejectment no writ is necessary, although the act prescribes the form of the writ of ejectment, and says it shall not be otherwise. This section of the act is applicable only to cases in which the suit is commenced by writ and does not impair the force of other sections by which all persons are permitted to enter suits without writs. *Massey v. Thomas*, 6 Binn. (Pa.) 333.

10. *Massey v. Thomas*, 6 Binn. (Pa.) 333.

11. *M'Calmont v. Peters*, 13 Serg. & R. (Pa.) 196.

**Confession of Judgment by Defendants Not Necessary.**—A judgment entered by a prothonotary, in pursuance of an agreement that an amicable action shall be entered, and that the prothonotary shall enter judgment against the defendants, in a certain sum,

is valid; and it is not necessary that there should be a confession of judgment in writing by the defendants, expressing the amount due to the plaintiff. *Cook v. Gilbert*, 8 Serg. & R. (Pa.) 567.

12. *M'Calmont v. Peters*, 13 Serg. & R. (Pa.) 196.

13. See *Com. v. Cleveland*, etc. R. Co., 29 Pa. 370; *Miller v. Cambria County*, 25 Pa. Super. Ct. 591. See also *Lord v. Veazie*, 8 How. (U. S.) 251, 12 L. ed. 1067, and the cases generally cited in this title.

In Pennsylvania the Act of 1877 giving the right of appeal in cases where the court refuses to open a judgment entered upon a warrant of attorney has no application where the judgment sought to be opened was confessed in an amicable action, and the record failed to show that it was by virtue of a warrant of attorney. *Limbirt v. Jones*, 118 Pa. 589, 12 Atl. 584; *Appeal of Blythe Twp.* (Pa.), 12 Atl. 849.

# AMICUS CURIAE

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### CROSS-REFERENCE:

Attorney and Client.

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**I. DEFINITION.**—The term *amicus curiæ* is applied to any one having no direct interest in the proceeding other than an executive officer of the court, parties, or attorneys of record in a cause, who is allowed to take part in the proceedings to the extent of advising the court as to the law or facts of which the court may take judicial notice.<sup>1</sup> This is an ancient usage derived from Roman law, and at an early date received the sanction of statute in England.<sup>2</sup>

1. "*Amicus curiæ* (Lat. A friend of the court). . . . One who, for the assistance of the court, gives information of some matter of law in regard to which the court is doubtful or mistaken. Coke, 2d Inst. 178; 2 Viner, Abr. 475. The information may extend to any matter of which the court takes judicial cognizance. 8 Coke 15." Bouvier's Law Dict.; Shumaker & Longsdorf, Cyclopedic Law Dict.

"Counsel in court frequently act in this capacity when they happen to be in possession of a case which the judge has

not seen, or does not at the moment remember." Black's Law Dict.

2. The term is sometimes applied to counsel appearing in a summary proceeding representing other interests public in character (*State ex rel. Crozier v. Rost*, 49 La. Ann. 1451, 22 So. 421); to counsel heard because interested in a similar case (*Ex parte Randolph*, 2 Brock. 447, 461, 20 Fed. Cas. No. 11,558), and to strangers suggesting the correction of errors (*United States v. Gale*, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. ed. 857; *Falmouth v. Strode*,

**II. WHO MAY ACT, AND WHEN.**—The term *amicus curiae*, in its ordinary use, implies the friendly intervention of counsel to remind the court of some matter of law which has escaped its notice, and in regard to which it appears to be in danger of going wrong.<sup>3</sup> Such an intervention is granted, not as a matter of right, but of privilege, and the privilege ends when the suggestion has been made.<sup>4</sup> It is within the discretion of the court<sup>5</sup> to allow any person, either attorney or layman, to act in a judicial proceeding<sup>6</sup> in the capacity of an *amicus curiae* for the assistance of the court on a case already before it.<sup>7</sup> In fact the court may request information of any attorney of the court, as an *amicus curiae*.<sup>8</sup>

11 Mod. 136, 88 Eng. Reprint 949); Bouvier's Law Dict., tit. "Amicus Curiae," citing Year Books 4 Hen. VI 16; Thal. Dig. lib. 13, c. 14, 11 Pitts. L. J. 321.

**Distinguishable From Others.**—The term *amicus curiae* (a friend of the court) implies one not directly interested—for as to parties who stand in privity or are interested, other means are provided whereby they may take part and other consequences follow upon their participation. See *Stryker v. Goodnow's Admr.*, 123 U. S. 527, 540, 8 Sup. Ct. 203, 31 L. ed. 194; *Williams v. Baker*, 17 Wall. (U. S.) 144, 151, 21 L. ed. 622; *Old Dominion Copper, etc. Co. v. Bigelow*, 203 Mass. 159, 204, 216, 89 N. E. 193.

See, however, *Robinson v. Lee*, 122 Fed. 1010, where the validity of certain revenue bond script of a state was involved. The question arose as to whether the state could be compelled to receive such script in payment of taxes. It was held that citizens and taxpayers other than the parties of record had such an interest as to be allowed to intervene and be heard through an attorney acting as *amicus curiae*. See also *Bass v. Fontleroy*, 11 Tex. 698, and *Blacks Law Dict.*, tit. "Amicus Curiae."

3. *Taft v. Northern Transp. Co.*, 56 N. H. 414. See also *Ala.*—*Birmingham L. & A. Co. v. First Nat. Bank*, 100 Ala. 249, 13 So. 945, 46 Am. St. Rep. 45. *Me.*—*Hamlin v. Particular Baptist Meeting House*, 103 Me. 343, 69 Atl. 315. *Pa.*—*Com. v. Collom*, 1 Pa. Super. 542. Anderson's Law Dict., "Amicus Curiae."

4. *Hamlin v. Particular Baptist Meeting House*, 103 Me. 343, 69 Atl. 315.

5. *U. S.*—*In re Columbia Real Estate Co.*, 101 Fed. 965. *Ala.*—*Birmingham L. & A. Co. v. First Nat. Bank*,

100 Ala. 249, 13 So. 945, 46 Am. St. Rep. 45. *Cal.*—*Tomkin v. Harris*, 90 Cal. 201, 27 Pac. 202. *Ill.*—*Ex parte Guernsey*, 21 Ill. 443. *Ind.*—*Irwin v. Armuth*, 129 Ind. 340, 28 N. E. 702; *Little v. Thompson*, 24 Ind. 146. *Mass.*—*Martin v. Tapley*, 119 Mass. 116; *Nauer v. Thomas*, 13 Allen 572. *Tex.*—*State v. Jefferson Iron Co.*, 60 Tex. 312.

In *In re Mumma's Estate*, 2 Pa. Dist. 592, it appeared to the court that accounts presented for confirmation contained credits for illegal fees paid out. A committee of the bar as *amici curiae* were appointed to file exceptions to the accounts in order that the validity of such fees might be properly brought up for adjudication.

Where parties are represented by counsel, an attorney cannot act as *amicus curiae* in the absence of a request by the court for further argument. *Nauer v. Thomas*, 13 Allen (Mass.) 572.

6. An appeal to the circuit court from an order of the county commissioners refusing to grant a liquor license is a judicial proceeding, though no remonstrance was filed, and the court has the right to authorize the appearance of an *amicus curiae* to defend the proceeding. *In re Arszman*, 40 Ind. App. 218, 81 N. E. 680. See also *State v. Gorman*, 171 Ind. 58, 85 N. E. 763.

7. *Birmingham Loan & A. Co. v. First Nat. Bank*, 100 Ala. 249, 13 So. 945, 46 Am. St. Rep. 45; *Martin v. Tapley*, 119 Mass. 116.

An attorney who has been refused permission to aid the prosecution in a criminal case for private pay may properly make pertinent suggestions as to proceedings as an *amicus curiae*. *People v. Gibbs*, 70 Mich. 425, 38 N. W. 257.

8. *U. S.*—*Ex parte Randolph*, 2 Brock. 447, 20 Fed. Cas. No. 11,558. *Ind.*—*Parker v. State*, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567.



**Interested Party Not Restricted to Rights of Amicus Curiae.**—Where an application is made for the appointment of a trustee, any person claiming the alleged trust property has a right to appear and become a party, and is not limited in his rights to those of an *amicus curiae*.<sup>9</sup>

**III. POWERS, RIGHTS AND FUNCTIONS.**—A. IN GENERAL.—The office of an *amicus curiae* is usually limited to making suggestions as to questions apparent upon the record,<sup>10</sup> or matters of practice presenting themselves for determination in course of proceedings in open court.<sup>11</sup>

It has been held that an *amicus curiae* may appear and file affidavits,<sup>12</sup> submit motions in writing,<sup>13</sup> introduce evidence,<sup>14</sup> examine witnesses, and make argument,<sup>15</sup> or make any suggestions to the court where there seems to be collusion between parties, or for any cause which the court is at liberty to recognize as proper for the interference of such persons;<sup>16</sup> but it is not ordinarily the function of an *amicus curiae*

Mo. — *In re* St. Louis Inst., 27 Mo. App. 633. Nev. — *Haley v. Eureka County Bank*, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815. Pa. — *In re Mumma's Estate*, 2 Pa. Dist. 592.

9. *Bass v. Fontleroy*, 11 Tex. 698.

10. *Jones v. Jefferson*, 66 Tex. 576, 1 S. W. 903.

Where the owner of an irrigation ditch sees fit to rest his right to have his appropriation determined solely upon the ground that the notice in the original proceeding was insufficiently published, the court will not determine other questions which might have been raised and which are suggested by *amicus curiae*. *Farmers' Union Ditch Co. v. Rio Grande Canal Co.*, 37 Colo. 512, 86 Pac. 1042.

**Cannot Interfere with Record, Though Appointed.**—Counsel appearing as *amicus curiae* has no right, on appeal of a cause, to interfere with or control the condition of the record, not having the rights in that regard of an adversary in the litigation. It is immaterial that the trial court assumed to appoint such *amicus curiae* to represent it on appeal, the court not being a party to the appeal and there being no authority for such appointment. *Estate of Pina*, 112 Cal. 14, 44 Pac. 332.

11. *Jones v. Jefferson*, 66 Tex. 576, 1 S. W. 903.

12. *Haley v. Eureka County Bank*, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815; *Olsen v. California Ins. Co.*, 11 Tex. Civ. App. 371, 32 S. W. 446. See also *Robinson v. Lee*, 122 Fed. 1010; *Ex parte Guernsey*, 21 Ill. 443.

13. *Haley v. Eureka County Bank*, 21

Nev. 127, 26 Pac. 64, 12 L. R. A. 815.

14. Ind. — *Irwin v. Armuth*, 129 Ind. 340, 28 N. E. 702. Nev. — *Haley v. Eureka County Bank*, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815. Tex. — *Bass v. Fontleroy*, 11 Tex. 698.

15. *In re Arszman*, 40 Ind. App. 218, 81 N. E. 680.

**Argument in Ex Parte Proceeding.**—On *mandamus* to compel issuance of a tavern keeper's license, argument may be made in opposition to petitioner by an *amicus curiae*. *Ex parte Yeager*, 11 Gratt. (Va.) 655.

16. U. S. — *United States v. Gale*, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. ed. 857. Ala. — *State v. Middleton*, 5 Port. 484; *Boyington v. State*, 2 Port. 100. Ill. — *Sampson v. Comr. of Highways*, 115 Ill. App. 443. La. — *Life Assn. of America v. Hall*, 33 La. Ann. 49. Tex. — *Jones v. Jefferson*, 66 Tex. 576, 1 S. W. 903; *State v. Jefferson Iron Co.*, 60 Tex. 312.

See also *Ward v. Alsop*, 100 Tenn. 619, 46 S. W. 573; *State v. Wilson*, 2 Lea (Tenn.) 204; *Stearns v. Stearns*, 10 Vt. 540.

**Letters of administration**, irregularly granted, revokable upon suggestion of *amicus curiae*. Ind. — *Croxton v. Renner*, 103 Ind. 223, 2 N. E. 601; *Jeffersonville R. Co. v. Swayne*, 26 Ind. 477. Kan. — *Mallory's Estate v. Burlington & M. R. Co.*, 53 Kan. 557, 36 Pac. 1059. Miss. — *Gasque v. Moody*, 12 Smed. & M. 153.

**No Interference in Agreed Case.**—A petition by an *amicus curiae* alleging that an agreed case was so worded as to ignore the rights of petitioner's clients is without merit, since parties need not make their cases with a view to the

to undertake the management of a cause as counsel,<sup>17</sup> or as judge.<sup>18</sup>

**B. RIGHT TO DEMUR.**—A demurrer cannot be filed by an *amicus curiæ*.<sup>19</sup>

**C. RIGHT TO MOVE FOR DISMISSAL.**—An *amicus curiæ* is not entitled to be heard, as a matter of right, on a motion to dismiss a case,<sup>20</sup> but it is within the court's discretion to entertain such motion, and the same will generally be granted whether the motion is made in the trial<sup>21</sup> or appellate court,<sup>22</sup> where the court is shown to be without jurisdiction,<sup>23</sup> or the suit a collusive, fraudulent or fictitious

rights of others. *State v. Wilson*, 2 Lea (Tenn.) 204.

**No Right to Inspection of Testimony.** Where on a petition by a wife for divorce, attorneys for the husband's creditors appear as *amici curiæ* and suggest collusion, they will not be permitted to inspect the affidavits or other testimony relied on to support the petition. *Stearns v. Stearns*, 10 Vt. 540.

**Notice to Interested Parties.**—If the parties immediately interested are not present, they should be informed of the suggestions of an *amicus curiæ*, and time given to them to resist or explain by affidavit or otherwise. *Ex parte Guernsey*, 21 Ill. 443.

Notice not necessary before motion by an *amicus curiæ* to dismiss on the ground that the action is fictitious. *Haley v. Eureka County Bank*, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815.

**17. Ala.**—*Birmingham L. & A. Co. v. First Nat. Bank*, 100 Ala. 249, 13 So. 945, 46 Am. St. Rep. 45. **Cal.**—*Estate of Pina*, 112 Cal. 14, 44 Pac. 332. **Ind.**—*Parker v. State*, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; *Knight v. Low*, 15 Ind. 374. **Me.**—*Hamlin v. Particular Baptist Meeting House*, 103 Me. 343, 69 Atl. 315. **Mass.**—*Martin v. Tapley*, 119 Mass. 116. **N. H.**—*Taft v. Northern Transp. Co.*, 56 N. H. 414. **N. Y.**—*E. B. v. E. C. B.*, 8 Abb. Pr. 44. **Pa.**—*Com. v. Cullom*, 1 Pa. Super, 542.

On motion of an *amicus curiæ* the court can do only what it would have done on its own motion if properly informed. *Moseby v. Burrow*, 52 Tex. 396; *Andrews v. Beck*, 23 Tex. 455.

**Appearance of Amicus Curiae Not Appearance of Party.**—The appearance of an *amicus curiæ*, though he may be the regular attorney of a party, does not bind such party as an appearance. *Old Dominion Copper Co. v. Bigelow*, 203 Mass. 159, 203-216, 89 N. E. 193, citing many cases; *International & G. N. R.*

*Co. v. Moore* (Tex. Civ. App.), 32 S. W. 379.

**18. In Com. v. Cullom**, 1 Pa. Super. 542, it was held that associate judges could not call a member of the bar as *amicus curiæ* to the bench to advise them as to how to conduct a trial and how to decide questions of law that might arise, the presiding judge having withdrawn because he had been of counsel. *Compare* *Boeock v. Cochran*, 32 Hun (N. Y.) 521, holding that a justice of the peace might properly request a neighboring justice, an attorney, to sit by him and advise.

**19. Ex parte Henderson**, 84 Ala. 36, 4 So. 284; *Hamlin v. Particular Baptist Meeting House*, 103 Me. 343, 69 Atl. 315.

**20. U. S.**—*In re Columbia Real Estate Co.*, 101 Fed. 965. **Ind.**—*Little v. Thompson*, 24 Ind. 146. **Me.**—*Hamlin v. Particular Baptist Meeting House*, 103 Me. 343, 69 Atl. 315. **N. H.**—*Taft v. Northern Transp. Co.*, 56 N. H. 414.

Motion based on alleged defects in complaint cannot be made by *amicus curiæ*. *Piggott v. Kirkpatrick*, 31 Ind. 261.

**21. Tomkin v. Harris**, 90 Cal. 201, 27 Pac. 202; *In re Burdick*, 162 Ill. 48, 44 N. E. 413.

**22. McAdam v. People**, 179 Ill. 316, 53 N. E. 1102. See also *Sampson v. Comr. of Highways*, 115 Ill. App. 443.

**23. Williams v. Blunt**, 2 Mass. 207; *Jones v. Jefferson*, 66 Tex. 576, 1 S. W. 903. See also *Olsen v. California Ins. Co.*, 11 Tex. Civ. App. 371, 32 S. W. 446.

A United States attorney in an attachment proceeding against a foreign state may, though disclaiming authority to act for defendants, appear as *amicus curiæ*, to call the court's attention to its want of jurisdiction and move that the attachment be vacated, regardless of the fact that Code Civ. Proc. § 682 does not provide for the vacation of such an attachment on motion of a

one.<sup>24</sup> And a motion for dismissal has been granted for want of prosecution.<sup>25</sup>

Counsel assuming to act as an *amicus curia* in moving the dismissal of a suit as to certain defendants, thereby assumes to act as counsel for them.<sup>26</sup>

**D. RIGHT TO EXCEPT OR APPEAL.**—Since an *amicus curia* is without power to represent a party he cannot take valid exceptions,<sup>27</sup> though appointed by the court,<sup>28</sup> nor can he carry a case from one court to

United States attorney. *Hassard v. Mexico*, 29 Misc. 511, 61 N. Y. Supp. 939, *affirmed* in 173 N. Y. 645, 66 N. E. 1110.

**Annulment of Bankruptcy Adjudication.**—In a proceeding to annul an adjudication of bankruptcy on the ground of want of jurisdiction, the court may, in its discretion, hear petitioner as an *amicus curia*, since want of jurisdiction is a question which the court should consider whenever or however raised, even if the parties forbear to make it or consent that the case may be considered on its merits. *In re Columbia Real Estate Co.*, 101 Fed. 965.

**24. Ala.**—*Birmingham L. & A. Co. v. First Nat. Bank*, 100 Ala. 249, 13 So. 945, 46 Am. St. Rep. 45. **Ill.**—*In re Burdick*, 162 Ill. 48, 44 N. E. 413; *In re Guernsey*, 21 Ill. 443. **Nev.**—*Haley v. Eureka County Bank*, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815. **N. Y.**—*Judson v. Flushing Jockey Club*, 14 Misc. 562, 36 N. Y. Supp. 128.

**Motion Dismissed, Collusiveness Not Appearing.**—A motion on the part of attorneys, in behalf of clients having alleged causes of action against defendant in the cause at bar involving the same question presented on appeal, to dismiss the appeal or to defer determination indefinitely on the ground that the action was of a collusive nature, brought to obtain in an *ex parte* manner the determination of a question of the utmost gravity and greatest public importance, will be denied, it appearing that the moving parties had ample opportunity to intervene upon the trial, or by brief upon submission, and that the action was brought in good faith. *Kelly v. New York City R. Co.*, 102 N. Y. Supp. 741.

**25.** *Tomkin v. Harris*, 90 Cal. 201, 27 Pac. 202, motion granted, it appearing that action had been delayed six years and that moving parties desired to purchase the property involved.

**26.** And in such a case defendants in

whose behalf counsel assumed to act must be deemed to have notice of a subsequent order of the court, striking off the discontinuance, counsel being present at that time. *Taft v. Northern Transp. Co.*, 56 N. H. 414.

**27. Ala.**—*Birmingham L. & A. Co. v. First Nat. Bank*, 100 Ala. 249, 13 So. 945, 46 Am. St. Rep. 45. **Ind.**—*Conrad v. Johnson*, 20 Ind. 421; *Morehouse v. Potter*, 15 Ind. 477; *Knight v. Low*, 15 Ind. 374; *Darlington v. Warner*, 14 Ind. 449; *Buchanan v. Beard*, 13 Ind. 471; *Hust v. Conn*, 12 Ind. 257; *Campbell v. Swasey*, 12 Ind. 70; *In re Arszman*, 40 Ind. App. 218, 81 N. E. 680. **Me.**—*Hamlin v. Peticular Baptist Meeting House*, 103 Me. 243, 69 Atl. 315. **Mass.** *Martin v. Tapley*, 119 Mass. 116. **Tex.**—*Chicago, R. I. & P. R. Co. v. Neil P. Anderson & Co.*, 130 S. W. 182. Error in failing to follow suggestions of *amicus curia* can be corrected only upon application of party who can profit by its correction. *Miller v. Keith*, 4 Cushm. (Miss.) 166.

Exceptions reserved by party since deceased will be considered by an appellate court, and suggestions as to their merits will be heard from any attorney within the court. *Kelley v. Riley*, 106 Mass. 339, 8 Am. Rep. 336; *Currier v. Lowell*, 16 Pick. (Mass.) 170. See also *Martin v. Tapley*, 119 Mass. 116; *Miles v. Williams*, 9 Ad. & El. 47, 58 E. C. L. 45; *Bridges v. Smyth*, 8 Bingh. 29, 21 E. C. L. 209.

**Motion of Amicus Curia Not Treated as Exception of Parties.**—*Andrews v. Beck*, 23 Tex. 455.

**28.** In *In re Stitzel's Estate*, 221 Pa. 227, 70 Atl. 749, 18 L. R. A. (N. S.) 284, the orphans' court surcharged executors, upon filing their accounts, with money paid out by them as counsel fees. Though no exceptions were filed to the account by either of the residuary legatees, charitable corporations, who were the only parties appearing to be interested, the court appointed an *amicus*



another by exceptions, appeal or writ of error, or begin any proceeding.<sup>29</sup>

E. RIGHT TO FILE BRIEFS AND PETITION FOR REHEARING. — A person not an attorney in the case will not be allowed to appear in the supreme court after opinion rendered, as an *amicus curiæ*, and to file briefs and a petition for a rehearing, unless at the request or with the assent of the attorneys engaged in the cause.<sup>30</sup>

IV. COMPENSATION. — To one to whom it has referred a matter for examination, the court, in the exercise of its general powers, may give a reasonable allowance to be taxed as costs.<sup>31</sup>

*curiæ* and allowed him, as such, to file exceptions. This was held error. The court said: "It is not the office of an *amicus curiæ* to become prosecutor to put into shape objections dictated by the court, and which the court itself has no authority to make in the absence of objection of some party in interest."

29. U. S. — *In re* Columbia Real Estate Co., 101 Fed. 965, 970. Ala. — *Birmingham L. & A. Co. v. First Nat. Bank*, 100 Ala. 249, 13 So. 945, 46 Am. St. Rep. 45. Cal. — *People v. Union Bldg. Assn.*, 127 Cal. 400, 58 Pac. 822, 59 Pac. 692. Ind. — *Irwin v. Armuth*, 129 Ind. 340, 28 N. E. 702. Me. — *Hamlin v. Particular Baptist Meeting House*, 103 Me. 343, 69 Atl. 315. Mass. — *Martin v. Tapley*, 119 Mass. 116. N. Y. — *E. B. v. E. C. B.*, 28 Barb. 299. Tex. — *Choctaw O. & G. R. Co. v. Locke*, 38 Tex. Civ. App. 191, 84 S. W. 1069. Va. — *Sayre v. Grymes*, 1 Hen. & M. 404; *Dunlop v. Com.*, 2 Call 284.

30. *City of Charlestown v. Cadle*, 167 Ill. 647, 49 N. E. 192. But see *People v. Union Bldg. Assn.*, 127 Cal. 400, 58 Pac. 822, 59 Pac. 692, holding that a receiver whose only interest was that of retaining his office to which he was appointed by the court by its final judgment in a cause litigated by other parties, might file a brief as an *amicus curiæ*, though he could not petition for a rehearing.

*Parker v. State*, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567, was a suit by a relator in the name of the state for a mandate provided for by law. As it involved a constitutional question the court gave the attorney general leave to appear. It was held that he was not a party, nor a representative of a party, but a friend of the court, and that he could not petition for a rehearing.

31. *In re* St. Louis Inst., 27 Mo. App. 633.

# ANIMALS

By OMAR O'HORROW,  
State Librarian of Indiana.

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# I. INJURIES TO PERSONS. — A. NATURE AND FORM OF ACTION.

1. In General. — The cases in which the owners or keepers of animals are liable for injuries done by them to the persons or property of others are divided into three classes, to-wit: (a) Actions for injuries done by wild animals, or animals by nature vicious. (b) Actions for injuries done by domestic animals, rightfully in the place where they do the mischief, and (c) Actions for injuries done by domestic animals that are wrongfully in the place where they do the mischief, or trespassing animals. In this last class of cases the gist of the action is the trespass, the injury being shown in aggravation of damages, and will be treated under trespassing animals.<sup>1</sup>

2. Injuries by Wild Animals. — The owner or keeper of a wild animal, an animal that is in its nature vicious, is, under all circumstances, *prima facie* liable for injuries done by such animal,<sup>2</sup> unless the person injured brings it upon himself.<sup>3</sup> While it is not unlawful for one to keep wild animals,<sup>4</sup> it is the duty of such person to keep them in such manner as will absolutely prevent injury to others through such vicious acts as they are by their natural propensities inclined to commit. He must keep them at his peril.<sup>5</sup>

An action for injuries by wild animals is civil in its nature and in jurisdictions where the common-law forms of action prevail, case is the proper remedy.<sup>6</sup> The gist of the action is the keeping of the animal with knowledge, actual or implied, of its vicious propensities.<sup>7</sup>

3. Injuries by Domestic Animals. — The owner of a domestic animal is not liable for an injury done by it unless he knew of its mischievous disposition, or could have known by the exercise of ordinary diligence.<sup>8</sup> At common law the gist of the action was the keep-

1. For matters of evidence, see ENCYCLOPAEDIA OF EVIDENCE, the title "Animals."

2. U. S. — Congress Springs Co. v. Edgar, 99 U. S. 645, 25 L. ed. 487. Ala. Hayes v. Miller, 150 Ala. 621, 43 So. 818, 124 Am. St. Rep. 93, 11 L. R. A. (N. S.) 748. Cal. — Gooding v. Chutes Co., 155 Cal. 620, 102 Pac. 819, 23 L. R. A. (N. S.) 1071. La. — Vredenburg v. Behan, 33 La. Ann. 627. N. Y. — Scribner v. Kelley, 38 Barb. 14. Wis. — Bormann v. City of Milwaukee, 93 Wis. 522, 67 N. W. 924, 33 L. R. A. 652. Eng. — Besozzi v. Harris, 1 F. & F. 92; Filburn v. The People's Palace, etc. Co., L. R. 25 Q. B. D. 258. Can. — Shaw v. McCreary, 19 Ont. 39.

3. Ervin v. Woodruff, 119 App. Div. 603, 103 N. Y. Supp. 1051; Besozzi v. Harris, 1 F. & F. 92; Filburn v. The People's Palace, etc. Co., L. R. 25 Q. B. D. 258.

4. Scribner v. Kelley, 38 Barb. (N. Y.) 14.

5. Ala. — Hayes v. Miller, 150 Ala.

621, 43 So. 818, 124 Am. St. Rep. 93, 11 L. R. A. (N. S.) 748. Cal. — Gooding v. Chutes Co., 155 Cal. 620, 102 Pac. 819, 23 L. R. A. (N. S.) 1071. Ia. — Parsons v. Manser, 119 Iowa 88, 93 N. W. 86, 97 Am. St. Rep. 283, 62 L. R. A. 132. La. — Vredenburg v. Behan, 33 La. Ann. 627. N. Y. — Scribner v. Kelley, 38 Barb. 14. Eng. — Besozzi v. Harris, 1 F. & F. 92.

6. Ala. — Durden v. Barnett, 7 Ala. 169. Ill. — Stumps v. Kelley, 22 Ill. 140. Mass. — Popplewell v. Pierce, 10 Cush. 509. Mich. — Brooks v. Taylor, 65 Mich. 208, 31 N. W. 837. Pa. — Mulherrin v. Henry, 11 Pa. Co., Ct. 49. R. I. — Fallon v. O'Brien, 12 R. I. 518, 34 Am. Rep. 713.

7. U. S. — Congress Springs Co. v. Edgar, 99 U. S. 645, 25 L. ed. 487. Ala. Hayes v. Miller, 150 Ala. 621, 43 So. 818, 124 Am. St. Rep. 93, 11 L. R. A. (N. S.) 748. Eng. — May v. Burdett, 9 Ad. & El. (N. S.) 101, 58 E. C. L. 99, 3 Eng. Rul. Cas. 108.

8. Ala. — Strouse v. Leipf, 101 Ala.

ing of the animal after notice of its vicious propensities, and this doctrine remains under most of the statutes.<sup>9</sup> In some instances, however, especially in the case of injuries by dogs, the statutes have changed the common law rule with regard to knowledge of the vicious propensities of the animal, and have made it unnecessary on the part of the injured party to allege or prove such knowledge.<sup>10</sup> Under such statutes it is generally held that negligence, in the ordinary sense of the word, is not the basis of the action.<sup>11</sup> But there are some cases holding the contrary.<sup>12</sup>

433, 14 So. 667, 46 Am. St. Rep. 122, 33 L. R. A. 622; *Durden v. Barnett*, 7 Ala. 169. Cal.—*Clowdis v. Fresno Flume & Irr. Co.*, 118 Cal. 315, 50 Pac. 373, 62 Am. St. Rep. 238; *Laverone v. Mangianti*, 41 Cal.—*Clowdis v. Fresno Flume & Irr. Co.* Southern Exp. Co., 95 Ga. 108, 22 S. E. 133, 51 Am. St. Rep. 62. Ill.—*Mareau v. Vanatta*, 88 Ill. 132; *Field v. Morrison*, 142 Ill. App. 454; *Feldman v. Sellig*, 110 Ill. App. 130; *Fritsche v. Clemow*, 109 Ill. App. 355. Ind.—*Klenberg v. Russell*, 125 Ind. 531, 25 N. E. 596; *Page v. Hollingsworth*, 7 Ind. 317. Mo.—*Bell v. Leslie*, 24 Mo. App. 661. N. J.—*Emmons v. Stevane*, 77 N. J. L. 570, 73 Atl. 544, 24 L. R. A. (N. S.) 458. Okla.—*Meegan Bros. v. McKay*, 1 Okla. 59, 30 Pac. 232. Wash.—*Lynch v. Kineth*, 36 Wash. 368, 78 Pac. 923, 104 Am. St. Rep. 958. W. Va.—*Johnston v. Mack Mfg. Co.*, 65 W. Va. 544, 64 S. E. 841, 131 Am. St. Rep. 979, 24 L. R. A. (N. S.) 1189. Wis.—*Bormann v. City of Milwaukee*, 93 Wis. 522, 67 N. W. 924, 33 L. R. A. 652; *Slinger v. Henneman*, 38 Wis. 504.

9. Ill.—*Ahlstrand v. Bishop*, 88 Ill. App. 424. Ind.—*Partlow v. Haggarty*, 35 Ind. 178. Mich.—*Brooks v. Taylor*, 65 Mich. 208, 31 N. W. 837. N. Y.—*Keenan v. Gutta Percha, etc. Co.*, 120 N. Y. 627, 24 N. E. 1096, *affirming* 46 Hun 544. Vt.—*Oakes v. Spaulding*, 40 Vt. 347, 94 Am. Dec. 404. Eng.—*May v. Burdett*, 9 Ad. & El. (N. S.) 101, 58 E. C. L. 99, 3 Eng. Rul. Cas. 108.

10. "Such being the common law, the statute now comes in and in the case of dogs removes the need of alleging and proving even the scienter. It makes the owner or keeper of a dog *prima facie* absolutely liable for an injury done by the animal. It leaves him where the common law left the keeper of a wild animal,—in the position of an insurer. It removes from the keeper of a dog, the protection of want of notice, which the common law allowed. He now keeps a dog at his peril. If the dog does an

injury, the injured party has an action both at common law and under the statute. At common law, as said by Lord Denman in *May v. Burdett*, the gist of the action was the keeping of the animal after notice of his injurious propensities. Under the statute the gist of the action is simply the keeping of the dog. The statute has made all else immaterial." *Hussey v. King*, 83 Me. 568, 22 Atl. 476.

11. Ill.—*Hammond v. Melton*, 42 Ill. App. 186. Me.—*Hussey v. King*, 83 Me. 568, 22 Atl. 476. Mass.—*Popplewell v. Pierce*, 10 Cush. 509. Mich.—*Brooks v. Taylor*, 65 Mich. 208, 31 N. W. 837. N. Y.—*Keenan v. Gutta Percha, etc. Co.*, 120 N. Y. 627, 24 N. E. 1096, *affirming* 46 Hun 544.

"It may be that, in a certain sense, an action against an owner for injury by a vicious dog or other animal is based upon negligence; but such negligence consists, not in the manner of keeping or confining the animal or the care exercised in respect of confining him, but the fact that he is ferocious and that the owner knows it, and proof that he is of a savage and ferocious nature is equivalent to express notice. The negligence consists in keeping such animal." *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123.

12. *Williams v. Moray*, 74 Ind. 25, 39 Am. Rep. 76.

The liability of the owner or keeper of an animal of any description for an injury committed by such animal is founded upon negligence, actual or presumed. *Scribner v. Kelley*, 38 Barb. (N. Y.) 14.

"The gist of such an action as this is not the keeping of the dog with knowledge of his dangerous nature, but rather the negligent failure to properly restrain the animal and to keep him so safely that he may not injure anyone who is lawfully at the place." *Hayes v. Smith*, 62 Ohio St. 161, 56 N. E. 879.

The action is remedial and not penal in its nature, even under statutes giving double damages,<sup>13</sup> and case<sup>14</sup> or trespass<sup>15</sup> is the proper remedy.

**B. PARTIES.**—A party who keeps, harbors, controls or has the custody of a dangerous or vicious animal, with knowledge of its vicious propensities, is liable for injuries caused by it, regardless of the ownership of the animal,<sup>16</sup> even though the keeping is without the consent and against the wishes of the owner.<sup>17</sup> Thus administrators,<sup>18</sup> executors,<sup>19</sup> corporations,<sup>20</sup> or the officers thereof,<sup>21</sup> members of a partnership,<sup>22</sup> railroads,<sup>23</sup> and ships,<sup>24</sup> have been

13. *Leone v. Kelly*, 77 Conn. 569, 60 Atl. 136.

14. "With notice of the vicious propensities of the animal, the action must be case and not trespass." *Stumps v. Kelley*, 22 Ill. 140. See also *Durden v. Barnett*, 7 Ala. 169.

15. *Hussey v. King*, 83 Me. 568, 22 Atl. 476.

16. *Ala.*—*Hayes v. Miller*, 150 Ala. 621, 43 So. 818, 124 Am. St. Rep. 93, 11 L. R. A. (N. S.) 748. *Cal.*—*Wilkinson v. Parrott*, 32 Cal. 102. *Colo.*—*Hornbein v. Blanchard*, 4 Colo. App. 92, 35 Pac. 187. *Iowa.*—*Schultz v. Griffith*, 103 Iowa 150, 72 N. W. 445, 40 L. R. A. 117. *Mo.*—*Hall v. Huber*, 61 Mo. App. 384. *N. Y.*—*Marsh v. Hand*, 120 N. Y. 315, 24 N. E. 463, *affirming* 40 Hun 339; *Bundschuh v. Mayer*, 81 Hun 111, 30 N. Y. Supp. 622, 1 N. Y. Ann. Cas. 60; *Lawlor v. French*, 14 Misc. 497, 35 N. Y. Supp. 1077.

"Where the owner of a dog placed it in the hands of another to prevent creditors from attaching it, such other person is a keeper of the dog under the statute and liable for injuries committed by it." *Marsh v. Jones*, 21 Vt. 378, 52 Am. Dec. 67.

"One may harbor a vicious dog without being the owner of the animal or controlling the premises on which it is kept." *Hayes v. Smith*, 62 Ohio St. 161, 56 N. E. 879.

"But while it is true that a person, not the owner of a dog, may be liable as its keeper, the mere fact that a dog is kept by its owner on the premises of another, with the knowledge, or acquiescence or permission of such owner, does not of itself make the owner of said premises the keeper of the dog." *Whittemore v. Thomas*, 153 Mass. 347, 26 N. E. 875. See also *Ky.*—*Bush v. Wathen*, 104 Ky. 548, 47 S. W. 599. *Me.*—*McCosker v. Weatherbee*, 100 Me. 25, 59 Atl. 1019. *Mass.*—*Boylan v. Everett*,

172 Mass. 453, 52 N. E. 541; *O'Donnell v. Pollock*, 170 Mass. 441, 49 N. E. 745. *N. Y.*—*Laguttuta v. Chisolm*, 65 App. Div. 326, 72 N. Y. Supp. 905. *Pa.*—*Fitzgerald v. Brophy*, 1 Pa. Co. Ct. 142.

As to who is a keeper or harbinger of a dog, see generally, *Holmes v. Murray*, 207 Mo. 413, 105 S. W. 1085, 123 Am. St. Rep. 386, 17 L. R. A. (N. S.) 431, and cases cited in note.

17. *Mitchell v. Chase*, 87 Me. 172, 32 Atl. 867; *Burnham v. Strother*, 66 Mich. 519, 33 N. W. 410.

18. *McAdams v. Starr*, 74 Conn. 85, 49 Atl. 897, 92 Am. St. Rep. 197.

19. *Hayes v. Smith*, 15 Ohio C. C. 300.

20. *Cal.*—*Gooding v. Chutes Co.*, 155 Cal. 620, 102 Pac. 819, 23 L. R. A. (N. S.) 1071; *Clowdis v. Fresno Flume & Irr. Co.*, 118 Cal. 315, 50 Pac. 373, 62 Am. St. Rep. 238. *N. Y.*—*Keenan v. Gutta Percha Mfg. Co.*, 46 Hun 544. *Wash.*—*Harris v. Carsteus Pack. Co.*, 43 Wash. 647, 86 Pac. 1125, 6 L. R. A. (N. S.) 1164. *W. Va.*—*Johnston v. Mack Mfg. Co.*, 65 W. Va. 544, 64 S. E. 841, 131 Am. St. Rep. 979, 24 L. R. A. (N. S.) 1189.

The fact that a dog was kept by the superintendent of a poor farm with the knowledge of the overseers, and fed with food furnished by the county, does not show that the city was the keeper of the dog so as to render it liable for injuries caused by it. *Collingill v. City of Haverhill*, 128 Mass. 218.

21. *Lawlor v. French*, 14 Misc. 497, 39 N. Y. Supp. 1077.

22. *Grant v. Ricker*, 74 Me. 487; *Grisom v. Hofius*, 39 Wash. 51, 80 Pac. 1002.

23. *Ill.*—*Chicago & A. R. Co. v. Kuckkuck*, 197 Ill. 304, 64 N. E. 358. *Mass.*—*Barrett v. Malden, etc. R. Co.*, 3 Allen 101. *N. Y.*—*McGarry v. New York & H. R. Co.*, 18 N. Y. Supp. 195, 45 N. Y. St. 564.

24. *The Lord Derby*, 17 Fed. 265.



held liable as keepers. A master is liable for an injury caused by a dog kept by a servant on his premises with his knowledge and consent.<sup>25</sup> So, also, is a father where the dog is kept on the premises by his minor child.<sup>26</sup>

A married woman is liable as keeper of a dog owned by her husband where she owns, and has absolute control of, the premises,<sup>27</sup> but she is not liable where her own dog is kept on premises controlled by her husband.<sup>28</sup>

**C. COMPLAINT. — 1. Sufficiency.** — Where an action for injury by animals is brought under a statute, all the facts necessary to bring the action within the statute must be alleged.<sup>29</sup> The pleading should set forth the facts with certainty and not in doubtful terms.<sup>30</sup> It is

25. *Mass.* — *Barrett v. Malden*, etc R. Co., 3 Allen 101. *N. C.* — *Harris v. Fisher*, 115 N. C. 318, 20 S. E. 461, 44 Am. St. Rep. 452. *Tex.* — *Barklow v. Avery*, 40 Tex. Civ. App. 355, 89 S. W. 417. See also *Fye v. Chapin*, 121 Mich. 675, 80 N. W. 797.

The owner of the premises is not liable where he has no control over the servant's dog. *Whallen v. Wetzell*, 6 Ky. L. Rep. 50.

Where the defendant employed a man to work for him, furnishing such man a separate house to live in, and the servant kept a vicious dog, the owner of the premises was not liable for an injury by the dog unless he had knowledge of his vicious disposition. *Simpson v. Griggs*, 58 Hun 393, 12 N. Y. Supp. 162.

A principal is not responsible for injuries by a dog kept by his agent unless he authorized the agent to keep the dog, or it was necessary that the dog be kept for the conduct or protection of the business. *Baker v. Kinsey*, 38 Cal. 631, 99 Am. Dec. 438.

26. *Cummings v. Riley*, 52 N. H. 368; *Plummer v. Ricker*, 71 Vt. 114, 41 Atl. 1045, 76 Am. St. Rep. 757.

See also *Mich.* — *Jenkinson v. Cogins*, 123 Mich. 7, 81 N. W. 974. *N. Y.* — *Duval v. Barnaby*, 75 App. Div. 154, 77 N. Y. Supp. 337. *Pa.* — *Snyder v. Patterson*, 161 Pa. 98, 28 Atl. 1006. *Can.* — *Vaughan v. Wood*, 28 N. B. 472, 18 Can. S. C. 703.

27. *Quilty v. Battie*, 135 N. Y. 201, 32 N. E. 47, 17 L. R. A. 521; *Valentine v. Cole*, 1 N. Y. St. 719; *Shaw v. McCreary*, 19 Ont. 39; *Hugron v. Statton*, 18 Rapport's Jud. Off. De Quebec 200.

But see *Burch v. Lowary*, 131 Iowa 719, 109 N. W. 282, 117 Am. St. Rep.

143; *McLaughlin v. Kemp*, 152 Mass. 7, 25 N. E. 18.

28. *Strouse v. Leipf*, 101 Ala. 433, 14 So. 667, 46 Am. St. Rep. 122, 23 L. R. A. 622.

29. *Monroe v. Rose*, 38 Mich. 347.

An allegation merely that the dog was accustomed to bite, without further allegation, is insufficient. *Keightlinger v. Egan*, 65 Ill. 235; *Feldman v. Sellig*, 110 Ill. App. 130.

Where the statute makes either the owner or keeper liable for injuries inflicted by an animal, it is not necessary to allege and prove that the defendant is the owner. An allegation that he is the keeper is sufficient. *Wilkinson v. Parrott*, 32 Cal. 102.

A complaint alleging that the defendant wrongfully kept a dog and negligently suffered it to go at large, that he knew that the animal was accustomed to commit such injuries, and that the plaintiff was injured without fault on his part, is sufficient. *Partlow v. Haggarty*, 35 Ind. 178.

**Amendment.** — A declaration in the common law form, in an action of trespass against the keeper of a dog for injuries caused by such dog, is amendable by adding an averment thereto that the action is brought under the statute, which allows the recovery of double damages for such injury. *Mitchell v. Chase*, 87 Me. 172, 32 Atl. 867.

**Misjoinder of Causes of Action.** — *Mosier v. Beale*, 43 Fed. 358, was an action by husband and wife in which it was alleged that the injuries were inflicted on the wife, and that "both plaintiffs herein have been injured." A demurrer was sustained because, while the husband was a proper party, he could not himself recover in this action.

30. *Murphy v. Preston*, 5 Mackey (D. C.) 514.

generally sufficient to allege the mischievous or vicious disposition of the animal, the injury resulting therefrom, and *scienter*.<sup>31</sup> It is not necessary to allege that the animal was not confined, as that is an affirmative defense which the defendant must allege and prove.<sup>32</sup>

**Contrary to the Form of the Statute.**—As the action is remedial and not penal in its nature, it need not be alleged that the act was committed contrary to the form of the statute.<sup>33</sup>

**2. Allegations of *Scienter*.**—At the common law it was necessary to allege and prove the vicious propensities of the animal committing the injury and that the owner or keeper had knowledge thereof,<sup>34</sup> except in the case of wild animals, where knowledge was conclusively presumed.<sup>35</sup> This is still the rule in most states under the statutes with regard to such animals as are not inclined by nature to be vicious, the common law being in force where not abrogated by statute.<sup>36</sup>

But the statutes in some states make an exception to the rule in cases of injuries by dogs, making it unnecessary either to allege or prove knowledge on the part of the owner or keeper, of the vicious disposition of the animal.<sup>37</sup> Such statutes, however, do not super-

31. *Graham v. Payne*, 122 Ind. 403, 24 N. E. 216.

32. *Graham v. Payne*, 122 Ind. 403, 24 N. E. 216.

33. *Mitchell v. Clapp*, 12 Cush. (Mass.) 278.

It is enough if the averments of the complaint are such as to show that the act is brought upon the statute and not otherwise. *Leone v. Kelly*, 77 Conn. 569, 60 Atl. 136.

Under the Kentucky statute providing that the owner or keeper should be liable for injury by a vicious dog unless the injury occurred on defendant's premises at night, or while the plaintiff was engaged in an unlawful act, such exception not being in the enacting clause but in a subsequent clause, the plaintiff need not allege that he is not within the exception, as such fact is a matter of defense. *Bush v. Wathen*, 104 Ky. 548, 47 S. W. 599.

34. **U. S.**—*Congress Springs Co. v. Edgar*, 99 U. S. 649, 25 L. ed. 487. **Conn.** *Leone v. Kelly*, 77 Conn. 569, 60 Atl. 136. **Del.**—*Friedman v. McGowan*, 1 Penne. 436, 42 Atl. 723. **D. C.**—*Murphy v. Preston*, 5 Mackey 514. **Ill.**—*Mareau v. Vanatta*, 88 Ill. 132; *Feldman v. Selig*, 110 Ill. App. 130. **Eng.**—*Jackson v. Mathison*, 15 M. & W. 563; 1 Chitty's Pleadings 82.

An allegation that defendant prior to and on the date of the injury wrongfully and negligently allowed his dog

to run at large, knowing his vicious propensity, is a sufficient allegation that at the time of the injury the defendant knowingly allowed a vicious dog to run at large. *Clanin v. Fagan*, 124 Ind. 304, 24 N. E. 1044.

An allegation that the animals were accustomed to bite mankind and that this propensity was known to the owner, is a sufficient allegation of *scienter*. *Durden v. Barnett*, 7 Ala. 169.

“By the common law the owner of domestic or other animals not naturally inclined to commit mischief, as dogs, horses and oxen, is not liable for any injury committed by them to the person or personal property unless it can be shown that he previously had notice of the animal's vicious propensity, or that the injury was attributable to some other neglect on his part, it being in general necessary in an action for injury committed by such animals to allege and prove *scienter*.” *Stumps v. Kelley*, 22 Ill. 140.

35. **U. S.**—*Congress Springs Co. v. Edgar*, 99 U. S. 649, 25 L. ed. 487. **Mass.** *Popplewell v. Pierce*, 10 Cush. 509. **Eng.**—*May v. Burdett*, 9 Ad. & El. (N. S.) 101, 58 E. C. L. 99, 3 Eng. Rul. Cas. 108; *Kelly v. Wade*, 12 Irish L. R. 424.

36. *Murphy v. Preston*, 5 Mackey (D. C.) 514; *Mareau v. Vanatta*, 88 Ill. 132; *Fritsche v. Clemow*, 109 Ill. App. 355.

37. *Leone v. Kelly*, 77 Conn. 569, 60 Atl. 136.

side the common law, but are intended to give a liberal remedy to the injured party.<sup>38</sup>

3. **Allegations of Negligence.**—In cases of injury by wild animals it is not necessary to allege negligence on the part of the keeper or owner.<sup>39</sup>

The same rule applies in the case of injuries by domestic animals that have become dangerous and vicious. It is sufficient in such a case to allege the keeping of the animal with knowledge of its vicious propensities.<sup>40</sup> It is not necessary to allege that the keeper was negligent in securing or taking care of the animal.<sup>41</sup>

4. **Negating Contributory Negligence.**—The courts are divided on the question of whether it is necessary for the plaintiff to allege that he was in the exercise of due care and was without fault. In some states such allegations are required,<sup>42</sup> but the better rule seems to be that it is unnecessary to allege want of contributory negligence, such being a matter of defense to be alleged and proved by the defendant.<sup>43</sup>

38. *Monroe v. Rose*, 33 Mich. 347.

39. *Jackson v. Baker*, 24 App. Cas. (D. C.) 100.

"Animals *feræ naturæ*, as a class, are known to be mischievous, and the rule is well settled that whoever undertakes to keep such an animal in places of public resort, is or may be liable for the injuries inflicted by it on a party who is not guilty of negligence and is otherwise without fault. . . . And it is an established rule of pleading that it is not necessary to aver negligence in the owner or keeper, as the burden is on the defendant to disprove that implied imputation." *Congress Springs Co. v. Edgar*, 99 U. S. 645, 25 L. ed. 487.

40. Ill.—*Ahlstrand v. Bishop*, 88 Ill. App. 424. Ind.—*Graham v. Payne*, 122 Ind. 403, 24 N. E. 216; *Guenther v. Fohey*, 26 Ind. App. 93, 59 N. E. 18. Mass.—*Popplewell v. Pierce*, 10 Cush. 509. Mich.—*Brooks v. Taylor*, 65 Mich. 208, 31 N. W. 837. N. Y.—*Woodbridge v. Marks*, 14 Misc. 368, 36 N. Y. Supp. 81; *Rogers v. Rogers*, 4 N. Y. St. 373. Eng.—*May v. Burdett*, 9 Ad. & El. (N. S.) 101, 58 E. C. L. 99, 3 Eng. Rul. Cas. 108; *Jackson v. Smithson*, 15 M. & W. 563.

41. Conn.—*Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175. Ind.—*Partlow v. Haggarty*, 35 Ind. 178. Mich.—*Brooks v. Taylor*, 65 Mich. 208, 31 N. W. 837. S. C.—*McCaskill v. Elliott*, 5 Strob. L. 196, 53 Am. Dec. 706. Eng.—*May v. Burdett*, 9 Ad. & El. (N. S.) 101, 58 E. C. L. 99, 3 Eng. Rul. Cas. 108.

42. Ill.—*Ward v. Danzeizen*, 111 Ill. App. 163. Ind.—*Williams v. Moray*, 74 Ind. 25, 39 Am. Rep. 76. Me.—*Garland v. Hewes*, 101 Me. 549, 64 Atl. 914.

In Indiana the rule has been changed by statute and contributory negligence is a defense, provable under the general denial. *Burns' Statute*, 1908, § 362.

The effect of the statute in New Hampshire is to obviate the necessity of proving *scienter*, but it does not establish an absolute liability of the owner. It must appear that the plaintiff was not a trespasser when the injury was received, and the doctrine of contributory negligence is applicable. *Quimby v. Woodbury*, 63 N. H. 370.

43. Conn.—*Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175. Ill.—*Chicago & A. R. Co. v. Kuckkuck*, 197 Ill. 304, 64 N. E. 358. Iowa.—*Miles v. Schrunck*, 139 Iowa 563, 117 N. W. 971; *Beckler v. Merringer*, 131 Iowa 614, 109 N. W. 185. Me.—*Hussey v. King*, 83 Me. 568, 22 Atl. 476. Md.—*Twigg v. Ryland*, 62 Md. 380. Mass.—*Popplewell v. Pierce*, 10 Cush. 509. Mich.—*Brooks v. Taylor*, 65 Mich. 208, 31 N. W. 837. N. Y.—*Woodbridge v. Marks*, 14 Misc. 368, 36 N. Y. Supp. 81. Eng.—*May v. Burdett*, 9 Ad. & El. (N. S.) 101, 58 E. C. L. 99, 3 Eng. Rul. Cas. 108; *Jackson v. Smithson*, 15 M. & W. 563.

The rule has since been changed in Maine by statute making such allegation necessary. *Pub. L., Maine*, 1903, c. 109.



D. PRESUMPTIONS. — There is no presumption that domestic animals are vicious,<sup>44</sup> but wild animals are presumed to be dangerous.<sup>45</sup> Negligence will be presumed where the owner had knowledge of the vicious nature of the animals,<sup>46</sup> or where the injury was caused by a wild animal.<sup>47</sup>

A man is presumed to be the owner of dogs kept or harbored on premises belonging to him.<sup>48</sup>

The keeper's knowledge of the vicious propensities of his dog will be presumed from the fact that he was accustomed to keep it tied during the daytime.<sup>49</sup>

E. BURDEN OF PROOF. — The burden of proving the defendant's knowledge of the vicious propensities of the animals committing the injury is on the plaintiff.<sup>50</sup> And where the right to recover depends upon the exercise of due care by the plaintiff to prevent the injury, the burden is upon him to show that he was without fault.<sup>51</sup>

F. DEFENSES. — That the party injured, knowing the dangerous propensity of the animal, wantonly incited or provoked it, and voluntarily and unnecessarily put himself in its way, is an affirmative defense and should be alleged and proved.<sup>52</sup>

44. *Laverone v. Mangianti*, 41 Cal. 138, 10 Am. Rep. 269; *Ward v. Danzeisen*, 111 Ill. App. 163.

45. *Scribner v. Kelly*, 38 Barb. (N. Y.) 14.

46. *May v. Burdett*, 9 Ad. & El. (N. S.) 101, 58 E. C. L. 99, 3 Eng. Rul. Cas. 108.

"In some of the cases it is said that from the vicious propensity and knowledge of the owner, negligence will be presumed, and in others, that the owner is *prima facie* liable. This language does not mean that the presumption or *prima facie* case may be rebutted by proof of any amount of care on the part of the owner in keeping or restraining the animal, and unless he can be relieved by some act or omission on the part of the person injured, his liability is absolute." *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123.

47. *Scribner v. Kelley*, 38 Barb. (N. Y.) 14.

48. *Bundschuh v. Mayer*, 81 Hun 111, 30 N. Y. Supp. 622, 1 N. Y. Ann. Cas. 60.

49. *Del.* — *Warner v. Chamberlain*, 7 Houst. 18, 30 Atl. 638. *Md.* — *Goode v. Martin*, 57 Md. 606, 1 Am. Neg. Cas. 124, 40 Am. Rep. 448. *N. Y.* — *Buckley v. Leonard*, 4 Denio 500. *Eng.* — *Jones v. Perry*, 2 Esp. 482.

50. *Ill.* — *West Chicago, etc. R. Co. v. Walsh*, 78 Ill. App. 595. *Md.* — *Twigg v. Ryland*, 62 Md. 380. *Mo.* — *Bell v.*

*Leslie*, 24 Mo. App. 661. *N. Y.* — *Laguttata v. Chisolm*, 65 App. Div. 326, 72 N. Y. Supp. 905.

51. *Garland v. Hewes*, 101 Me. 549, 64 Atl. 914; *Spellman v. Dyer*, 186 Mass. 176, 71 N. E. 295; *Raymond v. Hodgson*, 161 Mass. 184, 36 N. E. 791.

52. *Conn.* — *Kelley v. Killourey*, 81 Conn. 320, 70 Atl. 1031, 129 Am. St. Rep. 220. *Ill.* — *Chicago & A. R. Co. v. Kuckkuck*, 197 Ill. 304, 64 N. E. 358. *Mich.* — *Brooks v. Taylor*, 65 Mich. 208, 31 N. W. 837. *Minn.* — *Fake v. Addicks*, 45 Minn. 37, 47 N. W. 450, 22 Am. St. Rep. 716. *N. Y.* — *Lynch v. McNally*, 73 N. Y. 347; *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123; *Ervin v. Woodruff*, 119 App. Div. 603, 103 N. Y. Supp. 1051. *R. I.* — *Peck v. Williams*, 24 R. I. 583, 54 Atl. 381, 61 L. R. A. 351.

Where the action of the plaintiff in inciting and provoking the animal is relied upon as a defense, such act must be in some way connected with the acts producing the injury. Previous acts which are in no manner connected with the occasion in question are not available as a defense. *Schilling v. Smith*, 76 App. Div. 464, 78 N. Y. Supp. 586.

This defense, however, depends upon knowledge and it is only after notice that the public is required to be on guard to avoid injury. *Chicago & A. R. Co. v. Kuckkuck*, 197 Ill. 304, 64 N. E. 358.

**Contributory negligence** is a good defense in those jurisdictions holding that the plaintiff must show his freedom from fault.<sup>53</sup> But it is held in others that as negligence is not the basis of the action, contributory negligence on the part of the injured is no defense.<sup>54</sup>

**Negligence of a Fellow Servant.**—For the same reason it has been held that negligence of a co-servant is not a defense where the keeper had knowledge of the dangerous nature of the animal.<sup>55</sup>

**G. PROVINCE OF THE JURY.**—Where the liability of the defendant depends on the want of care or contributory negligence of the plaintiff, such fact is a question for the jury.<sup>56</sup> So, also, is the question of ownership or control of the animal committing the injury,<sup>57</sup> and in some cases the keeper's knowledge of vicious propensities of the animal.<sup>58</sup>

**II. INJURIES TO OTHER ANIMALS.**—**A. IN GENERAL.**—At common law in an action for injuries to other animals by domestic animals, it is necessary to allege and prove that the owner had notice or knowledge of the vicious propensities of his animals,<sup>59</sup> except

53. *Ward v. Danzeizen*, 111 Ill. App. 163; *Garland v. Hewes*, 101 Me. 549, 64 Atl. 914.

54. *Lynch v. McNally*, 73 N. Y. 347; *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123.

The owner or harbinger of a vicious dog, who knows of his vicious habits, is grossly or wilfully negligent and cannot set up a plea of contributory negligence on the part of a traveler who is injured. *Jones v. Carey*, 9 Houst. (Del.) 214, 31 Atl. 976.

Where the injury is caused by a wild animal it is no defense to allege "that said animal was not known to be fierce, dangerous and irreclaimable, but had been domesticated to such an extent as to lead those acquainted with its habits to believe that no harm would come from contact with it; that defendant had known the animal for some weeks before the alleged injury to plaintiff, and had never known it to harm anyone, although it had been brought constantly in contact with other people." *Hayes v. Miller*, 150 Ala. 621, 43 So. 818, 124 Am. St. Rep. 93, 11 L. R. A. (N. S.) 748.

55. *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123. See also *Talmage v. Mills*, 80 App. Div. 382, 80 N. Y. Supp. 637.

56. *Iowa*.—*Meier v. Shrunk*, 79 Iowa 17, 44 N. W. 209. *Ky.*—*Wolff v. Lamann*, 108 Ky. 343, 56 S. W. 408. *Mass.* *Spellman v. Dyer*, 186 Mass. 176, 71 N. E. 295; *Raymond v. Hodgson*, 161 Mass. 184, 36 N. E. 791; *Matteson v.*

*Strong*, 159 Mass. 497, 34 N. E. 1077; *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692. *Mich.*—*Barnum v. Terpening*, 75 Mich. 557, 42 N. W. 967.

57. *Mass.*—*Boylan v. Everett*, 172 Mass. 453, 52 N. E. 541; *O'Donnell v. Pollock*, 170 Mass. 441, 49 N. E. 745; *Whittemore v. Thomas*, 153 Mass. 347, 26 N. E. 875; *McLaughlin v. Kemp*, 152 Mass. 7, 25 N. E. 18. *N. Y.*—*Clark v. Disbrow*, 77 App. Div. 647, 79 N. Y. Supp. 126; *Laguttuta v. Chisolm*, 65 App. Div. 326, 72 N. Y. Supp. 905. *Vt.* *Corliss v. Smith*, 53 Vt. 532.

58. *Ind.*—*Cockerham v. Nixon*, 11 Ind. 269. *Md.*—*Goode v. Martin*, 57 Md. 606, 40 Am. Rep. 448. *N. Y.*—*Hahnke v. Friederich*, 140 N. Y. 224, 35 N. E. 487; *Bauer v. Lyons*, 23 App. Div. 204, 48 N. Y. Supp. 729; *Turner v. Craighead*, 83 Hun 112, 31 N. Y. Supp. 369; *O'Connell v. Mooney*, 32 Misc. 641, 66 N. Y. Supp. 486; *McGarry v. New York & H. R. Co.*, 18 N. Y. Supp. 195, 45 N. Y. St. 564. *Wash.*—*Grissom v. Hofius*, 39 Wash. 51, 80 Pac. 1002.

59. "If domestic animals, such as oxen and horses, injure anyone in person and property, if they are rightfully in the place where they do the mischief, the owner of such animals is not liable for such injury, unless he knew that they were accustomed to do mischief. And in suits for such injuries, such knowledge must be alleged and proved. For unless the owner knew that the beast was vicious, he is not liable. If the owner had such knowledge he is liable." *Decker v. Gammon*, 44 Me. 322, 69 Am. Dec. 99.

where the injury was committed after the animals had broken into the close of another. In the latter case the ground of the action is that the animals were wrongfully in the place where the injury was committed.<sup>60</sup> The statutes of most states have modified the common law rule, making the owner liable in some cases, regardless of his knowledge of the mischievous disposition of his animals.<sup>61</sup> And it is never necessary to allege or prove that the owner of wild beasts knew they were vicious, and it is not necessary to aver that he was negligent in allowing them to run at large, for he is bound to keep them shut up at his own peril.<sup>62</sup>

**B. REMEDIES. — 1. In General.** — A person has the right to protect himself and property from injury by animals, and may even kill the injuring animals when the circumstances justify it, or as in the case of dogs when they are running at large in violation of statute.<sup>63</sup>

**2. Actions. — a. In General.** — The actions of trespass or case are the remedies usually provided by statute for injury to animals by other animals, and either may be maintained at common law, according to the circumstances of the case.<sup>64</sup>

**Joinder.** — An action under the statute for double damages may be joined with a common law action of the same kind when the form of action is the same.<sup>65</sup>

**b. Parties.** — Only the owners and keepers of animals are liable for their injuries.<sup>66</sup> In case the injury is committed by several animals belonging to different persons, as where several dogs unite in killing sheep, the owner cannot maintain a joint action for the injury, in the absence of a statute making the several owners jointly liable.<sup>67</sup> In such case the plaintiff should elect to proceed against

60. *Decker v. Gammon*, 44 Me. 322, 69 Am. Dec. 99.

61. *Newton v. Gordon*, 72 Mich. 642, 40 N. W. 921.

62. 1 Hale P. C. 430; *Rex v. Huggins*, 2 Raym. 1583, 92 Eng. Reprint 524; *Mason v. Kieling*, 12 Mod. 333, 88 Eng. Reprint 1359.

63. In such case the relative value of animals is a proper circumstance to consider in determining whether the defense was reasonable under the circumstances. *Anderson v. Smith*, 7 Ill. App. 354.

64. *Newton v. Gordon*, 72 Mich. 642, 40 N. W. 921.

In an action for damages for killing plaintiff's horse by defendant's cow, the plaintiff named the original action "trespass" but later in an appeal to the county court amended and called the action trespass on the case. There was no material change in the declaration, the same having been named wrongly in the first instance. *Cogswell v. Baldwin*, 15 Vt. 404, 40 Am. Dec. 686.

"If sheep are killed by a dog known

to its owner to have a mischievous propensity that way, and suffered by him to be at large, the injury to the rights of property of the owner of the sheep is, at common law, attributed to the negligence of the owner of the dog, and an action on the case lies against him to recover such damages therefor, as the jury under the general rule of law on the subject of damages recoverable in that form of action, shall think him entitled to." *Cockfield v. Singletary*, 15 Rich. L. (S. C.) 240.

65. *Fairfield v. Burt*, 11 Pick. (Mass.) 244.

66. *Adams v. Hall*, 2 Vt. 9, 16 Am. Dec. 690.

The term "keeper" includes one who knowingly permits his servant to harbor a dog on his premises (*Jacobsmeier v. Poggemoeller*, 47 Mo. App. 560), and a father whose daughter, with his consent, keeps dogs on his premises (*Holmes v. Murray*, 207 Mo. 413, 105 S. W. 1085, 123 Am. St. Rep. 386, 17 L. R. A. [N. S.] 431).

67. Conn. — *Russell v. Tomlinson*, 2



one of the defendants solely for the separate damage done by his dog. and such proceeding will not bar a subsequent action against the other parties.<sup>68</sup> And where no joint action is allowed, the owner is liable only for the amount of damage done by his animal.<sup>69</sup> But where the statute permits a joint action, each owner is liable for the whole damage done in which his dog is jointly engaged.<sup>70</sup>

c. *Pleading*.—(1.) *Sufficiency*.—In order to recover damages for sheep killed by dogs, in an action under the statute, the pleadings must show that the defendants are within the statute.<sup>71</sup> While it is necessary to allege only that the defendant is the owner of the animal, if it is alleged that he is both owner and keeper, such allegation is descriptive and must be proved as laid.<sup>72</sup> An allegation that the dogs committing an injury were kept by "said defendants" is sufficient under a statute making each owner jointly and severally liable for all damage, although the proof should show that the dogs

Conn. 206. Minn.—Nohre v. Wright, 98 Minn. 477, 108 N. W. 865. N. Y.—Van Steenburgh v. Tobias, 17 Wend. 562; 31 Am. Dec. 310; Carroll v. Weiler, 4 Thomp. & C. 131, 1 Hun 605. Vt.—Adams v. Hall, 2 Vt. 9, 19 Am. Dec. 690.

But where different parties turn their horses into the pasture of another and they injure the latter's stock, a recovery may be had against one or all, as the parties are joint wrongdoers and the right of action does not depend upon the ownership of the horses. Martin v. Farrell, 66 App. Div. 177, 72 N. Y. Supp. 934.

"There is nothing in the statute making the wrong the joint wrong of the respective owners. Each is responsible only for the act of his own animal, and must be sued separately therefor." Dyer v. Hutchins, 87 Tenn. 198, 10 S. W. 194.

68. Van Steenburgh v. Tobias, 17 Wend. (N. Y.) 562, 31 Am. Dec. 310.

If dogs owned by different individuals unite in injuring sheep, trespass under the Vermont statutes may be maintained against one only of the owners, although the other is known to the defendant. Rowe v. Bird, 48 Vt. 578.

69. Conn.—Russell v. Tomlinson, 2 Conn. 206. Ind.—Denny v. Correll, 9 Ind. 72. Iowa.—Anderson v. Halverson, 126 Iowa 125, 101 N. W. 781. Mass.—Worcester County v. Ashworth, 160 Mass. 186, 35 N. E. 773; Buddington v. Shearer, 20 Pick. 477. N. J.—Nierenberg v. Wood, 59 N. J. L. 112, 35 Atl. 654. N. Y.—Auchmuty v. Ham, 1 Denio 495; Van Steenburgh v. Tobias, 17

Wend. 562, 31 Am. Dec. 310; Wilbur v. Hubbard, 35 Barb. 303; Carroll v. Weiler, 4 Thomp. & C. 131, 1 Hun 605.

70. Pa.—Kerr v. O'Connor, 63 Pa. 341. Vt.—Fairchild v. Rich, 68 Vt. 202, 34 Atl. 692. Wis.—Nelson v. Nugent, 106 Wis. 477, 82 N. W. 287, 80 Am. St. Rep. 51.

71. Adams v. Hall, 2 Vt. 9, 16 Am. Dec. 690.

A declaration that the "defendant did wrongfully maim, wound and kill the hogs of plaintiff" is a sufficient statement of the plaintiff's cause of action, where his hogs had been killed by vicious dogs belonging to defendant. Hale v. Van Dever, 67 Mo. 732.

72. Buddington v. Shearer, 20 Pick. (Mass.) 477.

A complaint in an action to recover a penalty for not killing a sheep-killing dog is bad if it fails to allege that defendant was owner, since a penalty cannot be recovered for mere possession of a dog. Williamson v. Carroll, 16 N. J. L. 217.

In an action of trespass under the statute, if the plaintiff allege that on a day at a place specified, the defendant was the "keeper" of a dog and had been for sometime prior thereto, and that said plaintiff at said time and place owned and had in possession a large number of sheep, and that defendant's dog killed and destroyed a number of said plaintiff's sheep, held that plaintiff need not prove that defendant owned the dog. If he satisfied the jury that defendant was keeping the dog it is sufficient. Smith v. Montgomery, 52 Me. 178.

were separately owned by the defendants.<sup>73</sup> It is not necessary to allege negligence where defendant permitted a vicious dog to run at large.<sup>74</sup>

**Contrary to the Forms of the Statute.**—In some states it is necessary to allege that the offense was committed contrary to the form of the statute, otherwise the action will be considered as brought at common law, and the plaintiff held to such allegations and proof as the common law requires.<sup>75</sup>

**(II.) Allegation of Knowledge.**—At the common law when the injury was committed at a place where the animal had a right to be, it was necessary to allege and prove that the owner of the animal had notice of its mischievous propensities.<sup>76</sup> In the case of injury by trespassing animals, no allegation of *scienter* is necessary.<sup>77</sup> The rule requiring an averment of *scienter* in cases of injuries by dogs has been abolished in most states by statute, and an allegation of injury and damage is all that is required.<sup>78</sup> In such states, where knowledge is alleged, it will be treated as surplusage and a recovery may be had although there is no evidence in support of such allegation.<sup>79</sup>

73. *McAdams v. Sutton*, 24 Ohio St. 333.

A declaration that "this dog by defendant owned and kept, did [at a time and place named], worry, wound and kill thirty of plaintiff's sheep, to the great damage of the plaintiff, and contrary to the form, force and effect of the statute," is sufficient under the statute. *Rowe v. Bird*, 48 Vt. 578.

74. *Snow v. McCracken*, 107 Mich. 49, 64 N. W. 866.

A complaint setting forth the fact that "defendant kept a dog that was in the habit of worrying and injuring cattle, and that the defendant, knowing its propensity, permitted it to run at large, and that said dog worried and injured the cow of plaintiff, for which he demands damages," is sufficient without the further allegation that defendant "wrongfully and negligently suffered the dog to run at large." *Forbes v. Shellabarger*, 50 Mo. 558.

75. *Cockfield v. Singletary*, 15 Rich. L. (S. C.) 240.

76. *Ky.*—*Murray v. Young*, 12 Bush 337. *Mo.*—*Hale v. Van Dever*, 67 Mo. 732; *Beckett v. Beckett*, 48 Mo. 396; *Jacobsmeier v. Poggemoeller*, 47 Mo. App. 560. *Vt.*—*Adams v. Hall*, 2 Vt. 9, 16 Am. Dec. 690.

77. The gist of the action, in such a case, is trespass. *Ill.*—*Burke v. Daley*, 32 Ill. App. 326. *Me.*—*Decker v. Gammon*, 44 Me. 322, 69 Am. Dec. 99. *N. J.*—*Angus v. Radin*, 5 N. J. L. 815, 8 Am.

Dec. 626. *N. Y.*—*VanLeuven v. Lyke*, 1 N. Y. 515; *Dunkle v. Kocker*, 11 Barb. 387. *Pa.*—*Dolph v. Ferris*, 7 Watts & S. 367. *Wis.*—*Chunot v. Larson*, 43 Wis. 536, 28 Am. Rep. 567.

78. *Kerr v. O'Connor*, 63 Pa. 341.

"At common law a person could not be made liable for injuries inflicted by vicious dogs belonging to him or under his control, unless the complaint averred, and it was established at the trial, that such owner or keeper was advised of the mischievous traits of his dogs. The statute merely dispensed with all proof of *scienter* and did not undertake to create a new cause of action. It merely changed the common law rule so as to impose a stricter liability." *Jacobsmeier v. Poggemoeller*, 47 Mo. App. 560. See *Earl v. Van Alstine*, 8 Barb. (N. Y.) 630; *Clark v. Hite*, Tapp. (Ohio) 1.

The only reason for the averment at common law was that it was necessary to show knowledge of such fact in the defendant before the plaintiff could recover. The reason for the rule requiring the averment to be made having been entirely abrogated by statute, the rule itself must be allowed to go with it. *Newton v. Gordon*, 72 Mich. 642, 40 N. W. 921.

79. *Mass.*—*Lyons v. Merriek*, 105 Mass. 71. *Mo.*—*Jacobsmeier v. Poggemoeller*, 47 Mo. App. 560. *Wis.*—*Chunot v. Larson*, 43 Wis. 536, 28 Am. Rep. 567.

**3. Question for Jury.**—In cases where *scienter* must be alleged, it has been held that such questions must be submitted to the jury.<sup>80</sup> The amount of damages for which the separate owners of dogs uniting in an injury are liable is a question of fact.<sup>81</sup> Whether the plaintiff had notice of the vicious propensities of his animal is for the jury to determine,<sup>82</sup> as also whether the owner of a vicious domestic animal has exercised requisite care in keeping him confined.<sup>83</sup> The negligence of the owner of horses injured by bees in hitching them near the stands,<sup>84</sup> the ownership of dogs<sup>85</sup> and the negligence of the driver of a run-a-way team,<sup>86</sup> are questions to be determined by the jury.

**C. LIABILITY OF MUNICIPALITIES. — 1. Actions.**—A right of action against a county or township for indemnity for sheep or other domestic animals killed by dogs can only be asserted in substantial compliance with the law creating it.<sup>87</sup> Where the law requires a written statement to be filed by the owner with the trustee of the township, stating the number of sheep killed and injured, and their value, such provision is mandatory and a verbal report is insufficient.<sup>88</sup> In some states mandamus will lie to compel the proper officers to pay indemnity,<sup>89</sup> but in others the action cannot be maintained.<sup>90</sup>

Ordinarily where officers designated by statute refuse to act, the action must be brought against such officers,<sup>91</sup> but the statute in some states makes the county or township liable in such case.<sup>92</sup>

**2. Pleadings.**—The pleadings should set forth all the facts necessary to bring the plaintiff within the statute. He must plead all the conditions necessary to entitle him to the payment of his claims.<sup>93</sup>

80. *Beckett v. Beckett*, 48 Mo. 396; *Campbell v. Brown*, 19 Pa. 359.

81. *Carroll v. Weiler*, 4 Thomp. & C. (N. Y.) 131, 1 Hun 605.

82. *Cockerham v. Nixon*, 11 Ind. 269.

83. *Briscoe v. Alfrey*, 61 Ark. 196, 32 S. W. 505, 54 Am. St. Rep. 203, 30 L. R. A. 607.

84. *Parsons v. Manser*, 119 Iowa 88, 93 N. W. 86, 97 Am. St. Rep. 283, 62 L. R. A. 132.

85. *Peeler v. McMillan*, 91 Mo. App. 310.

86. *Smith v. Clark*, 3 Lans. (N. Y.) 208.

87. *Columbia Twp. v. Pipes*, 122 Ind. 239, 23 N. E. 750; *Abell v. Prairie Civil Twp.*, 4 Ind. App. 599, 31 N. E. 477; *Hodges v. Tama County*, 91 Iowa 578, 60 N. W. 185.

And see *Johnson v. Griswold*, 179 Mass. 580, 61 N. E. 214, holding that a slight error in the certificate submitted to the county commissioners will not render the proceedings invalid if there has been a substantial compliance with the statute.

**Parties.**—The right to indemnity is

not confined to persons engaged in the business of raising sheep, but extends to those engaged in buying and selling the animals. *Wayne Twp. v. Jeffery*, 29 Ind. App. 574, 64 N. E. 933.

And it is not necessary that the owner of the sheep killed be a resident of the township in which the killing occurs. *Inhab. of Washington v. Applegate*, 22 N. J. L. 42.

88. *Columbia Twp. v. Pipes*, 122 Ind. 239, 23 N. E. 750; *Abell v. Prairie Civil Twp.*, 4 Ind. App. 599, 31 N. E. 477.

89. *Osborn v. Selectmen of Lenox*, 2 Allen (Mass.) 207; *Bowen v. Tioga County*, 6 Pa. Co. Ct. 613.

But to entitle the owner to a writ of mandamus he must show that the town committee had the requisite funds to pay the claim. *Rogers v. Neptune Twp.*, 52 N. J. L. 487, 20 Atl. 61.

90. *Shelby Twp. v. Randles*, 57 Ind. 390.

91. *Rogers v. Neptune Twp.*, 52 N. J. L. 487, 20 Atl. 61.

92. *Barber v. Town of Dummerston*, 72 Vt. 330, 47 Atl. 1069.

93. *McCullough v. Colfax County*, 4



The complaint should set forth the residence of the plaintiff, the number of sheep killed, time and place of killing, and that they were killed by dogs not owned or harbored by the plaintiff. It should also show the filing of a legal report with the trustee, state the value of the sheep killed, and that there were sufficient funds in the hands of the trustee to pay such claim, and a demand and refusal to pay the same. It is not necessary to allege that the sheep were not temporarily in the township, or that the plaintiffs were engaged in the business of sheep raising.<sup>94</sup>

**3. Review of Appraisal.** — Unless specifically provided for by statute, courts have no jurisdiction to revise the appraisal proceedings.<sup>95</sup>

**4. Action by Municipality Against Owner of Dogs.** — The statutes of some states provide that when a county or township has paid damages to the owner of domestic animals killed by dogs, it may proceed against the owner of the dogs, to recover the amount.<sup>96</sup> Where the owner may either collect his damages from the town or the owner of the dogs, and he elects to collect from the town, the town succeeds to the rights of such owner and may maintain an action against the owner of the dogs.<sup>97</sup> In such case a joint action against separate owners will lie.<sup>98</sup> But before the town can recover it must show strict compliance with the statute; thus it must allege and prove that it has drawn its order on the treasurer for the amount to be paid to the owner.<sup>99</sup>

**III. CONTAGIOUS OR INFECTIOUS DISEASES.** — **A. CIVIL ACTIONS.** — **1. The Action.** — At common law in suing for damages for the communication of a contagious or infectious disease to the plaintiff's animals,<sup>1</sup> the action may be in trespass<sup>2</sup> or in case<sup>3</sup> according to the particular facts existing.

Statutes conferring a right of action for injuries resulting from diseased animals running at large do not destroy the right of action in tort for damages.<sup>4</sup> The remedy furnished by such statutes must be considered cumulative rather than as a substitute, and it is optional with plaintiff to resort to one or the other.<sup>5</sup>

Neb. (Unof.) 543, 95 N. W. 29, where it is said: "Before the defendant county would be authorized to pay the claim sued on, it must have adopted by proper resolution, spread at large upon the record of proceedings of the board of commissioners, suitable regulations providing for the manner of payment of claims made upon the fund alleged to have been created therefor. Where such fact is not alleged the presumption is that it does not exist."

<sup>94.</sup> *Columbia Twp. v. Pipes*, 122 Ind. 239, 23 N. E. 750.

<sup>95.</sup> *Hodges v. Tama County*, 91 Iowa 578, 60 N. W. 185; *Titus v. Chase*, 126 Mich. 621, 86 N. W. 137.

<sup>96.</sup> *Jones v. Sherwood*, 37 Conn. 466; *Unity v. Pike*, 68 N. H. 71, 4<sup>4</sup> Atl. 78.

<sup>97.</sup> *Tenney v. Lenz*, 16 Wis. 566.

<sup>98.</sup> *Fairchild v. Rich*, 68 Vt. 202, 34 Atl. 692.

<sup>99.</sup> *Town of Richmond v. James*, 27 R. I. 154, 61 Atl. 54.

<sup>1.</sup> See *Fisher v. Clark*, 41 Barb. (N. Y.) 329.

<sup>2.</sup> *Barnum v. Vandusen*, 16 Conn. 200.

<sup>3.</sup> *Fisher v. Clark*, 41 Barb. (N. Y.) 329.

<sup>4.</sup> *Kemmish v. Ball*, 30 Fed. 759.

**Construction.** — A statute regulating the transportation of diseased cattle should be liberally construed, because it is remedial as well as penal. *Wilson v. Kansas City, etc. R. Co.*, 60 Mo. 184.

<sup>5.</sup> *Conard v. Crowdsen*, 75 Ill. App. 514.

A statute providing that if the owner

**2. Jurisdiction.**—Where the statute prohibits the introduction of Texas or diseased cattle into the state, justices of the peace have jurisdiction of actions for damages received by reason of such introduction.<sup>6</sup>

**3. Parties.**—All persons injured by shipping diseased cattle into a state may be joined as defendants in an action against the owner of the cattle,<sup>7</sup> and a railroad company, acting in conjunction with the owner of the cattle in bringing them into the state, may also be joined as a defendant in such action.<sup>8</sup> In an action for damages for the communication of disease to the plaintiff's cattle from cattle driven into the state illegally the purchaser of the cattle may be joined with the importer who contracted to assume the liability for the plaintiff's injury.<sup>9</sup> But unless there is a joint interest in the property or concert in its use and management, there cannot be a joint recovery.<sup>10</sup> If statutory liability depends upon ownership, the ownership must be unconditional.<sup>11</sup> So a surety who has a lien upon cattle is not liable for the infection of other cattle by them.<sup>12</sup>

or person having possession of sheep known to be affected with a contagious disease shall permit them to run at large, etc., he shall be liable for resulting damages, is remedial and not penal, and suit should be brought in case and not in debt. *Mount v. Hunter*, 58 Ill. 246.

6. *Wilton v. Sherlock*, 61 Mo. 257.

See *Stager v. Harrington*, 27 Kan. 414, concerning the practice peculiar to the Kansas cattle law.

**Territorial Jurisdiction.**—A statute providing that a justice of the peace shall appoint inspectors, etc. (Laws of Kansas, 1881, ch. 161), confines this power to his own township. *Wilcox v. Johnson*, 34 Kan. 655, 9 Pac. 610.

**Removal of Causes.**—In *Woodrum v. Clay*, 33 Fed. 897, it was held that the importer and purchaser of diseased cattle could not be separated in their interest so as to allow removal in a suit for damages to plaintiff's cattle.

**Amount Involved.**—The first item of a petition alleged damages from actual destruction of grass, the second from physical injury to tanks and by the use and pollution of water, and the third, damage to the whole range from the presence of diseased sheep. It was held that the first two items did not comprehend what was set up in the third, so as to state an amount below the jurisdiction of the trial court. *Tippett v. Corder* (Tex. Civ. App.), 117 S. W. 186.

7. *Missouri, K. & T. R. Co. v. Haber*, 56 Kan. 694, 44 Pac. 632.

8. *Chicago, etc. R. Co. v. Gasaway*,

71 Ill. 570; *Missouri, K. & T. R. Co. v. Haber*, 56 Kan. 694, 44 Pac. 632.

**Independent Violation of Law.**—When cattle are, during a prohibited season, brought by a railroad company into a county of the state and afterwards conveyed by one having no connection with the road, into another county, such transportation is a new and distinct offense for which the company would not be liable. *Surface v. Hannibal*, etc. R. Co., 63 Mo. 452; *Surface v. Hannibal*, etc. R. Co., 60 Mo. 216; *Wilson v. Kansas City*, etc. R. Co., 60 Mo. 184; *Coyle v. Chicago & A. R. Co.*, 27 Mo. App. 584.

9. *Woodrum v. Clay*, 33 Fed. 897.

10. *Newkirk v. Milk*, 62 Ill. 172.

If different owners of distinct droves of Texas cattle, acting independently, drive their cattle over plaintiff's land they are not jointly liable for harm resulting to plaintiff's cattle. *Yeazel v. Alexander*, 58 Ill. 254.

**Election of Parties Defendant.**—If several owners are sued in tort and some are not guilty, the plaintiff must make his election. The proper course is to enter a *nolle prosequi* against the defendants not guilty, or have the jury find them not guilty. *Yeazel v. Alexander*, 58 Ill. 254.

11. *Hatch v. Marsh*, 71 Ill. 370.

12. *Smith v. Race*, 76 Ill. 490; *Gibbs v. Coykendall*, 116 N. Y. 666, 22 N. E. 1135, *approving* 39 Hun (N. Y.) 140. But see *Sargent v. Slack*, 47 Vt. 674, 19 Am. Rep. 136.

**4. Complaint.**—**a. Particular Allegations.**—**(I.) Infection.**—A complaint seeking damages for the spread of contagious diseases by animals must contain a direct allegation that the animals of defendant were infected with a contagious disease.<sup>13</sup>

**(II.) Knowledge.**—In order to recover damages for the trespass of diseased sheep, it is not necessary for the plaintiff to allege or prove that defendant had knowledge of the diseased state,<sup>14</sup> especially where carelessness or negligence is averred.<sup>15</sup> Neither is it necessary, in an action for damages by a vendee against a vendor for infection communicated by vendor's horses, to aver that before or at the time of sale or delivery, the vendor had knowledge of such infected condition. That knowledge will be inferred.<sup>16</sup>

**(III.) Place.**—Where liability is, by statute, expressly limited to disease communicated "along the line of transportation" of a railroad, the petition should charge that the disease was there communicated.<sup>17</sup> But where the culpable act of a railroad is the bringing of cattle into the state during a prohibited period, no such allegation of place is necessary.<sup>18</sup>

**(IV.) Negating Defense.**—In an action for damages for disease communicated by Texas cattle unlawfully brought into the state, the declaration must show that the cattle were not so brought within the period permitted by the statute.<sup>19</sup> In a civil action to recover damages for a violation of the act to prevent the spread of contagious and infectious diseases among swine, it need not be alleged that the defendant has been convicted in a criminal prosecution for a violation of the act.<sup>20</sup>

**(V.) Conclusion.**—In an action for damages resulting from diseased sheep being allowed to run at large, it is not necessary to conclude against the form of the statute.<sup>21</sup>

**13. Conard v. Crowdsen, 75 Ill. App. 614.**

If a statute prohibits the bringing of Texas or Cherokee cattle into the state, it is not necessary to allege that the cattle were diseased, and proof that plaintiff's cattle were infected from diseased cattle is no variance. *Sangamon Dist. Co. v. Young, 77 Ill. 197.*

**14. Barnum v. Vandusen, 16 Conn. 200; Lee v. Burk, 15 Ill. App. 651** (where it was held that it was competent to prove such knowledge of defendant to enhance damages without any allegation to that effect in the declaration).

**15. North v. Woodland, 12 Idaho 50, 85 Pac. 215, 6 L. R. A. (N. S.) 921.**

**16. Canham v. Bruegman, 77 Neb. 436, 109 N. W. 733.** But see *contra*, *Missouri Pac. R. Co. v. Finley, 38 Kan. 550, 16 Pac. 951; Patee v. Adams, 37 Kan. 133, 14 Pac. 505; Coyle v. Conway, 35 Mo. App. 490* (an action upon a statute requiring a person to restrain his

diseased cattle on his own premises, where allegation and proof of knowledge were held necessary).

**17. Coyle v. Chicago & A. R. Co., 27 Mo. App. 584.**

**18. Wilson v. Kansas City, etc. R. Co., 60 Mo. 184.**

**19. Frye v. Chicago, B. & Q. R. Co., 73 Ill. 399,** where the court says: "Without this his purchase and ownership is illegal, and he can maintain no action growing out of his own wrongful act."

**20. Conard v. Crowdsen, 75 Ill. App. 614.**

**Contributory Negligence.**—In Indiana in a suit by a livery stable keeper for damages for communicating a distemper to two stallions by a horse of defendant, the complaint is good though not alleging that the injury occurred without negligence of plaintiff. *Fultz v. Wycoff, 25 Ind. 321.*

**21. Mount v. Hunter, 58 Ill. 246.**



b. *Variance*. — If the statute prohibits the importing of Texas cattle and it is not alleged that they were diseased, but proof of disease is adduced, the variance is not material, since liability depends upon the importing regardless of their diseased condition.<sup>22</sup> If the allegation is that the disease was "Texas cattle fever," and the finding of the court is that plaintiff's cattle died of "Texas fever," this is not a material variance.<sup>23</sup> The same is true of an allegation that a disease was "contagious," and a finding that it was "infectious."<sup>24</sup> Allegations concerning the particular spot where the disease was communicated are not material and may be disregarded.<sup>25</sup>

c. *Duplicity*. — A petition alleging that defendant sold to plaintiff a specified number of sheep, falsely representing them to be sound, that they were not sound, that relying on such representation plaintiff turned them into a field with others, whereby they also became diseased and the pasture rendered useless, states only a single cause of action, with circumstances showing special damage.<sup>26</sup>

5. *Defense*. — Contributory negligence is a defense to an action in damages against an owner for communicating disease by his animals,<sup>27</sup> the rule of law being that if, by ordinary care, the plaintiff might have avoided the consequences of defendant's negligence, he is not entitled to recover.<sup>28</sup> But nothing less than gross negligence of the plaintiff will defeat his recovery where he sues for injury sustained by bringing cattle into the state against a positive prohibition.<sup>29</sup>

6. *Trial*. — a. *Presumptions*. — It is not a legal presumption that Texas cattle do communicate disease to other cattle,<sup>30</sup> nor can it be assumed, as a matter of law, that cattle driven from one section of the state to another are liable to communicate any disease to the cattle in the section to which they are driven.<sup>31</sup> An allegation that

22. *Sangamon Dist. Co. v. Young*, 77 Ill. 197.

23. *Grayson v. Lynch*, 163 U. S. 468, 16 Sup. Ct. 1064, 41 L. ed. 230.

24. *Grayson v. Lynch*, 163 U. S. 468, 16 Sup. Ct. 1064, 41 L. ed. 230.

25. *Grayson v. Lynch*, 163 U. S. 468, 16 Sup. Ct. 1064, 41 L. ed. 230.

26. *Wilcox v. McCoy*, 21 Ohio St. 655.

27. Ill. — *Harris v. Hatfield*, 71 Ill. 298. Kan. — *Patee v. Adams*, 37 Kan. 133, 14 Pac. 505. Mo. — *Coyle v. Conway*, 35 Mo. App. 490.

28. *Walker v. Herron*, 22 Tex. 55.

29. *Sangamon Dist. Co. v. Young*, 77 Ill. 197.

30. *Davis v. Walker*, 60 Ill. 452; *Gibbs v. Coykendall*, 116 N. Y. 666, 22 N. E. 1135, affirming without opinion, 39 Hun (N. Y.) 140.

Judicial Notice. — That "Texas fever" under certain conditions will be imparted by Texas cattle to native cattle is a matter of which the courts

will take judicial notice. *Grimes v. Eddy*, 126 Mo. 168, 28 S. W. 756, 47 Am. St. Rep. 653, 26 L. R. A. 638, overruling *Bradford v. Floyd*, 80 Mo. 207.

Courts should take judicial notice that Texas or splenic fever is infectious or contagious. *Dorr Cattle Co. v. Chicago & G. W. R. Co.*, 128 Iowa 359, 103 N. W. 1003, citing *Furley v. Chicago, etc. R.*, 90 Iowa 146, 57 N. W. 719, 23 L. R. A. 73.

The fact that cattle coming from Texas, Arkansas and Indian Territory, during the spring and summer months, are often infected with a contagious fever called "Texas fever" was judicially noticed as a notorious fact in *Kimmish v. Ball*, 129 U. S. 217, 9 Sup. Ct. 277, 32 L. ed. 695.

But see *Davis v. Walker*, 60 Ill. 452, where the court says that the question is one of fact for the jury. See also *Missouri Pac. R. Co. v. Finley*, 38 Kan. 550, 16 Pac. 951.

31. *Clarendon Land Inv. Co. v. Mc-*

plaintiff kept horses for hire, and that his business was to feed and stable horses, will not permit the inference that he kept a hospital for horses sick with contagious diseases.<sup>32</sup>

b. *Burden of Proof*.—In an action against a seller for the value of hogs dying in the vendee's possession by reason of cholera, an averment that they were afflicted with cholera to the knowledge of the defendant places the burden on the plaintiff to prove these statements.<sup>33</sup> A cattle owner suing a railroad for turning loose on the range cattle infected with Texas fever, the *scienter* being alleged and denied, must show that the defendant knew or had notice of such facts as would make it chargeable with knowledge that the cattle were infected and liable to communicate the disease.<sup>34</sup>

c. *Province of Court and Jury*.—Whether defendant had knowledge that his animals were diseased,<sup>35</sup> and whether or not "scab" is a contagious disease,<sup>36</sup> have been held to be questions for the jury. But what care it is necessary for plaintiff to take to prevent infection is a proper question for the court.<sup>37</sup>

B. CRIMINAL PROCEDURE. — 1. *Jurisdiction*.<sup>38</sup> — Under a statute making it unlawful to bring infected cattle into a state, if such cattle are billed through to an interior town the local court has jurisdiction of the prosecution. There is no force in the argument that the offense was committed when the animals entered the state.<sup>39</sup>

2. *Indictment*. — a. *Language of Statute*. — Generally speaking, the pleading is sufficient if it brings the offense within the words of the statute.<sup>40</sup> So an indictment is sufficient if it charges the shipping and transporting a "cow," though the statutory word is "cattle."<sup>41</sup> If a statute makes it punishable to bring Texas cattle "into this state," an indictment charging that cattle were brought into a certain county is not good, since they might have been brought in from another county of the state.<sup>42</sup>

b. *Time*. — Charging that an offense was committed on May 25th is equivalent to charging that it was committed between February 1st and December 1st.<sup>43</sup>

Clelland, 89 Tex. 483, 34 S. W. 98, 35 S. W. 474, 59 Am. St. Rep. 70, 31 L. R. A. 669.

32. Fultz v. Wycoff, 25 Ind. 321.

33. O'Hair v. Morris, 87 Ill. App. 393.

34. Railway Co. v. Goolsby, 58 Ark. 401, 24 S. W. 1071. See also Carroll v. Eivers, Jr. 7 C. L. 226.

35. Truskett v. Bronaugh, 4 Ind. Ter. 731, 76 S. W. 294.

36. Mount v. Hunter, 58 Ill. 246.

37. Union Pac. R. Co. v. James, 163 U. S. 485, 16 Sup. Ct. 1109, 41 L. ed. 236.

38. *Grand Jury*. — Though a statute relating to driving cattle into the state provides that complaints for its viola-

tion should be made by the secretary of the state board of agriculture, the grand jury under its common law powers may find an indictment, regardless of the source of the complaint. State v. Snell, 21 R. I. 232, 42 Atl. 869. So also under R. I. Gen. Laws, c. 223, § 6.

39. Patrick v. State, 17 Wyo. 260, 98 Pac. 588, 129 Am. St. Rep. 1109.

40. State v. Sterritt, 19 Ore. 352, 24 Pac. 523.

41. State v. Snell, 21 R. I. 232, 42 Atl. 869.

42. Com. v. Illinois Cent. R. Co., 28 Ky. L. Rep. 734, 90 S. W. 273.

43. State v. Turner, 63 Kan. 233, 65 Pac. 217.

c. *Knowledge*.—An indictment for moving diseased sheep need not allege guilty knowledge, the offense being *malum prohibitum*.<sup>44</sup>

d. *Ownership*.—An indictment for moving diseased sheep which fails to follow the descriptive words of the statute in alleging the ownership of the sheep is bad on demurrer.<sup>45</sup>

e. *Negative Averments*.—Under a law relating to driving cattle into the state without first sending to a designated official a certificate that such cattle are free from tuberculosis, it is enough to allege that no certificate was sent as required, without setting out the particular character of the certificate required.<sup>46</sup>

f. *Duplicity*.—An indictment charging the unlawfully receiving, transporting and unloading of cattle, does not charge three separate offenses,<sup>47</sup> and an indictment charging accused with bringing diseased sheep into the state and causing such sheep to be brought into the state is not bad for duplicity.<sup>48</sup> An indictment which charges, first, that placards containing the words "Southern Cattle" were not placed on each side of the car during the transportation, and second, that the waybill did not have these words plainly written or stamped on its face, is bad for duplicity; but the objection should be reached by a motion to elect and not by demurrer.<sup>49</sup>

3. *Plea to the Charge*.—In a prosecution charging accused with bringing sheep into the state, which were infected with scab, a plea of guilty admits the bringing into the state and that they were so affected.<sup>50</sup>

*Waiver of Defect*.—Any defect in an information in alleging that accused caused sheep to be brought into the state in addition to alleging that he brought them in, is waived by pleading to the merits.<sup>51</sup>

4. *Trial*.—*Province of Jury*.—Whether or not sheep of defendant were infected with "scab" is properly a question for the jury.<sup>52</sup>

C. QUARANTINE AND INSPECTION.—1. *Nature and Jurisdiction*.—The live-stock sanitary commission is a judicial body of special and limited jurisdiction, and in the quarantining of animals to prevent

44. *State v. Sterritt*, 19 Ore. 352, 24 Pac. 523.

Under a law requiring the owner or person in charge, where his flock of sheep "has been inspected and found to be affected with scab," to "thoroughly cure the same within twenty days from said inspection," the indictment must allege in terms, or in words equivalent, that the owner or person in charge had knowledge of the inspection and its finding: it must allege either that he was present when the inspection was made or that he was properly informed of it. *Hand v. State*, 37 Tex. Crim. 310, 39 S. W. 676.

45. *State v. Sterritt*, 19 Ore. 352, 24 Pac. 523.

46. *State v. Snell*, 21 R. I. 232, 42 Atl. 869.

47. The portion describing the defendant as receiving and transporting being only descriptive of the defendant as a railroad company carrying cattle from other states, and surplusage. *Kansas City So. R. Co. v. State* (Ark.), 119 S. W. 288.

48. *Patrick v. State*, 17 Wyo. 260, 98 Pac. 588, 129 Am. St. Rep. 1109.

49. *United States v. Louisville & N. R. Co.*, 165 Fed. 936. But this practice is probably applicable to the United States Supreme Court, rather than to the lower courts.

50. *Patrick v. State*, 17 Wyo. 260, 98 Pac. 588, 129 Am. St. Rep. 1109.

51. *Patrick v. State*, 17 Wyo. 260, 98 Pac. 588, 129 Am. St. Rep. 1109.

52. *Troy v. State*, 10 Tex. App. 319.



the spread of disease is authorized to proceed in a summary manner and not according to the ordinary course of judicial procedure.<sup>53</sup>

**Appeal.** — As a rule the commission is the sole tribunal to determine the diseased condition and value of the animal,<sup>54</sup> though in some of the states the judgments of such tribunals are reviewable,<sup>55</sup> the proper practice being an application to the circuit court for a writ of certiorari.<sup>56</sup>

**2. Complaint or Order.** — An order of a live-stock commission to a sheriff authorizing him to take and hold cattle is in the nature of an execution on a judgment and is, *prima facie*, a justification of the sheriff's compliance with the order.<sup>57</sup> But an order failing to recite that plaintiff's cattle were "capable of communicating or liable to impart fever," or that such disease was found to be "malignant, contagious," etc., is not a complaint and constitutes no justification.<sup>58</sup> An order of the federal Secretary of Agriculture notifying railroad companies that a certain disease exists among sheep in the United States and that the transportation of them under certain conditions is a violation of the law, though not declaring within what territory a quarantine has been established, is a proper order to make.<sup>59</sup>

53. *Asbell v. Edwards*, 63 Kan. 610, 66 Pac. 641.

Rules when promulgated by such a body have the force of laws. *St. Louis, S. W. R. Co. v. Smith*, 20 Tex. Civ. App. 451, 49 S. W. 627.

The powers of such a commission cannot be extended by intendment. *Pierce v. Dillingham*, 203 Ill. 148, 67 N. E. 846, 62 L. R. A. 888; *Asbell v. Edwards*, 63 Kan. 610, 66 Pac. 641. But see *St. Louis, S. W. R. Co. v. Smith*, 20 Tex. Civ. App. 451, 49 S. W. 627.

**Judicial Notice.** — Courts will take judicial notice of the rules and regulations adopted by the Commissioner of Agriculture and proper officials for the suppression of disease among, and the quarantining of, animals. *Kansas City So. R. Co. v. State* (Ark.), 119 S. W. 288.

54. *Maynard v. Freeman* (Tex. Civ. App.), 60 S. W. 334.

In Michigan the only appellate jurisdiction is in the governor, whose approval of the action is necessary. *Shipman v. State Live-Stock Com.*, 115 Mich. 488, 73 N. W. 817.

**Liability of Inspector for Acting in Excess of Power.** — The act of inspecting and quarantining sheep is judicial in its nature, and so is the act of defining the limits of quarantine, and the officer is not liable in a civil action in the absence of averments and proof that he acted with malice, or through fraud or corruption. *Garff v. Smith*, 31 Utah 102, 86 Pac. 772, 120 Am. St. Rep. 924.

**Mandamus** will lie to compel the proper court to issue an order directing a county clerk to issue a warrant for the value of stock destroyed, as appraised. *Maynard v. Freeman* (Tex. Civ. App.), 60 S. W. 334.

55. **Ill.** — *Pearson v. Zehr*, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113, where the court says that to hold such *ex parte* proceedings unreviewable would not be a valid exercise of the police power, but a palpable violation of the constitutional provision concerning due process of law. **Mass.** — *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100, 23 Am. St. Rep. 850, 10 L. R. A. 116. **N. J.** — *Newark, etc. R. Co. v. Hunt*, 50 N. J. L. 308, 12 Atl. 697.

56. *Lewis v. Shelby County*, 116 Tenn. 454, 92 S. W. 1098.

57. *Hardwick v. Brookover*, 48 Kan. 609, 30 Pac. 21.

58. *Asbell v. Edwards*, 63 Kan. 610, 66 Pac. 641. This was under a law authorizing the sheriff to seize and quarantine only on a "complaint."

59. *United States v. Slater*, 123 Fed. 115.

A report that cattle affected with disease which "prevails to a greater or less extent" generally outside the state are liable to communicate disease, does not meet the requirements of a statute directing the report to state that "such diseases have become epidemic in certain localities in other states." *Pierce*

**3. Indictment and Information.**—Under acts of Congress authorizing the Secretary of Agriculture to establish quarantines and promulgate rules governing the same, an indictment against a carrier for violation of such rules cannot be sustained if it fail to allege the facts constituting promulgation.<sup>60</sup> An information drawn under the law relating to the inspection of cattle by a live-stock sanitary "commissioner," which charges a want of inspection by the "commission," is not invalidated by the omission of the terminal syllable "er."<sup>61</sup>

**4. Trial.**—a. *Province of Court and Jury.*—Where a statute provides that a sheep inspector, finding sheep infected with disease, may quarantine same, the decision of the inspector is not final, and the necessity for quarantine is a question for the jury.<sup>62</sup>

b. *Presumptions.*—It cannot be presumed that tuberculosis is a contagious disease, or that the statute prescribes a sure means of detecting it,<sup>63</sup> nor that a certain designated class of cattle is more susceptible to disease than others.<sup>64</sup>

c. *Burden of Proof.*—A party who attacks the constitutionality of quarantine or inspection statutes has the burden of proof.<sup>65</sup>

#### IV. INJURING OR KILLING ANIMALS.—A. CIVIL ACTIONS.—

**1. Nature and Form of Action.**—If the owner is seeking damages for an injury to an animal,<sup>66</sup> the action of trespass is the proper remedy where the cause of the injury to the animal is immediate, but where the injury is consequential the action should be in case.<sup>67</sup> If in an

*v. Dillingham*, 203 Ill. 148, 67 N. E. 846, 62 L. R. A. 888.

60. *United States v. Louisville & N. R. Co.*, 165 Fed. 936.

An information charging that the commission recommended and the governor promulgated that between certain dates no cattle should be transported, etc., in any manner, from south and east of certain named counties, etc., into certain other counties, etc., and charging defendant with driving stock into the forbidden territory without inspection, but not charging that the moving of the cattle without inspection was among the rules announced, does not charge a violation of law. *Wallace v. State (Tex. Crim.)*, 69 S. W. 506.

61. *State v. Asbell*, 74 Kan. 397, 86 Pac. 457.

62. *Richter v. State*, 16 Wyo. 437, 95 Pac. 51.

63. *Pierce v. Dillingham*, 203 Ill. 148, 67 N. E. 846, 62 L. R. A. 888.

64. *Pierce v. Dillingham*, 203 Ill. 148, 67 N. E. 846, 62 L. R. A. 888.

65. *St. Louis S. W. R. Co. v. Smith*, 20 Tex. Civ. App. 451, 49 S. W. 627.

66. *Blair v. Forehand*, 100 Mass. 136, 140, 97 Am. Dec. 82.

A bailee may sue for the injury to his possession. *Alabama, etc. R. Co. v. Jones*, 71 Ala. 487; *Hare v. Fuller*, 7 Ala. 717. And see *Railway Co. v. Hall*, 107 Tenn. 512, 64 S. W. 481; *Criner v. Pike*, 2 Head (Tenn.) 398.

For a collection of cases on the subject of property rights in dogs, see *Graham v. Smith*, 25 Pa. 323, 40 L. R. A. 503.

67. **III.**—*Painter v. Baker*, 16 Ill. 103. **N. C.**—*Dodson v. Mock*, 20 N. C. 146, 32 Am. Dec. 677. **S. C.**—*McCoy v. Phillips*, 4 Rich. 463. **Tenn.**—*James v. Caldwell*, 7 Yerg. 38.

Trespass is proper where a dog is killed by direct administration of poison—as where poison is thrown down to the dog mixed up with food. But where the defendant puts the poisoned food where he knows the dog will pass along and get it, case is the proper remedy. *Dodson v. Mock*, 20 N. C. 146, 32 Am. Dec. 677.

Actions on the case—setting trap for dog. *Townsend v. Wathen*, 9 East 277, 103 Eng. Reprint 579.

action for trespass the plaintiff fails to prove his case under the statute upon which he bases his action, he may yet recover for the trespass at common law.<sup>68</sup> Possession is not necessary to the maintenance of the action.<sup>69</sup>

**2. Complaint.**—a. *Generally.*—The complaint should inform the defendant in what the alleged wrongs consist.<sup>70</sup>

b. *Following the Statute.*—Where an action is brought under the statute, the complaint or demand must contain such substantial averments as will exhibit a case within the act,<sup>71</sup> and should be framed with reference to it.<sup>72</sup> Averments equivalent to the words of the statute are generally sufficient.<sup>73</sup> And a complaint which states facts showing a remedy either at common law or under the statute, or both, need not plead the statute.<sup>74</sup>

**Injury by Dog in Absence of Defendant.**—Trespass is proper where an injury is done by defendant with his dog, but if the injury be done by the dog in the absence of defendant and without his agency, case is the proper remedy. *Dilts v. Kinney*, 15 N. J. L. 130.

**Election.**—The necessity of suing in trespass extends no further than where an act of violence is committed on a beast, and though the injury may have followed the forcible act without the intervention of any voluntary and responsible agency, the party frequently has an election between trespass and case. *Waterman v. Hall*, 17 Vt. 128, 42 Am. Dec. 484.

**Unintentional Killing.**—An owner may maintain trespass for the wanton and malicious killing of his dog, but he cannot maintain case for its unintentional though negligent destruction. *Jemison v. Southwestern R.*, 75 Ga. 444, 58 Am. Rep. 476.

68. *Stewart v. Jewell*, 7 T. B. Mon. (Ky.) 110.

Action on the case at common law would often lie where a proceeding under the statute would not. *Smith v. Causey*, 22 Ala. 568.

Though a statute authorizing the bringing of a civil action uses the word "trespass," it is merely descriptive, and the form of remedy may be in case or trespass according as the one or the other is the more appropriate. *Ridge v. Featherston*, 15 Ark. 159.

69. *White v. Brantley*, 37 Ala. 430. And see *Louisville & N. R. Co. v. Fitzpatrick*, 129 Ala. 322, 29 So. 859, 87 Am. St. Rep. 64; *Criner v. Pike*, 2 Head. (Tenn.) 398.

If a person impounds animals damage-feasant, and kills them while in his possession, the destruction constitutes a conversion, and trover will lie; but if the same is done while not in his possession, trespass is the proper remedy. *Cannon v. Horsey*, 1 Houst. (Del.) 440.

70. *Lipscomb v. Seaman*, 151 Ala. 333, 44 So. 46.

**Amendment.**—An amendment which neither varies the cause nor changes the form of action is within the discretion of the court. *Hurd v. Chesley*, 55 N. H. 21; *Waterman v. Hall*, 17 Vt. 128, 42 Am. Dec. 484.

A count in trespass for killing a dog, in common law form, may be amended by inserting an allegation that the dog had around his neck a collar of brass, with the owner's name engraved thereon. *Hurd v. Chesley*, *supra*.

71. Mich.—*Dorr v. Loucks*, Mich. N. P. (1871) 182. N. J.—*Sinnickson v. Dungan*, 8 N. J. L. 226. N. C.—*McKay v. Woodle*, 28 N. C. 352.

72. *Tankersly v. Wedgworth*, 22 Ala. 677; *Smith v. Causey*, 22 Ala. 568.

73. *Dorr v. Loucks*, Mich. N. P. (1871) 182.

"Drove, chased, and hurried" are embraced in "worried." *Dorr v. Loucks*, *supra*.

**Allegation in the Negative.**—An averment that sheep "were depasturing on the farm of the plaintiff" is equivalent to an allegation that they were "out of the enclosure of defendant." *Dorr v. Loucks*, *supra*.

74. *Williams v. Mead*, 80 Conn. 434, 68 Atl. 1009; *McKay v. Woodle*, 28 N. C. 352.



c. *Particular Allegations.*—(I.) *Wilfulness and Malice.*—The declaration should aver that the killing was “wilful and malicious,” in those words, or in words of corresponding import.<sup>75</sup>

(II.) *Value.*—When the action is for damage committed to an animal, the averment of the value of the animal is not material.<sup>76</sup>

(III.) *Vicious Propensities.*—At common law, where injury to another arises from carelessness in keeping domestic animals, which are not naturally or necessarily vicious, such as dogs, horses, etc., there can be no recovery without allegation and proof that the owner knew of their vicious propensities.<sup>77</sup> But under statutes giving actions for certain depredations committed by animals it is not necessary to aver that they were wont to do such mischief.<sup>78</sup>

(IV.) *Damages.*—(A.) *GENERAL.*—Before a plaintiff can recover triple damages, he must make the necessary demand.<sup>79</sup> Double damages cannot be recovered unless the declaration is framed under a statute authorizing them.<sup>80</sup>

(B.) *SPECIAL.*—In accordance with the usual rule special damages can be recovered only after allegation and proof.<sup>81</sup>

(V.) *Negating Defense.*—A plaintiff need not negative the circumstances under which the defendant might lawfully kill the animal.<sup>82</sup> So in an action for the killing of a dog, where the statute requires proof that the tax, if any, has been paid, the plaintiff is not required to allege in the first instance the payment of the tax.<sup>83</sup>

d. *Variance.*—In an action for killing a cow, a plaintiff may recover upon proof of exclusive possession without title, although the summons averred that the cow was plaintiff’s property,<sup>84</sup> the variance being immaterial. But a declaration for an injury to “cattle” is not supported by evidence of injury done to “mules.”<sup>85</sup>

3. *Answer.*—a. *Generally.*—Material allegations must be proved as alleged.<sup>86</sup>

75. *Ridge v. Featherston*, 15 Ark. 159.

76. *Bean v. Green*, 4 Cush. (Mass.) 279.

The owner of a dog seeking to recover for its killing need not show pecuniary value. *Ala.*—*White v. Brantley*, 37 Ala. 430. *Ga.*—*Jemison v. Southwestern R.*, 75 Ga. 444, 58 Am. Rep. 476. *N. C.*—*Morse v. Nixon*, 51 N. C. 293; *State v. Latham*, 35 N. C. 33; *Dodson v. Mock*, 20 N. C. 146, 32 Am. Dec. 677. *Tenn.*—*Wheatley v. Harris*, 4 Sneed 468, 70 Am. Dec. 258. *Tex.*—*Heiligmann v. Rose*, 81 Tex. 222, 16 S. W. 931, 26 Am. St. Rep. 804, 13 L. R. A. 272.

77. *Smith v. Causey*, 22 Ala. 568.

78. *Dorr v. Loucks*, Mich. N. P. (1871) 182.

79. *Lee v. Nelms*, 57 Ga. 253.

80. *Tankersly v. Wedgworth*, 22 Ala. 677.

81. *Teagarden v. Hetfield*, 11 Ind. 522.

82. *Lowell v. Gathright*, 97 Ind. 313.

83. *Jordan v. McGill*, 43 App. Div. 264, 60 N. Y. Supp. 33.

84. *Railway Co. v. Hall*, 107 Tenn. 512, 64 S. W. 481.

In an action for killing a certain “beagle hound” the proof was that it was a “beagle hound fox dog,” part fox and part beagle, and the variance was held immaterial. *O’Neil v. Newman*, 132 Mich. 489, 93 N. W. 1064.

85. *Brown v. Bailey*, 4 Ala. 413.

86. In an action for shooting a dog, allegations that “he attacked the defendants and was accustomed to attack and bite mankind,” are both material. *Clark v. Webster*, 1 Car. & P. 104, 11 E. C. L. 331.

b. *Incomplete Paragraph*.—An answer is defective which sets up two defenses neither of which is good standing alone, but which, taken together, would make a legal defense.<sup>87</sup>

c. *Particular Allegations*.—(I.) *Owner's Knowledge of Propensities*.—Though the owner's knowledge of his dog's vicious acts should be pleaded in defense to an action for killing the dog, if the defect is not objected to it may be disregarded on appeal.<sup>88</sup>

(II.) *Exhaustion of Other Means of Defense*.—In an action for killing an attacking animal, if the defense is the necessity of protecting property, the answer should allege facts showing the necessity.<sup>89</sup>

4. *Trial*.—a. *Burden of Proof*.—In an action for killing a dog, plaintiff has the burden of showing wrongful killing, the word wrongful being used in its legal and not in its ethical sense.<sup>90</sup> But if the defendant justifies under a sheep-killing statute, the burden is on him to show that the dog was chasing or worrying sheep within the meaning of the statute.<sup>91</sup> In an action for killing a dog, the owner need not prove in the first instance that he has paid a tax, or that the dog is not taxable.<sup>92</sup>

b. *Province of Court and Jury*.—The reasonable necessity for

87. *Simmonds v. Holmes*, 61 Conn. 1, 23 Atl. 702, 15 L. R. A. 253.

88. *Miller v. Spaulding*, 41 Wis. 221.

*Defense* permissible, though not pleaded. That the animal was worthless may be shown in mitigation of damages. *Dunlap v. Snyder*, 17 Barb. (N. Y.) 561.

*Set-Off*.—The defendant, by way of set-off, may show that he has sustained damages from the transaction immediately connected with the tort for which suit was brought. *Spray v. Ammerman*, 66 Ill. 309.

Thus in an action for trespass committed upon stock while on the premises of defendant, a set-off of damages to the crop done by the stock is not maintainable where the fence around such crop was not a legal fence. *Woodward v. Purdy*, 20 Ala. 379; *Hamilton v. Howard*, 68 Ga. 288.

*Mitigation of Damages*.—Matter in mitigation must be wrongful. Defendant killed plaintiff's dog because he was used in chasing defendant's cattle off plaintiff's premises. The cattle received no more injury than was necessary in driving them from plaintiff's

field, and it was held that such injury could not be shown in mitigation. *Spray v. Ammerman*, 66 Ill. 309.

The defendant, a mere wrongdoer, who wantonly destroys a mare, cannot prove in mitigation of damages that the mare did not belong to the plaintiff. *Criner v. Pike*, 2 Head (Tenn.) 398.

89. In *Wright v. Ramscot*, 1 Saund. (Eng.) 82, 85 Eng. Reprint 92, the defendant killed a mastiff that was attacking his dog. To defend he must allege that the dogs could not be separated in any other way.

The right of action for injury done by an animal is merely cumulative to the prior right to make a reasonable defense to protect property. The killing of the attacking animal must be reasonably necessary, under all the circumstances of the case, for the protection of property. *Anderson v. Smith*, 7 Ill. App. 354.

90. *Brown v. Graham*, 80 Neb. 281, 114 N. W. 153.

91. *Cole v. Van Syckle*, 8 Pa. Dist. 362.

92. *Jordan v. McGill*, 43 App. Div. 264, 60 N. Y. Supp. 33.

killing a dog is a question for the jury,<sup>93</sup> as is also the commercial value of the animal in the particular locality.<sup>94</sup>

**5. Costs.**—A tender of compensation for killing or injuring of animals can have no effect upon the costs of the case.<sup>95</sup>

**6. Appeal.**—Even if the payment of a dog tax were a prerequisite to an action for killing the dog, the objection cannot be raised for the first time upon appeal.<sup>96</sup>

**B. CRIMINAL PROSECUTIONS.**—**1. Generally.**—Maliciously killing or injuring a domestic animal is an indictable offense both at common law<sup>97</sup> and by statute.<sup>98</sup>

**2. Jurisdiction.**—Justices of the peace ordinarily have jurisdiction of this class of prosecutions,<sup>99</sup> but if a justice has no jurisdiction to impose a fine equal to the amount of the injury, the case is beyond his jurisdiction,<sup>1</sup> and a county court has no jurisdiction of an appeal from the judgment of the justice.<sup>2</sup>

**3. Parties to Prosecution.**—In a prosecution for maliciously killing a dog, the owner, who may be the instigator of the prosecution, is a *quasi* party thereto.<sup>3</sup>

**93. Mich.**—*McChesney v. Wilson*, 132 Mich. 252, 93 N. W. 627. **Miss.**—*Hodges v. Causey*, 77 Miss. 353, 26 So. 945, 78 Am. St. Rep. 525, 48 L. R. A. 95. **N. Y.**—*Leonard v. Wilkins*, 9 Johns. 233. **Pa.**—*King v. Kline*, 6 Pa. St. 318. **Eng.**—*Hanway v. Boulton*, 4 C. & P. 350, 19 E. C. L. 415.

**Abatement of Nuisance.**—Whether shooting among a lot of dogs that regularly and persistently annoyed plaintiff's family is a reasonable and necessary means to get rid of the nuisance is a question for the jury. *Hubbard v. Preston*, 90 Mich. 221, 51 N. W. 209, 30 Am. St. Rep. 426, 15 L. R. A. 249.

**Conflict of Evidence.**—*O'Neil v. Newman*, 132 Mich. 489, 93 N. W. 1064.

**Chasing and Worrying.**—Whether, under the evidence, a dog is "chasing and worrying," is a question for the jury. *Cole v. VanSyckle*, 8 Pa. Dist. 362, 7 Northampton Co. Rep. (Pa.) 45.

**94. Spray v. Ammerman, 66 Ill. 309; *Dunlap v. Snyder*, 17 Barb (N. Y.) 561.**

The bad habits of a dog killed by defendant other than those involved in the plea of justification, may be shown not in bar of the action, but to be considered in assessing the value of the dog. *Reynolds v. Phillips*, 13 Ill. App. 557.

**Verdict.**—A verdict that does not find any issue properly presented by the pleadings will not support a judgment. *Ford v. Taggart*, 4 Tex. 492. In this case the plaintiff sued the defendant for shooting his mules and the defend-

ant answered that the mules had broken into his enclosure, etc. The jury found "the damages to be equal and that each party pay equal proportions of the costs incurred and go out of court."

Special findings control the general verdict only where there is an irreconcilable conflict between them upon a material question. *Jacquay v. Hartzell*, 1 Ind. App. 500, 27 N. E. 1105.

**95. Cole v. Tucker, 6 Tex. 266.**

**96. Jordan v. McGill, 43 App. Div. 264, 60 N. Y. Supp. 33.**

**97. Chickens.**—*Respublica v. Teischer*, 1 Dall. (U. S.) 335, 1 L. ed. 163.

**Cattle.**—**Mass.**—*Com. v. Leach*, 1 Mass. 59. **N. Y.**—*People v. Smith*, 5 Cow. 258. **N. C.**—*State v. Hill*, 79 N. C. 656.

**Dogs.**—*Kinsman v. State*, 77 Ind. 132; *State v. Latham*, 35 N. C. 33; *Dodson v. Mock*, 20 N. C. 146, 32 Am. Dec. 677. But see *State v. Mease*, 69 Mo. App. 581; *Com. v. Maclin*, 3 Leigh (Va.) 809.

**98. Practically every state has a statute covering this offense.**

**99. Com. v. Leach, 1 Mass. 59.**

In Alabama a justice of the peace may issue a warrant of arrest, returnable before the criminal court. *Walker v. State*, 89 Ala. 74, 8 So. 144, a prosecution for killing a cow.

**1. State v. Towle, 48 N. H. 97; *Uecker v. State*, 4 Tex. App. 234.**

**2. Uecker v. State, 4 Tex. App. 234.**

**3. State v. Garner, 8 Port. (Ala.) 447; *Kinsman v. State*, 77 Ind. 132.**



**4. Indictment. — a. Certainty. — (I.) Generally. —** If the fair import of an indictment charges an offense, confusion in the language employed will not render the indictment bad,<sup>4</sup> but if the indictment fails to express the charge in a plain, intelligible and explicit manner, it will not stand.<sup>5</sup> This does not mean absolute, but reasonable certainty.<sup>6</sup>

**(II.) Language of Statute. —** The description of the animal killed should be definite enough to enable the party charged to properly prepare his defense.<sup>7</sup>

Generally an indictment is sufficient which states the offense in the terms and language of the code,<sup>8</sup> or so plainly that the nature of the offense charged may be easily understood.<sup>9</sup> As in other cases the exact words of the statute need not be used if the substitution is equivalent to them, or of more extensive signification.<sup>10</sup> But there are some instances where it is not sufficient to pursue the language of the statute creating the offense, the requirements of pleading demanding a more specific statement of the nature of the injury.<sup>11</sup> Thus, if the words of the statute descriptive of the class of animals are in general terms, it will not be sufficient to follow them,<sup>12</sup> but a specific description is necessary which must, however, fall within the class described by the statute.<sup>13</sup>

**(III.) Allegations in the Disjunctive. —** When offenses are of the same character and subject to the same punishment, the defendant may, by alternative allegations, be charged with either in the same count.<sup>14</sup>

**b. Particular Allegations. — (I.) Time. —** According to the general rule the indictment should set forth some definite time as that of the alleged commission of the act.<sup>15</sup>

4. *Sample v. State*, 104 Ind. 289, 4 N. E. 40.

A charge in the indictment that defendant "did unlawfully, maliciously, etc., destroy and injure, or cause to be destroyed and injured a certain mare," etc., is not objectionable for multifariousness or uncertainty, and the defendant may be convicted under it if by the single act charged against him the mare was either injured or destroyed. *State v. Slocum*, 8 Blackf. (Ind.) 315.

5. *State v. Staton*, 66 N. C. 640.

6. *State v. Credle*, 91 N. C. 640.

7. *State v. Credle*, 91 N. C. 640.

8. *Ark. — Lemon v. State*, 19 Ark. 171. *Ga. — Bailey v. State*, 65 Ga. 410.

*Mass. — Com. v. Sowle*, 9 Gray 304, 69 Am. Dec. 289. *Miss. — Duncan v. State*, 49 Miss. 331. **N. C. —** *State v. Deal*, 92 N. C. 802; *State v. Credle*, 91 N. C. 640.

9. *Bailey v. State*, 65 Ga. 410; *Duncan v. State*, 49 Miss. 331.

10. *State v. Staton*, 66 N. C. 640.

Thus the word "shooting" was held to include "wounding." *State v. Butts*,

92 N. C. 784. But the word "deposit" is not equivalent to the word "expose." *State v. Pratt*, 54 Vt. 484.

11. *State v. Jackson*, 7 Ind. 270; *State v. Hill*, 79 N. C. 656.

12. *State v. Stanton*, 23 N. C. 424; *State v. Lange*, 22 Tex. 591.

13. *State v. Hambleton*, 22 Mo. 452.

14. *Thomas v. State*, 111 Ala. 51, 20 So. 617; *Burgess v. State*, 44 Ala. 190.

15. An indictment for shooting a cow, charging that the offense was committed in a certain year without naming the day or month, was held to be defective. *Bailey v. State*, 65 Ga. 410.

In an indictment charging the killing of a dog in March, 1887, an averment that he was duly listed for taxation in the year 1886 shows that the dog was listed at the time he was killed. *Hewitt v. State*, 121 Ind. 245, 23 N. E. 83.

A criminal complaint for wantonly killing a cow is sufficient though it uses the present tense in describing the kill-

(II.) **Place and Venue.**—In an indictment for maliciously injuring an animal, the omission of the word county in the body, where it is properly stated in the caption,<sup>16</sup> or is written at full length in the margin,<sup>17</sup> does not render it defective. If jurisdiction depends upon certain facts, as where an offense is indictable if committed at a certain place, the facts should be alleged.<sup>18</sup>

(III.) **Ownership.**—Whether an indictment must allege ownership depends generally upon the statute under which a prosecution is brought. Ordinarily the animal alleged to be injured must be alleged to be the property of a person named,<sup>19</sup> directly, and not by way of inference.<sup>20</sup> If the owner's name is unknown, it should be so stated.<sup>21</sup> Where a doubt exists as to the ownership or as to the true name of the owner, it may be laid in two or more counts in different persons. But if a distinct offense is stated by each count there can be a conviction for one offense only.<sup>22</sup>

(IV.) **Intent.**—Where the statute employs such words as wilfully,<sup>23</sup> unlawfully,<sup>24</sup> feloniously,<sup>25</sup> maliciously,<sup>26</sup> etc., in describing the offense, it is usually necessary to allege such words in the indictment, or their equivalents.<sup>27</sup> But under such statutes it is not necessary to

ing. *Walker v. State*, 89 Ala. 74, 8 So. 144.

16. *Caldwell v. State*, 49 Ala. 34.

17. *Taylor v. State*, 6 Humph. (Tenn.) 285.

An indictment with venue in the margin alleging that the offense was committed by then and there fastening, etc., sufficiently shows the place where the offense was committed. *State v. Sloeum*, 8 Blackf. (Ind.) 315.

18. In a prosecution for poisoning animals, the phrase "while the animal is in an inclosure not surrounded by a lawful fence," as used in the statute, is essential. *State v. Deal*, 92 N. C. 802; *State v. Staton*, 66 N. C. 640. Though not necessary, the better practice would be to state, also, where the inclosure is. *State v. Painter*, 70 N. C. 70; *State v. Allen*, 69 N. C. 23. See *State v. Pratt*, 54 Vt. 484, where it was held that an indictment which does not state on whose land the poison was deposited is insufficient.

19. *State v. Deal*, 92 N. C. 802; *Stone v. State*, 3 Heisk. (Tenn.) 457.

An animal is properly described as the property of the mortgagor rather than of the mortgagee. *Walker v. State*, 89 Ala. 74, 8 So. 144.

But under statutes for the prevention of cruelty to animals it is unnecessary to allege ownership. *Grise v. State*, 37 Ark. 456; *State v. Brocker*, 32 Tex. 611, overruling *State v. Smith*, 21 Tex. 748; *McLaurine v. State*, 28 Tex. App. 530,

13 S. W. 992; *Collier v. State*, 4 Tex. App. 12; *Turman v. State*, 4 Tex. App. 586; *Benson v. State*, 1 Tex. App. 6. If the allegation is made the proof of ownership must correspond. *McLaurine v. State*, 28 Tex. App. 530, 13 S. W. 992.

20. *State v. Jackson*, 7 Ind. 270.

21. *State v. Pierce*, 7 Ala. 728.

An allegation that the animal was an estray is a sufficient averment that the ownership is unknown. *State v. Anderson*, 34 Tex. 611.

22. *Bass v. State*, 63 Ala. 108.

23. *State v. Parker*, 81 N. C. 531; *Uecker v. State*, 4 Tex. App. 234.

24. *State v. Deal*, 92 N. C. 802; *State v. Parker*, 81 N. C. 531.

25. *State v. Deffenbacher*, 51 Mo. 26.

26. Idaho.—*State v. Churchill*, 15 Idaho 645, 98 Pac. 853, 19 L. R. A. (N. S.) 835. Miss.—*Rembert v. State*, 56 Miss. 280. Tenn.—*Stone v. State*, 3 Heisk. 457; *Boyd v. State*, 2 Humph. 39.

"Maliciously" is sufficient without adding the words "out of a spirit of revenge or wanton cruelty," as used in the statute. *Rembert v. State*, 56 Miss. 280.

27. *Thompson v. State*, 51 Miss. 353.

Where the statute defines the offense to be in "wilfully and maliciously killing," etc., it is not sufficient to charge that the killing was "felonious, unlawful and malicious." *State v. Delue*, 2 Pinn. (Wis.) 204. See also *State v. Lowe*, 56 Kan. 594, 44 Pac. 20; *State v. Woodward*, 95 Mo. 129, 8 S. W. 220.

charge express malice against the owner of the animal killed,<sup>28</sup> unless the ingredient of the offense is the intent to injure such owner.<sup>29</sup>

(V.) **Value.**—In an affidavit or indictment for malicious injury to animals, the value of the property injured need not be stated,<sup>30</sup> but where a fine is made to depend upon the amount of the injury, an indictment which fails to aver such value is fatally defective.<sup>31</sup>

(VI.) **Allegations Concerning the Injury.**—(A.) **AMOUNT OR EXTENT.**—The amount of damage occasioned by the injury must be stated,<sup>32</sup> and an averment of value will not suffice.<sup>33</sup>

(B.) **KIND AND CHARACTER.**—The kind and character of the injury should be stated.<sup>34</sup>

(C.) **MEANS AND MANNER.**—(1.) *Generally.*—The means used to effect the injury need not be stated,<sup>35</sup> nor the manner of the killing be described.<sup>36</sup>

(2.) *Use of Poison.*—In an indictment for “unlawfully and maliciously” killing animals, it is a sufficient description of the mode of killing to say that it was “with and by means of poison,”<sup>37</sup> and it is unnecessary to state what kind of poison was used,<sup>38</sup> or to aver that the quantity of poison exposed was sufficient to kill,<sup>39</sup> or to aver that the act was feloniously done.<sup>40</sup> But if to maliciously administer poison is the offense defined in the statute, the indictment must charge that the act was done maliciously.<sup>41</sup>

28. Mo.—*State v. Hambleton*, 22 Mo. 452. N. C.—*State v. Scott*, 19 N. C. 35. Tenn.—*Stone v. State*, 3 Heisk. 457. Tex.—*Manes v. State*, 20 Tex. 38; *Nutt v. State*, 19 Tex. 340.

29. *State v. Rector*, 34 Tex. 565.

30. Ala.—*Caldwell v. State*, 49 Ala. 34. Ark.—*Grise v. State*, 37 Ark. 456. Ind.—*Sample v. State*, 104 Ind. 289, 4 N. E. 40; *Dinwiddie v. State*, 103 Ind. 101, 2 N. E. 290. Tex.—*Barton v. Nix*, 20 Tex. 39.

*Contra*, *United States v. Gideon*, 1 Minn. 292.

An indictment for destroying fourteen hens may allege value as a lump sum. *Com. v. Falvey*, 108 Mass. 304.

31. *Dunklin v. State*, 134 Ala. 195, 32 So. 666; *State v. Garner*, 8 Port. (Ala.) 447.

32. *Sample v. State*, 104 Ind. 289, 4 N. E. 40; *Harness v. State*, 27 Ind. 425; *State v. Peden*, 2 Blackf. (Ind.) 371.

**Affidavit—Charge of Damage.**—Maliciously injuring or killing a dog may be charged as to the damage of the property or to the damage of the owner. *Kinsman v. State*, 77 Ind. 132.

33. *Uecker v. State*, 4 Tex. App. 234; *Nicholson v. State*, 3 Tex. App. 31.

34. *Brown v. State*, 76 Ind. 85.

35. Ark.—*Yowell v. State*, 41 Ark. 355. Ind.—*State v. Merrill*, 3 Blackf.

346. Mass.—*Com. v. Falvey*, 108 Mass. 304; *Com. v. Sowle*, 9 Gray 304, 69 Am. Dec. 289.

**Force and Arms.**—The omission of the words “with force and arms” is not fatal (*Taylor v. State*, 6 Humph. [Tenn.] 285), when other equivalent words are used. *State v. Pratt*, 54 Vt. 484.

36. *State v. Cantrell*, 2 Hill (S. C.) 389.

37. *State v. Labounty*, 63 Vt. 374, 21 Atl. 730.

38. *People v. Keeley*, 81 Cal. 210, 22 Pac. 593; *Com. v. Falvey*, 108 Mass. 304.

**Paris Green.**—The words “paris green” import a poisonous substance. *State v. Labounty*, 63 Vt. 374, 21 Atl. 730.

39. *People v. Keeley*, 81 Cal. 210, 22 Pac. 593; *State v. Labounty*, 63 Vt. 374, 21 Atl. 730.

40. *People v. Keeley*, 81 Cal. 210, 22 Pac. 593.

41. *State v. Lightfoot*, 107 Iowa 344, 78 N. W. 41, holding that “wilfully and unlawfully” is not enough.

But “wilfully and maliciously” administering poison to a horse has been held sufficient averment of criminal intent. *Com. v. Brooks*, 9 Gray (Mass.) 299. And see *Com. v. Falvey*, 108 Mass. 304; *Com. v. McLaughlin*, 105 Mass. 460.



(VII.) **Negating Defense.** — It is not usually necessary to allege matters negating the circumstances under which defendant is not guilty,<sup>42</sup> or to show that the offense comes within the exception embraced in a proviso of the statute,<sup>43</sup> particularly when such proviso is foreign to the case.<sup>44</sup> So an indictment for killing an animal need not allege that it was killed in an enclosure having an insufficient fence,<sup>45</sup> nor is it necessary to aver to whom the enclosure belongs.<sup>46</sup>

c. **Conclusion and Other Formalities.** — An indictment for malicious mischief to animals may conclude at common law,<sup>47</sup> but if brought under the statute, it must conclude against the form of the statute.<sup>48</sup> The prosecuting witness need not indorse the indictment,<sup>49</sup> and an information need not contain the name of the state's attorney in the body of it.<sup>50</sup>

d. **Duplicity.** — "Disfiguring" an ox and "injuring" an ox cannot be charged in one count,<sup>51</sup> and an election to prosecute for one offense only does not cure the defect.<sup>52</sup> An allegation of injuring or killing two or more animals at the same time and place, or so near to each other as to constitute the same offense,<sup>53</sup> is not double,<sup>54</sup> though each was killed in a different manner.<sup>55</sup>

e. **Variance.** — Evidence must conform to the material allegations in the indictment or information.<sup>56</sup>

42. *State v. Batson*, 31 Mo. 343.

43. *Hewitt v. State*, 121 Ind. 245, 23 N. E. 83.

44. *Swartzbaugh v. People*, 85 Ill. 457.

45. *Dean v. State*, 37 Ark. 57. But see *McGahagin v. State*, 17 Fla. 665.

46. *State v. Painter*, 70 N. C. 70; *State v. Allen*, 69 N. C. 23.

47. *State v. Hill*, 79 N. C. 656; *State v. Scott*, 19 N. C. 35.

48. *State v. Hill*, 79 N. C. 656.

49. *Ashworth v. State*, 63 Ala. 120; *Fein v. Territory*, 1 Wyo. 376.

50. *State v. Pratt*, 54 Vt. 484.

51. *McGahagin v. State*, 17 Fla. 665.

52. *Thomas v. State*, 111 Ala. 51, 20 So. 617.

53. *Burgess v. State*, 44 Ala. 190.

54. *Rex v. Mogg*, 4 C. & P. 364, 19 E. C. L. 420.

55. *Hayworth v. State*, 14 Ind. 590.

56. *State v. Deal*, 92 N. C. 802.

**Material Variance.** — An allegation that an animal was the property of one E. is not supported by proof that it belonged to E.'s minor child (*Collier v. State*, 4 Tex. App. 12), or that the property was laid in "L. S. and others," by proof that "L. S." was the exclusive owner. *State v. Hill*, 79 N. C. 656.

An indictment for the "wilful killing of a horse" is not supported by proof of the killing of a "gelding"

(*Gholston v. State*, 33 Tex. 342. *Contra*, *Fein v. Territory*, 1 Wyo. 376), or for "wounding and killing a mule," by proof that the mule was wounded (*Reid v. State*, 8 Tex. App. 430), or for "injuring a cow," by proof that the animal injured was an "ox." *State v. Hill*, 79 N. C. 656.

An indictment charging injury to a mare and an ox is not supported if the state fails to prove that they were injured at the same time. *Burgess v. State*, 44 Ala. 190. And see *Thomas v. State*, 111 Ala. 51, 20 So. 617.

**Immaterial Variance.** — An indictment for filling and saturating a potato with a liquid poison, is supported by showing that a hole was made in the potato and filled with bran saturated with poison. *Com. v. McLaughlin*, 105 Mass. 460.

Evidence that hens found and ate poison, exposed by a person with intent that they should find and eat it, will sustain an averment that the person caused them to eat the poison. *Com. v. Falvey*, 108 Mass. 304.

A charge that the animal was the property of the general owner will admit proof of malice towards the special owner. *Stone v. State*, 3 Heisk. (Tenn.) 457.

The precise date upon which the killing was committed is not a material mat-

**5. Motion To Quash or Demurrer.** — The fact that an act making the needless killing of animals a misdemeanor does not provide how the offense is to be punished is no cause for a demurrer to an indictment under that act.<sup>57</sup>

**6. Trial.** — a. *Presumptions and Burden of Proof.* — Ordinarily the burden is on the state to prove that the defendant killed the animal with criminal and malicious intent,<sup>58</sup> as the defendant is entitled to start with the presumption in his favor.<sup>59</sup> And if there is a presumption of malice, yet if there are circumstances to repel such presumption, express malice must be proved.<sup>60</sup> Malice, however, may be presumed from the circumstances surrounding the commission of the act,<sup>61</sup> or from the act itself, if it is illegal,<sup>62</sup> and the presumption may be strong enough to shift the burden of proof from the prosecution to the defense upon that particular question.<sup>63</sup>

b. *Province of Court and Jury.* — The question of the value of an animal,<sup>64</sup> the felonious and malicious intent in the killing,<sup>65</sup> and the capacity of an infant to commit the crime of maliciously killing an animal,<sup>66</sup> have been held to be questions of fact for the determination of the jury. Whether a certain conversation amounted to a license to shoot and kill an ox should also be left to the jury.<sup>67</sup>

c. *Verdict.* — Where malice unspecified, or against the owner of the animal killed, is an ingredient of the offense, a verdict which finds

ter, and an allegation that fourteen hogs were killed on one day when proof showed five on a different day, is not a matter of which the defendant can complain. *Carson v. State*, 80 Neb. 619, 114 N. W. 938.

See *State v. Briggs*, 1 Aik. (Vt.) 226, as to what is and what is not a material variance between description and proof.

57. *State v. Greenlees*, 41 Ark. 353.

58. *Idaho.* — *State v. Churchill*, 15 Idaho 645, 98 Pac. 853, 19 L. R. A. (N. S.) 835. *Mass.* — *Com. v. Walden*, 3 Cush. 558. *Tex.* — *Farmer v. State*, 21 Tex. App. 423, 2 S. W. 767.

But it is not enough that the act was wilfully done. *Wallace v. State*, 30 Tex. 758.

**Needless Killing.** — In an indictment for needlessly killing an animal, the burden is on the state to prove the killing under such circumstances as, unexplained, would authorize the jury to believe that it was needless. *Grise v. State*, 37 Ark. 456.

59. *Com. v. Frederick*, 27 Pa. Super. 228.

60. *Chappell v. State*, 35 Ark. 345.

61. *Ala.* — *Hobson v. State*, 44 Ala. 380; *Hill v. State*, 43 Ala. 335. *Ga.* — *Mosely v. State*, 28 Ga. 190. *Idaho.* — *State v. Churchill*, 15 Idaho 645, 98 Pac.

853, 19 L. R. A. (N. S.) 835. *N. C.* — *State v. Barnard*, 88 N. C. 661. *Tex.* — *Jones v. State*, 3 Tex. App. 228.

62. *State v. Council*, 1 Overt. (Tenn.) 305; *Wallace v. State*, 30 Tex. 758.

63. *Mosely v. State*, 28 Ga. 190.

64. The value of a mule, the height of a fence, and whether defendant killed the mule, and if so, maliciously, are all questions of fact for the jury. *Dean v. State*, 37 Ark. 57.

65. *Dean v. State*, 37 Ark. 57; *Carson v. State*, 80 Neb. 619, 114 N. W. 938.

In a prosecution for administering poison to a dog, evidence tending to show that the dog, two weeks prior to the killing, had bitten defendant's boy, did not authorize the court to say, as a matter of law, that the killing was done maliciously and only for the purpose of preventing similar attacks. *State v. Coleman*, 29 Utah 417, 82 Pac. 465.

If a criminal offense is committed openly and without secrecy this fact should be considered by the jury upon the question of the existence of the felonious intent. *State v. Credle*, 91 N. C. 640.

66. *State v. Toney*, 15 S. C. 409.

67. *Ashworth v. State*, 63 Ala. 120.

the defendant guilty of the commission of the act without the essential malice amounts to an acquittal.<sup>68</sup>

**V. DRIVING FROM RANGE OR PASTURE.**—A. NATURE AND FORM OF ACTION.—The driving away of stock from range or pasture is usually made an offense by statute,<sup>69</sup> though it may also be made the basis of an action in tort at common law.<sup>70</sup> In both classes of actions, the ingredients of the offense and the rules of procedure relating thereto are substantially the same.

B. JURISDICTION.—One may be prosecuted for this offense in any county into or through which he may drive the stock, or in the county of the original taking.<sup>71</sup>

C. INDICTMENT.—1. Allegations.—a. *Language of Statute.*—It is in most cases sufficient if equivalent words or phrases equivalent to the statutory language are used.<sup>72</sup>

b. *Limits of Range.*—The word “range” or “accustomed range” is a matter of local description, and admits of proof under the general allegation, without defining by averment the limits of the range.<sup>73</sup>

c. *Distance Driven.*—It is unnecessary to state what distance the animals had been driven.<sup>74</sup>

d. *Ownership.*—The indictment must negative the fact that the cattle were the property of the defendant,<sup>75</sup> and while it may not be necessary to allege the ownership of the live stock directly, yet, if alleged, the allegation must be proved.<sup>76</sup>

e. *Authority To Drive.*—Under statutes where an ingredient of the offense is the lack of written authority to drive the cattle away, there must be an averment of such lack of written authority.<sup>77</sup>

68. Miss.—*Duncan v. State*, 49 Miss. 331. N. C.—*State v. Newby*, 64 N. C. 23. Tenn.—*State v. Wilcox*, 3 Yerg. 278, 24 Am. Dec. 569.

69. Wilfully driving stock from the range, with intent to defraud, etc., whether the punishment be imprisonment or a fine, is a felony. *Woods v. State*, 26 Tex. App. 490, 10 S. W. 108. But it is not a larceny, for it contains other elements than ordinary theft and requires a different character of proof. *Long v. State*, 39 Tex. Crim. 461, 46 S. W. 821, 73 Am. St. Rep. 954. However, the effect of such statutes is not to take larceny of stock out of the provisions of the general law, but to leave the act indictable under either. *Kollenberger v. People*, 9 Colo. 233; 11 Pac. 101; *In re Pratt*, 19 Colo. 138, 34 Pac. 680; *Arnold v. Ludlam*, 38 Ill. 190.

70. *Newell v. Giggey*, 13 Colo. 16, 21 Pac. 904; *Chamberlain v. Gage*, 20 Iowa 303.

71. *McElmurray v. State*, 21 Tex. App. 691, 2 S. W. 892; *Shubert v. State*,

20 Tex. App. 320; *Rogers v. State*, 9 Tex. App. 43.

72. *Shubert v. State*, 20 Tex. App. 320.

To charge a defendant with driving live stock out of the instead of its accustomed range, is to charge one and the same offense. *Fowler v. State*, 38 Tex. 559.

73. *Darnell v. State*, 43 Tex. 147; *State v. Thompson*, 40 Tex. 515; *Foster v. State*, 21 Tex. App. 80, 17 S. W. 548; *Shubert v. State*, 20 Tex. App. 320.

74. *Darnell v. State*, 43 Tex. 147.

75. *Heard v. State*, 8 Tex. App. 466; *Covington v. State*, 6 Tex. App. 512; *Long v. State*, 6 Tex. App. 642.

76. *Smith v. State*, 43 Tex. 433; *State v. Faucett*, 15 Tex. 585.

77. *Heard v. State*, 8 Tex. App. 466; *Covington v. State*, 6 Tex. App. 512.

Where the indictment charges the ownership of cattle driven in two persons and avers the driving “without the consent of the said owners,” this is sufficient. *Smith v. State*, 21 Tex. App. 133, 17 S. W. 558.



f. *Intent*.—The indictment need not aver an intention to appropriate the animals to the use of the defendant.<sup>78</sup>

g. *Value*.—In some jurisdictions the value of the animals driven must be alleged and proved,<sup>79</sup> but there are decisions holding the contrary.<sup>80</sup>

2. *Duplicity*.—The prosecution need not divide a single act into all the separate charges which might be formed out of it, but may charge, as one act, the driving away of the cattle of different persons.<sup>81</sup> Under an ordinary indictment for theft, a conviction cannot be had for wilfully driving stock out of their accustomed range,<sup>82</sup> and a defective charge of theft, following a count for driving cattle from their range, and which is only by way of summation, will be disregarded.<sup>83</sup>

3. *Variance*.—If an indictment alleges ownership, or that possession is in the owner, the state must prove those facts.<sup>84</sup>

D. TRIAL.—1. *Presumptions*.—Possession of animals does not carry with it the presumption of ownership, nor on the other hand is it conclusive on the question of felonious taking.<sup>85</sup>

2. *Burden of Proof*.—If it is necessary that the driving away shall be found wilful, the burden of establishing the fact rests upon the plaintiff.<sup>86</sup>

3. *Province of Court and Jury*.—Whether the defendant acted in good faith or with fraudulent intent is for the jury to determine.<sup>87</sup>

VI. AGISTMENT.—A. ACTIONS BY AGISTOR.—1. *For Compensation*.—a. *In General*.—A petition in an action to recover for the pasturage of cattle is not objectionable as alleging conclusions in alleging that the land had water and grass sufficient to maintain and keep the cattle in good condition and furnished ample range for them,

78. *Smith v. State*, 34 Tex. 612.

79. *Powell v. State*, 7 Tex. App. 467; *Marshall v. State*, 4 Tex. App. 549.

80. *Chesnut v. People*, 21 Colo. 512, 42 Pac. 656; *Wills v. State*, 40 Tex. 69 (which holds that it is only necessary to prove value where the penalty is a fine having respect to the value of the stock).

81. *Long v. State*, 43 Tex. 467. The indictment in this case charged the driving of one beef and followed it up with a charge of driving another and yet another, connecting the averments by the words *then and there*. The court said: "The form in which the averments are made is perhaps objectionable, as failing with sufficient certainty to show that it was all one transaction; but we are not prepared to say that the uncertainty is such as reaches the substance of the indictment, and so infects it that it does not appear 'from the face thereof that any offense against

the law was committed by defendant.'"

An indictment following the statute and alleging that defendant "did unlawfully and without having first obtained the consent of the owner and legal proprietor thereof then and there take possession of, use and drive off a certain mare," is good. *State v. Nicholson*, 2 Marv. (Del.) 448, 43 Atl. 251.

82. *Long v. State*, 39 Tex. Crim. 461, 537, 46 S. W. 821, 73 Am. St. Rep. 954, overruling a long line of decisions to the contrary.

83. *Long v. State*, 43 Tex. 467.

84. *Smith v. State*, 43 Tex. 433; *State v. Faucett*, 15 Tex. 585; *Long v. State*, 39 Tex. Crim. 461, 537, 46 S. W. 821, 73 Am. St. Rep. 954.

85. *Wills v. State*, 40 Tex. 69.

86. *Newell v. Giggey*, 13 Colo. 16, 21 Pac. 904.

87. *Bawcom v. State*, 41 Tex. 189; *Wills v. State*, 40 Tex. 69; *Turner v. State*, 7 Tex. App. 596.

without alleging the number of acres.<sup>88</sup> The defendant is estopped to deny the plaintiff's title if plaintiff is in possession.<sup>89</sup> But the owner may reduce the amount demanded by any damage he may have sustained through the agistor's negligence.<sup>90</sup> In such case, where the agistor fails to return all the animals, or returns them in an injured condition, the burden is upon him to exonerate himself from liability.<sup>91</sup> Where he accounts for the damage, or where the defendant makes specific charges of negligence, the burden is on the latter.<sup>92</sup> Under a contract by which the owner agrees to pay for all cattle re-delivered to him in good condition, the agistor cannot recover for cattle not delivered, or for cattle delivered in poor condition.<sup>93</sup>

b. *Parties.* — Where the statute limits the right to persons engaged in the business of keeping and caring for stock, the pleadings must show that the parties were so engaged.<sup>94</sup>

c. *The Allegations.* — In an action to enforce a lien, the complaint should describe the animals,<sup>95</sup> and should allege sufficient facts to show that the parties seeking to benefit from the same are the ones designated by statute as entitled to the lien.<sup>96</sup> The insertion

88. *O'Neal v. Knippa* (Tex.), 19 S. W. 1020.

89. *Eastman v. Tuttle*, 1 Cow. (N. Y.) 248.

90. For example, failure to maintain proper fences, whereby sheep escaped and mingled with other sheep infected with scab, and some of them died. *Sargent v. Slack*, 47 Vt. 674, 19 Am. Rep. 136.

The defendant may set up by plea in reconvention a provision against overstocking in the agreement and the violation thereof by the plaintiff, and it is no answer that the defendant knew of the overstocking, unless he consented to it. *Fields v. Haley* (Tex. Civ. App.), 72 S. W. 115.

*Agistor Not an Insurer.* — *Crawford v. Cashman*, 82 Mo. App. 554, where defendant's counterclaim was not allowed because evidence showed no negligence on plaintiff's part.

91. *Crawford v. Cashman*, 82 Mo. App. 554; *Goodfellow's Exrs. v. Meegan*, 32 Mo. 280.

92. *Crawford v. Cashman*, *supra*.

93. *Stonam v. Waldo*, 17 Mo. 489.

*To Enforce Lien.* — At common law unless by special agreement an agistor had no lien. Ala. — *Hickman v. Thomas*, 16 Ala. 666. Cal. — *Lewis v. Tyler*, 23 Cal. 364. Ill. — *Millikin v. Jones*, 37 Ill. 372. Ind. — *Hanch v. Ripley*, 127 Ind. 151, 26 N. E. 70, 11 L. R. A. 61. Iowa. — *McCoy v. Hock*, 37 Iowa 436.

Me. — *Miller v. Marston*, 35 Me. 153, 56 Am. Dec. 694. Mass. — *Goodrich v. Willard*, 7 Gray 183. Minn. — *Skinner v. Caughey*, 64 Minn. 375, 67 N. W. 203. N. Y. — *Grinnell v. Cook*, 3 Hill 485, 491, 492, 38 Am. Dec. 663; *Bissell v. Pearce*, 28 N. Y. 252. N. C. — *Mauney v. Ingram*, 78 N. C. 96. Eng. — *Jackson v. Cummins*, 5 M. & W. 342; *Chapman v. Allen*, Cro. Car. 271, 79 Eng. Reprint 836.

*Contra*, *Cadwalader v. Dilsworth*, 26 Wkly. Notes, Cas. 32. See also *Kelsey v. Layne*, 28 Kan. 218, 42 Am. Rep. 158.

Such a lien, now given in many states by statute (Ind. — *Bunnell v. Davidson*, 85 Ind. 557. Neb. — *Kroll v. Ernst*, 34 Neb. 482, 51 N. W. 1036; *Gates v. Parrott*, 31 Neb. 581, 48 N. W. 387. Wyo. *Fein v. Wyoming Loan & Tr. Co.*, 3 Wyo. 331, 22 Pac. 1150), extends only to the classes of property specifically enumerated (*Fein v. Wyoming Loan & Tr. Co.*, 3 Wyo. 331, 22 Pac. 1150).

94. *Conklin v. Carver*, 19 Ind. 226.

95. *Hooker v. McAllister*, 12 Wash. 46, 40 Pac. 617.

96. Thus an answer, in an action to recover the value of an animal sold by the agistor, was held insufficient in that it did not allege that the defendants were engaged in the business of feeding and keeping animals, as such persons were the only ones entitled to a lien under the statute. *Conklin v. Carver*, 19 Ind. 226.

of a count in a petition for shoeing a horse and for taxes will not invalidate the petition although no lien for shoeing or taxes is given by statute.<sup>97</sup>

d. *Defenses.* — One who has actual notice of the seizure of his stock under a statute providing for the enforcement of a lien for pasturage cannot attack the statute on the ground that it fails to provide for notice before a sale of the property,<sup>98</sup> nor can he deny plaintiff's title to the land if the plaintiff was in possession at the time the services were rendered.<sup>99</sup>

**2. Against Stranger for Injury or Conversion.** — An agistor has, by virtue of the custody of the animals, such a possession and title that he may maintain an action of trespass or trover against a stranger for any injury to his possession, or for a conversion of the property.<sup>1</sup>

**B. ACTIONS BY OWNER. — 1. In General.** — It is a condition precedent to the maintenance of an action to recover the possession of agisted animals that the owner make payment or tender the amount of charges for their care and keeping,<sup>2</sup> unless prevented from so doing by the act of the agistor.<sup>3</sup>

**2. Pleadings.** — In an action to recover for the loss of property, the complaint should allege the business of the defendant, delivery and acceptance of the animals, tender of the price of keeping, and a demand and refusal to deliver. It is not necessary to allege negligence;<sup>4</sup> but if the owner allege negligence, the burden is upon him to prove the same.<sup>5</sup>

**3. Burden of Proof.** — The cases on the question of the burden of proof in cases of loss or injury to animals while in the agistor's custody are conflicting. In some states it is held that where the owner shows that the animals have not been returned or that they were returned in an injured condition, the burden of showing that such loss or injury was not the result of negligence is upon the agistor.<sup>6</sup>

97. *Allen v. Ham*, 63 Me. 532.

98. *Griffith v. Gross*, 108 Ky. 160, 55 S. W. 1077.

99. *Eastman v. Tuttle*, 1 Cow. (N. Y.) 248.

1. *Ind.* — *New York, etc. R. Co. v. Auer*, 106 Ind. 219, 6 N. E. 330, 55 Am. Rep. 734. *N. H.* — *McKeen v. Converse*, 68 N. H. 173, 39 Atl. 435. *N. Y.* — *Bass v. Pierce*, 16 Barb. 595. *Ohio.* — *Betts v. Mouser*, Wright 744.

2. *Kroll v. Ernst*, 34 Neb. 482, 51 N. W. 1036; *Gates v. Parrot*, 31 Neb. 581, 48 N. W. 387.

3. *Staat v. Evans*, 35 Ill. 455.

4. **Burden of Proof.** — The proper mode of procedure under a petition only alleging demand and refusal is to make proof thereof. Defendant will then show the loss of property as his excuse for non-delivery. It will then devolve upon plaintiff to show that such loss oc-

curred through defendant's negligence. *Cummings v. Mastin*, 43 Mo. App. 558.

5. *Wood v. Remick*, 143 Mass. 453, 9 N. E. 831; *McCarthy v. Wolfe*, 40 Mo. 520.

In an action of trover, the plaintiff may rely on a demand and refusal of the property, and thus put the opposite party on the defense; but in an action of assumpsit, or an action on the case founded on negligence, the plaintiff must make out a *prima facie* case as he charges it. *Winston v. Taylor*, 28 Mo. 82, 75 Am. Dec. 112.

6. *Ill.* — *Burlingame v. Horne*, 30 Ill. App. 330. *Iowa.* — *Ware Cattle Co. v. Anderson*, 107 Iowa 231, 77 N. W. 1026. *Mo.* — *Goodfellow v. Meegan*, 32 Mo. 280; *Crawford v. Cashman*, 82 Mo. App. 554; *Cummings v. Mastin*, 43 Mo. App. 558.

Where an agistor receives cattle in



Other states hold that where the loss or injury has been accounted for, or where the owner alleges negligence, the burden is upon the owner.<sup>7</sup> And some cases hold that as the action is founded upon the negligence of the agistor, the burden never shifts, but is always upon the owner to prove such negligence.<sup>8</sup>

4. **Question for Jury.**—An agistor of stock cannot be rendered liable for loss of stock on mere proof of loss. He is held to the exercise of ordinary care and diligence, and what constitutes such care and diligence under the circumstances is a question for the jury.<sup>9</sup>

5. **Against Third Persons.**—The owner may bring an action of trover against a stranger for conversion of agisted animals. But a judgment against the defendant in favor of the agistor is a bar to any further action by the owner.<sup>10</sup>

**VII. ANIMALS RUNNING AT LARGE.**—A. STOCK LAWS.—1. **In General.**—The laws of the various states on the subject of animals running at large differ materially. In some, the matter is regulated by a general law applicable to the entire state, while in others, although controlled by the general law, it is left to the people of the counties or divisions of counties to determine whether the law shall be adopted in their district. And in many states the legislature delegates the power to municipal authorities to pass by-laws and ordinances regulating the matter. In those states where it is left to the people of the district to determine whether or not the law shall be adopted, the adoption is accomplished by an election of the people of the district or by an order of the local authorities.<sup>11</sup>

good condition and returns them in a damaged condition, or fails to return one of them at all, the law will presume negligence on his part and will put upon him the burden of showing ordinary care. *Hudson v. Bradford*, 91 Ill. App. 218.

7. *Wood v. Remick*, 143 Mass. 453, 9 N. E. 831; *Calland v. Nichols*, 30 Neb. 532, 46 N. W. 631.

8. *Rayl v. Kreilich*, 74 Mo. App. 246; *Casey v. Donovan*, 65 Mo. App. 521; *Kemp v. Phillips*, 55 Vt. 69.

9. *Ga.*—*Arrington Bros. & Co. v. Fleming*, 117 Ga. 449, 43 S. E. 691, 97 Am. St. Rep. 169. *Mo.*—*Rey. v. Toney*, 24 Mo. 600, 69 Am. Dec. 444; *Rayl v. Kreilich*, 74 Mo. App. 246. *Vt.*—*Kemp v. Phillips*, 55 Vt. 69.

10. *Gove v. Watson*, 61 N. H. 136; *Collins v. Bennett*, 46 N. Y. 490.

11. **Adoption by Election.**—See *Martin v. Crook*, 155 Ala. 198, 46 So. 482.

**The Petition.**—See the following cases: *Ala.*—*Commissioner's Court v. Wilborn*, 155 Ala. 192, 46 So. 585; *Brazeel v. Commissioner's Court*, 155

*Ala.* 196, 46 So. 584; *Commissioner's Court v. Johnson*, 145 Ala. 553, 39 So. 910; *Flowers v. Grant*, 129 Ala. 275, 30 So. 94. *Miss.*—*Garner v. Webster County*, 79 Miss. 565, 31 So. 210. *N. C.* *Newsom v. Earnheart*, 86 N. C. 391. *Tex.*—*Missouri, etc. R. Co. v. Tolbert*, 101 S. W. 1014; *Cox v. State* (Tex. Crim.), 88 S. W. 812; *Ex parte Kimbrell*, 47 Tex. Crim. 333, 83 S. W. 382; *Jones v. Carver*, 29 Tex. Civ. App. 268, 67 S. W. 780; *Gilley v. Haddox* (Tex. App.), 15 S. W. 714.

**The Order for Election.**—*Ala.*—*Cross White v. Commissioner's Court*, 49 So. 870; *Brazeel v. Commissioner's Court*, 155 Ala. 196, 46 So. 584; *Jones v. Elliott*, 150 Ala. 437, 43 So. 564; *Mayfield v. Commissioner's Court*, 148 Ala. 548, 41 So. 932; *Hawthorn v. State*, 116 Ala. 487, 22 So. 894. *Tex.*—*Gulf, etc. R. Co. v. Campbell* (Tex. Civ. App.), 105 S. W. 539; *Cox v. State* (Tex. Crim.), 88 S. W. 812; *Robertson v. State*, 44 Tex. Crim. 270, 70 S. W. 542; *Reuter v. State*, 43 Tex. Crim. 572, 67 S. W. 505; *Graves v. Rudd*, 26 Tex. Civ. App. 554, 65 S. W. 63;

**2. Actions.**—If commissioners refuse to make an order establishing a stock law and no appeal is provided for, mandamus will lie to compel action.<sup>12</sup> And the same remedy will lie to compel them to make an order extending the stock law territory.<sup>13</sup>

**3. Review.**—It is held in some states that where the statute provides no mode of review, *certiorari* is the proper remedy.<sup>14</sup> And generally the only right to a review is that provided by statute,<sup>15</sup> and no contest of a stock law election can be maintained unless specifically provided for.<sup>16</sup>

**4. Appeals.**—Generally, until a board takes final action establishing a stock law, no appeal lies.<sup>17</sup> However, in one state, at least, under the statute, an appeal lies from all decisions.<sup>18</sup>

#### B. ENFORCEMENT OF REGULATIONS AGAINST RUNNING AT LARGE.—

**1. By Civil Action.**—Penalties for the violation of statutes and ordinances prohibiting animals from running at large are, in some jurisdictions, enforceable in a civil action and not by criminal prosecution,<sup>19</sup> and the same rule applies in some states as to the penalty

Roberson v. State, 42 Tex. Crim. 595, 63 S. W. 884; Kirkland v. Guinn, 26 Tex. Civ. App. 39, 62 S. W. 1101; McElroy v. State, 39 Tex. Crim. 529, 47 S. W. 359; Field v. Hall, 16 Tex. Civ. App. 233, 40 S. W. 749.

**Notice.**—See *Ex parte* Kimbrell, 47 Tex. Crim. 333, 83 S. W. 382. See also Hawthorn v. State, 116 Ala. 487, 22 So. 894; Kirkland v. Guinn, 26 Tex. Civ. App. 39, 62 S. W. 1101.

**Adoption by Order.**—St. Louis & S. F. R. Co. v. Mossman, 30 Kan. 336, (Pac.); Noffziger v. McAllister, 12 Kan. 315; Stockton v. Caldwell, 86 Miss. 477, 38 So. 369.

**Sufficiency of Order.**—Noffziger v. McAllister, 12 Kan. 315; Tinkham v. Greer, 11 Kan. 299.

**Publication.**—Pond v. Treathart, 43 Kan. 41, 22 Pac. 1014; Reed v. Sexton, 20 Kan. 195; Hoover v. Mear, 16 Kan. 11.

**12.** Where a complaint alleges that the petitioners for a stock law are resident landowners in the territory named and that the petition was signed by a majority in the proposed stock law territory, the petitioners are the proper parties to compel the granting of the petition. Perry v. Commissioners, 130 N. C. 558, 41 S. E. 787.

**13.** Stokes v. Winfree, 23 Tex. Civ. App. 690, 57 S. W. 918.

**14.** Henry v. Board of Revenue, 151 Ala. 511, 44 So. 110; Stanfill v. Court of County Revenue, 80 Ala. 287.

**15.** Bowles v. Leflore County, 85 Miss. 387, 37 So. 707.

In a proceeding brought to have a board of supervisors vacate their order in annexing certain lands to a beat in which they had previously declared the stock law in force, it was held that the board has ordinarily no power to review, reverse or vacate its own judicial action after final adjournment. Keenan v. Harkins, 82 Miss. 709, 35 So. 177.

**16.** Harris v. Perryman, 103 Ga. 816, 30 S. E. 663; Meadows v. Taylor, 82 Ga. 738, 10 S. E. 204.

Although the statute authorizes a contest of stock law election, *certiorari* is the proper remedy to review the action of a court establishing a stock law district under a void election, there being nothing to contest if the election is void. In such case, the resident landowners of the district are the proper parties to apply for the writ. Commissioner's Court v. Johnson, 145 Ala. 553, 39 So. 910.

**17.** Bowles v. Townes (Miss.), 38 So. 354.

**18.** Board v. Haines, 4 Okla. 701, 46 Pac. 561.

**19.** Willis v. Legris, 45 Ill. 289; Sloan v. People, 108 Ill. App. 545.

Under the Texas statute the penalty, a part of which goes to the informer, is recoverable only in a *qui tam* action; an indictment will not lie. Rawlings v. State, 39 Tex. 200; State v. Garcia, 38 Tex. 543.

In Massachusetts, the action of debt will lie by the field driver to recover his fees for impounding. Wild v. Skinner, 23 Pick. (Mass.) 251.

for keeping unlicensed dogs.<sup>20</sup> But before a recovery can be had it is necessary to show that the animals were at large with the knowledge or sufferance of the owner, and a showing by him that the animals escaped without his fault constitutes a good defense.<sup>21</sup>

**2. By Criminal Prosecution.**—*a. For Violation of Stock Laws.*—**(I.) In General.**—The fact that a stock law allows a civil action to recover fees for impounding does not bar criminal prosecution to furnish a violation of the act.<sup>22</sup> It seems, however, that where the penal statute is passed after the people have adopted a local option stock law, which provides only a civil remedy, an indictment will not lie for a violation of the law in that county.<sup>23</sup> That a municipal ordinance permits certain animals to run at large is no defense to a prosecution under a statute prohibiting it.<sup>24</sup>

**(II.) Indictment.**—An indictment for a violation of the stock law is sufficient if it follows the words of the statute.<sup>25</sup> In some states it is held that it is unnecessary to aver all the various proceedings required by the act to be gone through with in establishing the district,<sup>26</sup> while in others the indictment must set forth all the facts necessary to show that the law has been legally adopted.<sup>27</sup>

It is sufficient to allege that the defendant kept a dog "without said dog being then and there licensed according to law," without averring want of registry, or that the dog was not licensed in another county.<sup>28</sup>

**3. By Impounding.**—*a. In General.*—The right to impound animals running at large being largely statutory, the requirements of the statute must be strictly complied with.<sup>29</sup>

20. *Ives v. Jefferson Co.*, 18 Wis. 166; *Carter v. Dow*, 16 Wis. 317.

21. **III.**—*Collinsville v. Seanland*, 58 Ill. 221; *Willis v. Legris*, 45 Ill. 289. Pa.—*Shaw v. Com.*, 72 Pa. 68; *Com. v. Fourteen Hogs*, 10 Serg. & R. 393. Wis.—*Montgomery v. Breed*, 34 Wis. 649.

22. *Roberson v. State*, 42 Tex. Crim. 595, 63 S. W. 884.

23. *Johnson v. State*, 52 Tex. Crim. 510, 106 S. W. 374; *McElroy v. State*, 39 Tex. Crim. 529, 47 S. W. 359.

24. *Perkins v. State, ex rel. Knapp*, 80 Ohio St. 450, 89 N. E. 8.

25. *Mays v. State*, 89 Ala. 37, 8 So. 28.

If the statute prohibits "knowingly" allowing hogs to run at large, it is sufficient to charge that defendant "unlawfully" allowed it. *State v. Patterson*, (Ala.), 42 So. 19.

26. *Davis v. State*, 141 Ala. 84, 37 So. 454, 109 Am. St. Rep. 19.

27. The indictment must allege a legal petition, an order by the commissioner's court for the election, the declaration of the result by the county

judge and publication for thirty days prior to the institution of the prosecution of the result of the election, and the kind of stock involved. *King v. State (Tex. Crim.)*, 74 S. W. 773.

An averment that the swine were permitted to run at large on the sidewalks of a certain city in violation of a city ordinance is a sufficient allegation that they were at large on a public highway. *Com. v. Curtis*, 9 Allen (Mass.) 266.

28. *Com. v. Thompson*, 2 Allen (Mass) 507.

**For Keeping Unlicensed Dog—Parties Liable.**—The keeper and not the owner is liable for keeping an unlicensed dog (*Jones v. Com.*, 15 Gray, Mass., 193), if he has the dog in his possession at the time required by statute for licensing the same (*Com. v. Brimblecom*, 4 Allen [Mass.] 584).

29. **III.**—*Erlinger v. Boneau*, 51 Ill. 94; *Clark v. Lewis*, 35 Ill. 417. Ind.—*Jones v. Clouser*, 114 Ind. 387, 16 N. E. 797; *Nafe v. Leiter*, 103 Ind. 138, 2 N. E. 317; *Forsyth v. Walch*, 4 Ind. App. 182, 30 N. E. 720; *Frazier v. Goar*, 1 Ind. App. 38, 27 N. E. 442. Mass.—



b. *Rescue*.—Under a statute providing a penalty for the rescue of animals from the pound by the owner, the penalty may be recovered in a *qui tam* action,<sup>30</sup> or by a criminal prosecution.<sup>31</sup> Generally, in such actions, the owner cannot set up as a defense the fact that the impounding was unlawful.<sup>32</sup>

c. *Sale*.—(I.) *In General*.—Before animals impounded for running at large can be sold, it must be judicially determined that the penalty, has been incurred, and a sale without such determination is absolutely void and confers no title upon the purchaser. The poundmaster cannot determine the question.<sup>33</sup> No demand by the owner is necessary before bringing replevin against the purchaser at an unauthorized sale,<sup>34</sup> and the sale of animals belonging to different owners must be separate.<sup>35</sup>

(II.) *Notice*.—Notice of the sale should be given at the time<sup>36</sup> and in the manner prescribed by the statute. Personal notice should be given if possible, but if the owner is unknown or beyond the jurisdiction of the court, a proceeding *in rem* with proper notice is sufficient.<sup>37</sup>

*Coffin v. Field*, 7 Cush. 355. **Mo.**—*Gates v. Crandall*, 123 Mo. App. 414, 100 S. W. 51.

Failure to comply renders a person impounding a trespasser *ab initio*. *Wyman v. Turner*, 14 Ind. App. 118, 42 N. E. 652.

The right to impound is generally specifically granted by statute, but a city ordinance may authorize impounding. *Whitlock v. West*, 26 Conn. 406.

**Who May Impound**.—**Ill.**—*Holcomb v. Davis*, 56 Ill. 413; *Erlinger v. Boneau*, 51 Ill. 94. See also *Friday v. Floyd*, 63 Ill. 50. **Ind.**—*McManaway v. Crispin*, 22 Ind. App. 368, 53 N. E. 840. **Mass.**—*Gilmore v. Holt*, 4 Pick. 258. **N. Y.**—*Jackson v. Morris*, 1 Denio 199.

**Animals Running at Large**.—**Ind.**—*Nafe v. Leiter*, 103 Ind. 138, 2 N. E. 317. **Mass.**—*Pickard v. Howe*, 12 Mete. 198. **Mo.**—*Shy v. Richards*, 79 Mo. App. 662. **Ohio**.—*Holtzkemper v. Langloth*, 8 Ohio C. C. 520.

**Notice and Sufficiency Thereof**.—See the following cases: **Conn.**—*Goodsell v. Dunning*, 34 Conn. 251. **Ind.**—*Wyman v. Turner*, 14 Ind. App. 118, 42 N. E. 652; *Forsyth v. Walch*, 4 Ind. App. 182, 30 N. E. 720. **Ky.**—*Gentry v. Little*, 16 Ky. L. Rep. 26. **Mass.**—*Sanderson v. Lawrence*, 2 Gray 178; *Field v. Jacobs*, 12 Mete. 118; *Pickard v. Howe*, 12 Mete. 198; *Wild v. Skinner*, 23 Pick. 251; *Gilmore v. Holt*, 4 Pick. 258; *Coffin v. Field*, 7 Cush. 355. **Mo.**—*Gates v. Crandall*, 123 Mo. App. 414, 100 S. W. 51. **N. C.**—*Rose v. Hardie*, 98 N. C. 44, 4 S. E. 41.

30. *Melody v. Reab*, 4 Mass. 471.

The action will lie although the cattle are never out of sight of the field driver after the rescue and are afterwards delivered to him by the owner to be impounded. *Vinton v. Vinton*, 17 Mass. 342.

**Sufficiency of Complaint**.—An allegation in a complaint, after describing the offense, that the act complained of was "contrary to an act by the state entitled 'Of pounds and impounding beasts'" was equivalent to an allegation that the act was contrary to the form of the statute. *Cleaves v. Jordan*, 35 Me. 429.

31. *Com. v. Beale*, 5 Pick. (Mass.) 514.

32. *Field v. Coleman*, 5 Cush. (Mass.) 267; *Com. v. Beale*, 5 Pick. (Mass.) 514; *Melody v. Reab*, 4 Mass. 471.

However, it has been held in Wisconsin that where the animal escapes without the fault of the owner and he uses due diligence to recapture it without delay, such facts constitute a good defense to an action for the penalty by the person impounding. *Montgomery v. Breed*, 34 Wis. 649.

33. **Ala.**—*Ryall v. Smith*, 138 Ala. 145, 34 So. 1009. **Ill.**—*Willis v. Legris*, 45 Ill. 289; *Poppen v. Holmes*, 44 Ill. 360, 92 Am. Dec. 186; *Clark v. Lewis*, 35 Ill. 417. **Ky.**—*Gentry v. Little*, 16 Ky. L. Rep. 26.

34. *Clark v. Lewis*, 35 Ill. 417.

35. *Clark v. Lewis*, 35 Ill. 417.

36. *Clark v. Lewis*, 35 Ill. 417.

37. *Gentry v. Little*, 16 Ky. L. Rep. 26.

Where a written notice is specified, a verbal notice is insufficient unless the owner appears personally at the sale.<sup>38</sup>

d. *Remedies for Unlawful Impounding.*—Replevin is the usual remedy for unlawfully impounding animals running at large.<sup>39</sup> But such remedy is not exclusive and the owner does not waive his right to maintain trespass on the grounds of irregularities or omissions in the proceedings by paying the fees of the field driver and pound-keeper.<sup>40</sup> In some states a demand and tender are necessary before action,<sup>41</sup> but this is not so if the animal has been sold at an invalid sale.<sup>42</sup> If the person impounding the animals fails to care for them properly, he becomes a trespasser *ab initio*, and is liable in an action for damages.<sup>43</sup>

4. **Killing Dogs Running at Large.**—An officer who, in killing a dog found running at large, has acted within the law is not liable.<sup>44</sup>

#### VIII. MARKS AND BRANDS.—A. CRIMINAL PROSECUTION.—

1. **Indictment.**—a. *Sufficiency in General.*—An indictment for altering or defacing a mark or brand, or for wrongfully marking or branding an animal the property of another, is sufficient if couched in the language of the statute<sup>45</sup> or in words of similar import.<sup>46</sup>

Omitting the purely formal words of the statute does not render the indictment bad.<sup>47</sup>

b. *Necessary Allegations.*—(I.) **Ownership.**—The indictment must contain an averment of ownership or that the name of the owner is unknown,<sup>48</sup> but it is not necessary that the person named in the indict-

38. *Denham v. Anderson*, 14 Ky. L. Rep. 391.

39. *Marx v. Labadie*, 51 Mich. 605, 17 N. W. 76.

Taking possession of the animals after the commencement of the action does not constitute a bar. *Frazier v. Goar*, 1 Ind. App. 38, 27 N. E. 442.

40. *Coffin v. Field*, 7 Cush. (Mass.) 355.

41. *Holcomb v. Davis*, 56 Ill. 413; *Holtzkemper v. Langloth*, 8 Ohio C. C. 520.

42. *Clark v. Lewis*, 35 Ill. 417.

43. Where a plea by a plaintiff in replevin alleged that defendant detained plaintiff's milk cows in a pound from seven a. m. till five p. m., in warm weather, and did not relieve them with any meat and water, whereby they became greatly injured by the shrinking of their milk and in other respects, it was held that there was a sufficient averment that the cattle needed relief. *Adams v. Adams*, 13 Pick. (Mass.) 384.

**Who Liable.**—Persons impounding animals are not responsible for the illegal acts of the poundkeeper after they have surrendered the animals into his possession. *Hall v. Hall*, 24 Conn. 358; *Byron v. Crippen*, 4 Gray (Mass.) 312;

*Coffin v. Vincent*, 12 Cush. (Mass.) 98. Nor are they liable where the owner, by his own acts, prevents them from complying with the law. *Gilmore v. Holt*, 4 Pick. (Mass.) 258.

44. *Walker v. Towle*, 156 Ind. 639, 59 N. E. 20, 53 L. R. A. 749; *Kerr v. Seaver*, 11 Allen (Mass.) 151. See, however, *McAneany v. Jewett*, 10 Allen (Mass.) 151; *Bishop v. Fahay*, 15 Gray (Mass.) 61.

45. Fla.—*Shiver v. State*, 41 Fla. 630, 27 So. 36; *Morgan v. State*, 13 Fla. 671. N. C.—*State v. O'Neal*, 29 N. C. 251; *State v. Davis*, 24 N. C. 153. Ore.—*State v. Lee*, 17 Ore. 488, 21 Pac. 455. S. C.—*State v. Roberts*, 3 Brev. 139.

46. *State v. Stelly*, 48 La. Ann. 1478, 21 So. 89.

47. *Murrah v. State*, 51 Miss. 675.

**Duplicity.**—A count charging that the defendant did "brand and mark" and also that he did "by so branding, deface, alter and obliterate the said recorded brand" is not void for duplicity. *Ortega v. Territory*, 8 Ariz. 37, 68 Pac. 544.

48. *State v. Haws*, 41 Tex. 161; *State v. Faucett*, 15 Tex. 584; *Slaughter v. State*, 7 Tex. App. 123.

ment be the real owner. For the purposes of the statute, as in the case of theft, possession, with actual care, control and management, is sufficient.<sup>49</sup>

(II.) Intent. — There must be a charge that the act was committed with the intent to defraud the owner or to convert the property to the use of the defendant,<sup>50</sup> but it is not necessary to allege an intent to "steal" the property.<sup>51</sup>

(III.) Consent of Owner. — The indictment must charge that the marking or alteration was done without the consent of the owner.<sup>52</sup>

(IV.) Description of Animal. — A description of the animal in the words designated in the statute is sufficient.<sup>53</sup>

(V.) Description of Mark or Brand Altered. — It is not necessary to allege what the former brand was or in what manner it was altered.<sup>54</sup>

(VI.) Value. — Where the altering the mark or brand or the wrongful branding of an animal is punished in the same manner as larceny, and where by a later statute larceny of such animal is made a felony regardless of value, it is unnecessary to allege the value of the animal in the indictment.<sup>55</sup> But if the statute makes the punishment depend upon the value of the animal, the indictment must allege value.<sup>56</sup>

(VII.) Time and Place. — The indictment must charge the time and place of the commission of the offense.<sup>57</sup>

Charging that the animal was "the property of an estate" is not enough. *People v. Hall*, 10 Cal. 425.

The indictment must charge also that the animal was not the property of the defendant. *Cresap v. State*, 28 Tex. App. 529, 13 S. W. 992.

Ownership of Marks and Brands. — The owner of the marks and brands need not be named where the name of the owner of the animals is set out. *Shiver v. State*, 41 Fla. 630, 27 So. 36; *State v. Stelly*, 48 La. Ann. 1478, 21 So. 89.

49. *Alford v. State*, 31 Tex. Crim. 299, 20 S. W. 553.

If ownership is in one person but the animals are in the custody and control of another, the indictment should aver ownership in the real owner with possession in the other, or ownership and possession in the latter. *Williams v. State*, 41 Tex. Crim. 365, 57 S. W. 93.

50. *Ariz.* — *Ortega v. Territory*, 3 *Ariz.* 37, 68 Pac. 544; *Blevins v. Territory*, 4 *Ariz.* 326, 41 Pac. 442. *Fla.* — *Morgan v. State*, 13 Fla. 671. *Mo.* — *State v. Matthews*, 20 Mo. 55. *S. C.* — *State v. Roberts*, 3 *Brev.* 112. *Tex.* — *State v. Haws*, 41 Tex. 101; *State v. Hall*, 27 Tex. 333; *Cresap v. State*, 28 Tex. App. 529, 13 S. W. 992.

51. *State v. Stelly*, 48 La. Ann. 1478, 21 So. 89.

An indictment charging the altering of the marks and brands of an animal with "intent to claim the same" follows substantially the language of that part of the statute which defines the intent made an ingredient of the offense and is sufficiently definite to apprise the defendant of the specific intent charged against him and to enable him to prepare his defense thereto. *Shiver v. State*, 41 Fla. 630, 27 So. 36.

52. *State v. Haws*, 41 Tex. 161; *State v. Hall*, 27 Tex. 333; *Cresap v. State*, 28 Tex. App. 529, 13 S. W. 992.

53. *State v. Stelly*, 48 La. Ann. 1478, 21 So. 89.

In charging the unlawful branding of a colt, it is not necessary to allege that the colt was of the horse species. *Pullen v. State*, 11 Tex. App. 89.

54. *State v. O'Neal*, 20 N. C. 251; *State v. Lee*, 17 Ore. 483, 21 Pac. 455.

*Contra*, *Sewall v. State*, *Wright* (Ohio) 483, holding that an indictment for defacing an ear-mark on certain sheep was defective in that it did not set out the existing mark and describe its alteration, or the manner as near as may be.

55. *Houston v. State*, 66 Ark. 607, 50 S. W. 44.

56. *Melton v. State*, 20 Tex. App. 262.

57. *Morgan v. State*, 13 Fla. 671. On or about a certain date before



c. *Variance*.—Any material variance between the proof and the allegations is ground for a new trial. Thus, if the indictment alleges the particular manner of the alteration of a brand and the evidence shows a different alteration, the variance is fatal.<sup>58</sup>

2. *Verdict*.—The verdict must conform to the charges alleged in the indictment,<sup>59</sup> but if the indictment contains more than one count judgment will not be arrested if the verdict can be supported by any one of the counts.<sup>60</sup>

3. *Defenses*.—Where the branding of more than one animal occurs at the same time or so near the same time as to constitute practically the same transaction, a conviction for the branding of one of the animals is a bar to any further prosecution.<sup>61</sup>

B. *CIVIL ACTIONS*.—Where the statute provides an action of debt for a penalty for the unlawful marking of the animals of another, the owner must allege that the defendant marked the animals with his own mark.<sup>62</sup>

C. *SEQUESTRATION*.—Under statutes providing that civil officers may seize and sequester unmarked and unbranded animals, and freshly branded animals whose ownership is disputed, the requirements of the statute as to procedure must be strictly complied with, and a notice not in compliance therewith will render the entire proceedings void.<sup>63</sup>

**IX. REGULATIONS FOR SLAUGHTERING.**<sup>64</sup>—*Indictment*.—An indictment against a butcher for failing to report to the commissioners's court on the first day of the term all the cattle slaughtered by him since the last term of the court must allege that defendant was a butcher and that as such butcher had slaughtered a number of animals prior to the first day of the term.<sup>65</sup>

the finding of the indictment, is sufficient. *Ortega v. Territory*, 8 Ariz. 37, 68 Pac. 544.

58. *David v. State* (Tex. Crim.), 20 S. W. 553.

An indictment charging the unlawful branding a steer which was the property of J. F. R., is not sustained by evidence that it belonged to N. B. R. *Mayes v. State*, 33 Tex. 340.

The proof need not show that all the brands were changed in the manner charged. *House v. State*, 15 Tex. App. 522.

59. *State v. Nichols*, 12 Rich. L. (S. C.) 672, a general verdict for marking six hogs where only three were marked.

60. *State v. Davis*, 24 N. C. 153.

Where one count of an indictment charges the altering of the mark of a hog, and the other the larceny of the

same hog, it does not necessarily denounce two felonious acts that were contemporaneous and forming parts of the same transaction so as to render two separate sentences thereunder null and void. *State v. Stelly*, 48 La. Ann. 1478, 21 So. 89.

61. *Adams v. State*, 16 Tex. App. 162.

62. *Reagh v. Spann*, 3 Stew. (Ala.) 100.

63. *Lacey v. Parks*, 9 Ariz. 241, 80 Pac. 367.

64. *Power of State To Regulate*.—See *State v. Davis*, 72 N. J. L. 345, 61 Atl. 2; *State v. Harned*, 72 N. J. L. 353, 61 Atl. 5.

*Regulation by Municipality*.—See cases cited in note to *Ex parte Lacey*, 108 Cal. 326 (Pac.), 38 L. R. A. 640, 651.

65. *Braun v. State*, 40 Tex. Crim. 236, 49 S. W. 620.

Where the law requires butchers to keep lists of all cattle slaughtered, with names of persons from whom purchased, together with the marks and brands, etc., to charge a failure to return "lists of cattle slaughtered" is sufficiently certain and negatives defendant's compliance with the law.<sup>66</sup>

Under a statute requiring a butcher to make report of every animal slaughtered, whether purchased or raised by himself, a charge that defendant failed to make report of "all animals purchased and slaughtered by him" does not state the offense and is defective.<sup>67</sup>

66. *Schutze v. State*, 30 Tex. 508.

67. *Kinney v. State*, 21 Tex. App. 348, 17 S. W. 423.

# ANNUITIES

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**I. DEFINITION.** — An annuity is an annual sum granted to a person in fee for life, or years,<sup>1</sup> by parol or written contract<sup>2</sup> (or, as

1. Ala. — *Turrentine, Adms. v. Perkins*, 46 Ala. 631, *citing* Coke Litt. 144, Cal. — *Estate of Apple*, 66 Cal. 432, 438, 6 Pac. 7, "a bequest of certain specified sums periodically," *quoting* § 1357 Civil Code. Conn. — *Bartlett v. Slater*, 53 Conn. 102, 22 Atl. 678, 55 Am. Rep. 73. Iowa. — *White v. Marion*, 139 Iowa 479, 117 N. W. 254. Mo. — *Lynch v. Houston*, 138 Mo. App. 167, 119 S. W. 994, *citing* *Bouvier's Law Dict.*, 43. N. Y. — *Kearney v. Cruikshank*, 117 N. Y. 95, 22 N. E. 580; *Booth v. Ammerman*, 4 Bradf. Sur. 132, a stated sum payable annually. R. I. — *Pearson v. Chace*, 10 R. I. 455.

"An annuity is the grant of a certain sum of money to be paid by the grantor or his representative, at the expiration of fixed consecutive periods, for a definite term, or for life, or in fee. Formerly, the term annuity referred to the nature of the security on which the grantee relied, and expressed

a charge upon the person or personal estate of the grantor only, while a charge upon the real estate of the grantor was signified by the term of a rent. At the present day an annuity is applied indiscriminately to every species of security.' *Petersdorff's Abr. Supplement*, Vol. 1, p. 205. It therefore appears that the name annuity is applied to a rent charge if at the same time the person remains personally liable on the grant or covenant creating it. Minor in his *Institutes* says, that annuities when made a charge on land are real estate. 2 *Minor's Inst.*, (2d ed.) ch. 3, p. 31. After the death of the grantor, however, the liability may be solely on the land and it has been held that in such case the action was local. *Whitaker v. Forbs*, referred to in the article in 11 *Harvard Law Rev.*" 2 *Andrews' American Law* (2d ed.), 1107, n. 7.

2. A contract for a life annuity, unless it be a life annuity issuing out



the term is sometimes used, by will),<sup>3</sup> charging the person of the grantor only.<sup>4</sup> It is personal to the annuitant,<sup>5</sup> and is distinguishable from a rent charge,<sup>6</sup> and a gift of the income of certain property.<sup>7</sup>

of or charged upon lands, is a mere chose in action for the payment of money and may be the subject of a parol or written contract, in the absence of statute requiring it to be by deed. *Cahill v. Maryland L. Ins. Co.*, 90 Md. 333, 45 Atl. 180, 47 L. R. A. 614, a suit on an annuity policy issued by the defendant.

**By Deed.** — "An annuity is an incorporeal hereditament created by grant, which necessarily implies an instrument under seal." *Berry v. Doremus*, 30 N. J. L. 399, citing *Coke Lit.* 166, b.

3. *DeHaven v. Sherman*, 131 Ill. 115, 22 N. E. 711, 6 L. R. A. 745; *Bates v. Barry*, 125 Mass. 83, 28 Am. Rep. 207. See *Driggs v. Plunkett*, 32 Ky. L. Rep. 390, 105 S. W. 976.

Annuity given by will is considered as a legacy (*Heatherington v. Lewenberg*, 61 Miss. 372; *Attorney-General v. Downing*, 1 Dick. 414, 417, 21 Eng. Reprint 330; *Sibley v. Perry*, 7 Ves. 522, 534, 6 R. R. 183, 32 Eng. Reprint 211), unless there is something to show that the testator distinguished between them, as in *Nannock v. Horton*, 7 Ves. Jr. 391, 402, 32 Eng. Reprint 158.

4. Ala. — *Turrentine, Admr. v. Perkins*, 46 Ala. 631, citing *Coke Litt.* 144, b. Conn. — *Bartlett v. Slater*, 53 Conn. 102, 22 Atl. 678, 55 Am. Rep. 73. Iowa. *White v. Marion*, 139 Iowa 479, 117 N. W. 254. Md. — *Rebecca Owning's Case*, 1 Bland 290, 296. Mo. — *Lynch v. Houston*, 138 Mo. App. 167, 119 S. W. 994.

Where an annuity is charged on real and personal property conveyed by deed, an acceptance binds the grantee and he is not relieved on account of the destruction of the personalty. *Taylor v. Forsey*, 56 Ala. 426.

Fact that payment is secured by lien does not affect the personal character of the obligation any more than a mortgage affects the personal character of a note which it secures. *Lynch v. Houston*, 138 Mo. App. 167, 119 S. W. 994.

The fact that the annuitant rents and collects rent from land upon which a lien exists for the payment of annuity, and applies the same toward payment thereof, does not affect the personal obligation of the party charged under the plain terms of the contract. *Lynch v.*

*Houston*, 138 Mo. App. 167, 119 S. W. 994.

5. *Moore v. Dunn*, 92 N. C. 63; *Nannock v. Horton*, 7 Ves. Jr. 391, 402, 32 Eng. Reprint 158.

6. "Rent Charge" and "Annuity" Distinguished. — "It is frequently difficult to distinguish between a rent charge and an annuity. The latter is generally a charge against the person, whereas a rent charge is against land in the hands of the purchaser, and it arises out of the land. . . . An annuity is 'A yearly payment of a certain sum of money granted to a person for life, or years, or in fee, chargeable upon the person of the grantor; it therefore differs from a rent charge which is charged upon the land.' (Wharton's Law Dictionary, 43.) 'An annuity is a thing very distinct from a rent charge, with which it is frequently confounded; a rent charge being a burden imposed upon and issuing out of lands, whereas an annuity is a yearly sum chargeable only upon the person of the grantor.' (2 Blackstone, 40.) An 'annuity is chargeable upon the person of the grantor, for if the annuity was made chargeable upon land, it would then become a rent charge.' [2 Kent's Com. (12th Ed.), 460.] . . . In Bacon's Abridgment (title 'Annuities') it is stated that 'An annuity, strictly taken, is a yearly payment of a certain sum of money granted to another in fee simple, fee tail, or life, or years, charging the person of the grantor only: If payable out of lands, it is properly called a rent charge; but if the person and estate be made liable, as they most commonly are, then it is generally called an annuity.' (Italics ours.)" *Lynch v. Houston*, 138 Mo. App. 167, 119 S. W. 994.

Reservation of a life estate in a deed is not an annuity. *White v. Marion*, 139 Iowa 479, 117 N. W. 254.

7. Distinction Between Income and an Annuity. — The former embraces all the net profits after deducting all necessary expenses and charges—the latter is a fixed amount directed to be paid absolutely and without contingency. *Whitson v. Whitson*, 53 N. Y. 479 (quoting *Redfield on Wills*, pt. 2, 453); *Ex parte McComb*, 4 Bradf. Sur. (N. Y.) 151. See also *Pearson v. Chace*, 10 B. L. 455.

**II. REMEDIES AND ESSENTIAL ALLEGATIONS IN PLEADINGS.**—A. IN GENERAL.—To recover an annuity, an action of debt or covenant is proper.<sup>8</sup>

A bill in equity may be resorted to for the purpose of collecting an annuity when the same has been created by will.<sup>9</sup> And it seems that there is no rule that an annuitant whose annuity is repurchasable, and whose title is not impeached, cannot be sued in equity, except for the purpose of redemption.<sup>10</sup>

Where security is given for payment of an annuity, a foreclosure suit may be brought.<sup>11</sup>

Where a wife is made an annuitant by deed to the grantor's daughters, she to have the same in lieu of dower, in a suit to collect such annuity it is not incumbent on her to show that she had elected to take the same in lieu of dower, as this would be a defense merely.<sup>12</sup>

In Canada it is not necessary in a bill to enforce an annuity deed to allege the enrollment of a memorial as required by the English annuity acts.<sup>13</sup>

**B. ELECTION OF REMEDIES.**—Where a devisee accepts a devise

*Compare* Ritter's Estate, 148 Pa. 577, 24 Atl. 120.

8. Horton v. Cook, 10 Watts (Pa.) 124, 36 Am. Dec. 151.

Where an annuity is charged on lands an action of debt does not lie for arrears. Kelly v. Clubbe, 6 Moore (Eng.) 336, 3 Br. & B. 130; Webb v. Jiggs, 4 M. & S. (Eng.) 113, 16 R. R. 408, 105 Eng. Reprint 777.

In an action on a mere collateral covenant, by which defendant jointly with another undertakes to secure the payment of an annuity issuing out of land, debt is not the proper remedy for the recovery of arrears, but covenant. Randall v. Rigby, 4 Mees. & W. (Eng.) 130.

Under the common law a writ of annuity was a remedy at law against the person of the grantor to recover an annuity and arrears, though the annuity continued, but for the future a *scire facias* was necessary on the judgment. This writ is now out of use. Davis v. Speed, 5 Mod. 143, 87 Eng. Reprint 572. See also *infra*, "Judgment or Decree, and execution;" Owing's Case, 1 Bland (Md.) 290.

A devisee could not avail himself of it, since the deviser's death was necessary to give effect to a gift of annuity. Townshend v. Duncan, 2 Bland (Md.) 45, citing William Clun's Case, 10 Co. 127a, 77 Eng. Reprint 1117; Co. Litt. 144; Brediman's Case, 6 Co. 56b, 77 Eng. Reprint 339.

9. Brandon v. Brandon, 46 Miss. 222.

An annuity given by will is for many

purposes treated as a legacy, and its payment may be enforced in equity. Townsend v. Duncan, 2 Bland (Md.) 45.

In a suit by a grantor to collect an annuity and support reserved in the deed, a prayer to enforce the equity or interest in or lien upon the lands described is appropriate. Bentley v. Gardner, 45 App. Div. 216, 60 N. Y. Supp. 1056.

10. Knight v. Bowyer, 2 De G. & J. 421, 44 Eng. Reprint 1053.

11. Where a mortgage is given to secure the payment of life annuities in specific articles, but not support and maintenance, the proper remedy for failure to perform is by foreclosure of the mortgage, and not a rescission of the contract. Peterson v. Oleson, 47 Wis. 122, 2 N. W. 94.

After a judicial sale of land for arrearages, a balance remaining after payment goes to the defendant in the execution and the annuitant must look to the land for arrearages accruing thereafter. Walters v. Steele, 210 Pa. 219, 59 Atl. 821.

**Any Security May Be Resorted to.**—An annuitant, like any other creditor, may have several securities, some of which may be partial, and others entire, and may resort to any one or more to obtain satisfaction. Shepherd's Appeal, 2 Grant's Cas. (Pa.) 402.

12. Taylor v. Forsey, 56 Ala. 426.

13. Emmons v. Crooks, 1 Grant Ch. (U. C.) 159.

charged with an annuity, he becomes liable to pay the same, though not expressly undertaking to do so, and the annuitant may elect between a suit to recover on the devisee's implied liability or on the lien, and an action of the former nature will not preclude another of the latter character.<sup>14</sup>

C. PROCEEDINGS BY ANNUITANT'S CREDITORS.—An annuity may be reached by the annuitant's creditors in equity.<sup>15</sup> It is generally held that a creditor's bill is the proper remedy.<sup>16</sup>

In Canada an equitable attachment is proper.<sup>17</sup>

III. PARTIES.—Where an annuity is payable to a husband and wife during their joint lives, the latter is entitled to maintain a bill for the foreclosure of a mortgage given to secure its payment.<sup>18</sup>

In case executors are appointed by will to receive and apply an annuity, a bill filed for an account cannot pass by the executors and obtain payment out of property in the hands of devisees unless the bill shows affirmatively that the money never came to the executors and still remains a charge upon the estate.<sup>19</sup> Those having annuities charged upon an estate prior to a mortgage need not be made parties in a foreclosure suit.<sup>20</sup>

Revivor.—Where an annuitant, after having obtained a decree for arrears, dies pending an appeal, the suit may be revived by his personal representative.<sup>21</sup>

IV. DEFENSES.—A. IN GENERAL.—The fact that an annuitant gives receipts for many years for the annuity, although nothing is paid, is sufficient to prevent his estate from recovering anything on the annuity for the years for which receipts were given, but that fact furnishes no defense against the collection of the annuity for subsequent years.<sup>22</sup> Nor does a declaration or promise of an annuitant, made without consideration, of an intention not to collect the annuity, though satisfactorily proven, furnish any defense against its collection.<sup>23</sup>

14. *Stringer v. Gamble*, 155 Mich. 295, 118 N. W. 979.

15. *Degraw v. Clason*, 11 Paige (N. Y.) 136; *Gifford v. Rising*, 51 Hun 1, 3 N. Y. Supp. 392 (holding that statement that annuity is for support does not render it exempt).

In New Jersey, under the statute, an annuity held in trust cannot be reached by creditors where the trust has been created by, or the fund held in trust has proceeded from, some person other than the debtor himself. *Frazier v. Barnum*, 19 N. J. Eq. 316, 97 Am. Dec. 666.

16. *Sillick v. Mason*, 2 Barb. Ch. (N. Y.) 79, *affirming* 4 Sandf. Ch. 351; *Bryan v. Knickerbacker*, 1 Barb. Ch. (N. Y.) 409; *Degraw v. Clason*, 11 Paige (N. Y.) 136.

Interest May Be Reached Beyond That Necessary for Support.—*Scott v. Nevius*, 6 Duer (N. Y.) 672; *Sillick v.*

*Mason*, 2 Barb. Ch. (N. Y.) 79, *affirming* 4 Sandf. Ch. 351; *Clute v. Pool*, 8 Paige (N. Y.) 82.

17. *Bank of British North America v. Matthews*, 8 Grant Ch. (U. C.) 486.

18. *Sloan v. Frothingham*, 72 Ala. 589.

19. *Clason v. Lawrence*, 3 Edw. Ch. (N. Y.) 48.

20. *Delabere v. Norwood*, 3 Swanst. (Eng.) 144.

21. *Smith v. Smith*, 15 Lea (Tenn.) 93.

22. *Triplett v. Woodward's Admr.*, 98 Va. 187, 35 S. E. 455.

23. *Rationale*.—"A party does not lose his right to collect a debt by simply declaring that he does not intend to collect it, unless he has actually released it, or his agreement to release is based upon a valuable consideration." *Triplett v. Woodward's Admr.*, 98 Va. 187, 35 S. E. 455.



Where a sufficient consideration appears upon the face of an annuity contract, whether the consideration was so inadequate as to suggest fraud cannot be considered upon demurrer. Fraud must be pleaded.<sup>24</sup>

An annuitant whose claim is secured by bond and deed of trust cannot be compelled to enforce his lien before proceeding against the general estate of his deceased debtor.<sup>25</sup>

A set off may be pleaded to an action of debt on bond, the condition of which is for payment of an annuity.<sup>26</sup>

Where two persons agree to pay an equal annuity to a third, stipulating for a division of any surplus remaining after the annuitant's demise, the annuitant is entitled to enforce payment from each, and it is no defense that he has failed to make the other pay, the right to the surplus, if any, accruing only after the annuitant's death.<sup>27</sup>

In Canada in a bill to enforce an annuity deed, defendant cannot take an objection for want of the enrollment of a memorial unless such defense has been set up in his answer.<sup>28</sup>

**B. STATUTE OF LIMITATIONS.**—The statute of limitations may be pleaded as a defense to an action for the recovery of an annuity.<sup>29</sup> Which statute is applicable depends upon whether the action is upon contract,<sup>30</sup> or is a foreclosure proceeding.<sup>31</sup> The payment of an annuity does not toll the statute on a debt released in consideration of payment of the annuity.<sup>32</sup>

In an action to recover the purchase money paid for an annuity, on the ground of failure of consideration in that one of the securities therefor had been set aside, the statute begins to run from the time when the security was set aside, it not appearing that the considera-

24. *Price's Admx. v. Price's Admx.*, 23 Ky. L. Rep. 1911, 1947, 60 S. W. 529.

25. *Scrimbley v. Doolbeer*, 13 Mo. App. 125.

26. *Collins v. Collins*, 2 Burr. (Eng.) 520.

27. *Smith v. Smith*, 15 Lea (Tenn.) 93.

28. *Esmond v. Crooks*, 1 Grant Ch. (U. C.) 179.

29. Statute of limitations will not run as to a legacy but will as to an annuity. *Hunter v. Nockolds*, 1 Macn. & G. 540, 41 Eng. Reprint 1113; *Smithson v. Hamilton*, 2 Ark. 71, 20 Tex. Reprint 443. But see *Snow v. Booth*, 8 De G., M. & G. 22, 41 Eng. Reprint 315; *Cox v. Dolman*, 2 De G., M. & G. 592, 22 L. J. Ch. 427, 17 Jur. 97, 42 Eng. Reprint 1003.

**Presumption of Payment From Lapse of Time.**—Where many years have elapsed since the annuitant's death, the annuitant will be presumed to have been paid. *Smithson v. Hamilton*, 2 Ark. 71, 20 Tex. Reprint 443. But an annuity can never be presumed paid during the

life of the annuitant. *Cornwall v. Hoyt*, 7 Conn. 420.

30. In an action on an implied promise to pay annuities, the statute of limitations must be applied as in the case of an ordinary action upon an implied contract, though plaintiff might have sought a recovery on an existing lien. *Stringer v. Stevens' Estate*, 146 Mich. 181, 109 N. W. 269, 8 L. R. A. (N. S.) 331.

In Alabama a claim for an annuity of a fixed sum created by deed, charged on lands and payable annually during the annuitant's life, is not within the three year limitation as a claim on an open account. *Taylor v. Forsey*, 56 Ala. 420, 438.

31. The statute of limitations affecting the foreclosure of mortgage liens is applicable to suits for the enforcement of liens on land for the payment of annuities. *Booger v. Grindle*, 150 Mich. 297, 118 N. W. 979.

32. *Price's Admx. v. Price's Admx.*, 23 Ky. L. Rep. 1911, 1947, 60 S. W. 529.

tion had failed before that time, and not from the time when the annuity was last paid.<sup>33</sup>

And in an action to recover the consideration money of a void annuity, if the annuity was granted at a time in excess of the statutory period before the action was brought, but was treated by the grantor as a subsisting annuity within that period, though subsequently avoided, the statute does not begin to run until the avoidance.<sup>34</sup>

**V. JUDGMENT OR DECREE AND EXECUTION.**—Under a decree for an annuity, plaintiff should be allowed to levy by execution the sum found due at the trial, and the decree should stand as a security for future arrears, with liberty to apply from time to time to sue out fresh executions thereon.<sup>35</sup> A legatee having a charge upon the residuary estate is, as an annuitant, entitled to judgment for administration.<sup>36</sup> But in a suit to collect an annuity created by will, it being stated on argument by complainant's counsel that defendant was amply responsible, the decree need not make the annuity a lien upon the land devised to defendant, unless it shall be found to be necessary by a subsequent application.<sup>37</sup>

A decree against purchasers of land encumbered by mortgage to secure payment of annuities ought to provide that so much of their lands respectively should be sold as would be sufficient to pay their proportions of the annuity due or unsatisfied by sales of lands remaining in the vendor and liable to be sold, except so far as they shall agree to pay, and actually pay, their respective proportions of such balance, and to hold their lands subject to the future decree of the court for their proportions of any sum growing due thereafter.<sup>38</sup>

Where real estate is vested in a trustee to pay an annuity out of the profits, and, subject to the annuity, in trust for a child, if while the annuitant is living, a creditor of the child recovers a judg-

33. *Huggins v. Coates*, 5 Q. B. 432, 13 L. J. Q. B. 46, 48 E. C. L. 432.

34. *Cowper v. Goddard*, 3 M. & S. 219, 9 Bing. 748, 23 E. C. L. 452.

35. *Rebecca Owings' Case*, 1 Bland (Md.) 290, 297, citing *Ridgely v. Lee*, 3 H. & Mill. (Md.) 94; *Sparks v. Garrigues*, 1 Bin. (Pa.) 152; *Marshall v. Thompson*, 2 Munf. (Va.) 412; *Ranelagh v. Hayes*, 1 Vern. 190, 23 Eng. Reprint 405.

An execution may be sued out for arrears accruing subsequent to judgment without a *scire facias*, at any time within a year after they are incurred, or even afterwards, if a writ of execution has been previously sued out and properly continued down. *Wood v. Wood*, 3 Wend. (N. Y.) 454.

**Fieri Facias.**—At the common law the payment of future installments

might be enforced by *fieri facias* sued out within the year after every day of payment, though it might be many years after the judgment. *Rebecca Owings' Case*, 1 Bland (Md.) 290, 296, citing 2 Inst. 471; *Gilb. Exec.* 12.

Under a general prayer the decree may provide for future payments. *Mahar v. O'Hara*, 9 Ill. 424, 432.

Though *scire facias* is not necessary it would be well that the direction to the sheriff should specify particularly the arrears claimed. *Wood v. Wood*, 3 Wend. (N. Y.) 454.

36. *Wollaston v. Wollaston*, 7 Ch. Div. 58, 47 L. J. Ch. 117, 37 L. T. 631, 26 W. R. 77.

37. *Mahar v. O'Hara*, 9 Ill. 424, 433.

38. *Mayo v. Tomkies*, 6 Munf. (Va.) 520.

ment against him, and exhibits his bill in chancery, to subject the child's equitable interest to the debt, the court ought not to direct a sale out and out of the debtor's equitable interest subject to the annuity, but only to direct the application of the surplus of profits as they accrue, after paying the annuity, to the debt.<sup>39</sup>

29. *Coutts v. Walker*, 2 Leigh (Va.)

185.



# ANOTHER ACTION PENDING

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Abatement, Pleas of;	Commencement of Action;
Attachment;	Garnishment.

**I. THE RULE STATED.** — A. IN GENERAL. — It is an established principle of our law of civil procedure that two suits shall not be brought between the same parties for the same cause of action, whether legal or equitable, before the same tribunal, or tribunals of concurrent jurisdiction, of the same sovereignty.<sup>1</sup> The principle is based upon the supposition that if the first suit is so constituted as to be effective and available and also to afford an ample remedy to the plaintiff in the second, then the latter is unnecessary, and therefore is vexatious and oppressive.<sup>2</sup>

According to the weight of modern authority the question whether the second action is vexatious is one of fact, and courts will not infer as a matter of law that the subsequent action is vexatious and unnecessary from the mere fact of the pendency of a prior action between the same parties founded on the same cause of action, but will inquire into the actual circumstances of the two cases.<sup>3</sup>

1. U. S.—*Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666. Conn.—*Cahill v. Cahill*, 76 Conn. 542, 57 Atl. 284. Ia.—*Van Vleck v. Anderson*, 136 Iowa 366, 113 N. W. 853.

2. Ala.—*Foster v. Napier*, 73 Ala. 595. Conn.—*Hatch v. Spofford*, 22 Conn. 485, 58 Am. Dec. 433, a leading case. Mo.—*State v. Dougherty*, 45 Mo. 294 (leading case); *Walter Comm. Co. v. Gilleland*, 98 Mo. App. 584, 73 S. W.

295. N. J.—*Dengler v. Hays*, 63 N. J. L. 14, 42 Atl. 775.

"Nemo bis vexari debet pro eadem causa" is the maxim at the foundation of the rule. *Emry v. Chappell*, 148 N. C. 327, 62 S. E. 411.

3. All attending circumstances are to be considered and the true question will be what is the aim of the plaintiff. Is it fair and just, or is it oppressive? Conn.—*Hatch v. Spofford*, 22 Conn. 485,



**B. DEFENSE NOT AVAILABLE IN FIRST ACTION.**—The original or first suit will not be abated by a plea that another action for the same cause was afterwards commenced in a court of the same state,<sup>5</sup> or of another state,<sup>6</sup> or of the United States.<sup>6</sup> Nor will a prior action in a federal court be abated by a subsequent proceeding in a state court.<sup>7</sup>

**Actions Begun Simultaneously.**—If two suits are brought at the same time, served at the same time, and are pending contemporaneously, the pendency of each is good ground for abatement of the other;<sup>8</sup> but although begun on the same day the one first served will abate the other.<sup>9</sup>

58 Am. Dec. 433. D. C.—National Exp. & Trans. Co. v. Barlatta, 7 App. Cas. 551. Ill.—Phillips v. Quick, 68 Ill. 324. Ky.—Adams v. Hardiner, 18 1/2 Mo. 37. Mo.—State v. Dougherty, 45 Mo. 234. Vt.—Lawner v. Garland, 21 Vt. 302. Va.—Norfolk & Western R. Co. v. Nunnally's Admr., 88 Va. 546, 14 S. E. 367.

Contrast—Foster v. Saylor, 73 Ala. 395, Grimes v. Ray, 22 N. H. 512.

The reason of the ancient rule required the second suit to be abated, not because upon inquiry into all the circumstances it was found to be in fact vexatious and oppressive, but because it apparently was vexatious and oppressive.

4. Ill.—Consolidated Coal Co. v. Oeltgen, 103 Ill. 38, 36 N. E. 609. Kan.—Hose v. Connersville, 16 Kan. 164. Ky.—124. Mo. v. Southern Ry. Co. & O. R. Co., 110 Ky. 38, 40 S. W. 941; Com. v. Southern Ry. Co., 44 Ky. L. Rep. 209, 105 S. W. 408; Lucas v. Com., 19 Ky. L. Rep. 372, 89 S. W. 202. La.—Morgan v. Thibout, 13 La. Ann. 295. Miss.—Stauffer v. Jackson, 61 Miss. 67. Mo.—Walsh v. Com., 100 Mo. 411, 14 S. W. 205. Pa.—Clark v. Weller, 22 Pa. 314. S. C.—Hamilton v. Lee, 41 S. C. 374, 19 S. E. 610. Tex.—Collins v. Co. v. Huyle (Tex. Civ. App.), 111 S. W. 310; Connor v. Saunders (Tex. Civ. App.), 29 S. W. 1140. Vt.—Baker v. Nation, 36 Vt. 373; Morton v. Webb, 7 Vt. 123. Wash.—Hall v. Woolery, 20 Wash. 440, 55 Pac. 702.

In St. Louis etc. R. Co. v. Smith, 82 Ark. 105, 100 S. W. 884, plaintiff brought an action at law for personal injuries. Before trial the plaintiff instituted suit in equity against defendant to cancel a release alleged to have been obtained by fraud. The later suit did not abate the earlier,

which could be tried while the other was pending.

5. Steele v. Conn. Gen. Life Ins. Co., 31 App. Div. 389, 52 N. Y. Supp. 373, affirmed in 160 N. Y. 703, 57 N. E. 1125, holding that a subsequent action in Connecticut by an auxiliary administrator is no bar to a prior action by a domiciliary administrator in New York; King v. Phillips, 8 Bosw. (N. Y.) 603; Republic of Mexico v. Arrangois, 1 Abb. Pr. (N. Y.) 437, 5 Duer (N. Y.) 634.

6. Wood v. Lake, 13 W. 84.  
7. Leading Case.—Renner v. Marshall, 1 Wheat. (U. S.) 219, 4 L. ed. 15.

8. Conn.—Beach v. Norton, 8 Conn. 71. Ia.—Elliott v. Guinn, 123 Iowa 179, 24 N. W. 629. N. Y.—Hagler v. Holley, 3 Wend. 258.

Contrast—Proof of another action begun on the same day as one in which the plea is filed does not sustain a plea of prior action pending, since the law does not regard fractions of a day.

Middlebrook v. Travis, 68 Hun 155, 22 N. Y. Supp. 672.

Under Georgia Code, § 2894, where there are two suits pending by the same plaintiff against the same defendant upon the same cause of action, commenced at the same time, the defendant may require the plaintiff to elect which one he will prosecute.

Wilson v. Atlanta, K. & N. R. Co., 115 Ga. 171, 41 S. E. 699; The Augusta & S. R. Co. v. Dorsey, 68 Ga. 225.

9. Townsend v. Chase, 1 Cow. (N. Y.) 115; Morton v. Webb, 7 Vt. 123.

Parol evidence is admissible to prove priority. Davis v. Doolittle, 9 N. H. 545. A suit by declaration is presumed to have been first commenced when brought on the same day as a suit by attachment. Wales v. Jones, 1 Mich. 254. See also Marks v. Marks, 75 Fed. 321.

**II. WHAT IS "ANOTHER ACTION?"**—A. IN GENERAL.—There must be two "suits" or "actions" proceeding at the same time or the rule does not apply;<sup>10</sup> and where either is not an original or independent action, but merely a supplementary or auxiliary proceeding in a former suit, there is not another action pending.<sup>11</sup>

B. ATTACHMENTS.—The pendency of one attachment may be pleaded in abatement of a subsequent attachment between the same parties for the same cause of action in the same county,<sup>12</sup> but it is not ground for abating a subsequent action *in personam* to recover the same claim.<sup>13</sup> An action *in personam* will not abate because of the

10. *Harp v. Abbeville Inv. & Const. Co.*, 108 Ga. 168, 33 S. E. 998 (holding that all opposing interests in the first case having become vested in one person, the suit becomes a nullity and cannot be pleaded as another action pending); *Halpen v. Guilbeau*, 37 La. Ann. 110 (holding that where a suit was stolen from a court-house and plaintiff filed copies there was not a new action).

A complaint, more than five years old, under Gen. St. § 72, concerning the maintenance of bastard children and on which no proceedings have been had subsequent to the issuing of the warrant, and which has not been continued or brought forward on the docket, cannot be deemed a pending suit in any such sense as to operate in abatement of a new complaint. *Meredith v. Wall*, 14 Allen (Mass.) 155. See also *Raessler v. Temp. Mut. Ben. Assn.*, 3 Pa. Co. Ct. 393.

Advertising for presentation of claims under order of court by an assignee is no defense to action against him for an accounting. *Ludake v. McKeevor*, 9 N. Y. St. 827.

Action by a client to compel an attorney to pay over money, in which the attorney has been arrested, precludes a summary order requiring him to pay over. *In re Mori*, 36 Ill. (78 N. Y.) 369.

"Action" as used in the New York Code under § 488, authorizing a demurrer when it appears on the face of the complaint that there is another action pending, signifies an ordinary prosecution in a court of justice by a party against another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. *Queens County Water Co. v. O'Brien*, 151 App. Div. 91, 115 N. Y. Supp. 495, quoting § 3333 Code Civ. Proc.

Petition and Action.—Though one of

the two proceedings is a petition and the other an action, the first is a bar. *Graham v. Lyon*, 16 Barb. (N. Y.) 461.

11. *Hemman v. Bourgeois' Estate*, 28 La. Ann. 186.

Application for an attachment for contempt for failure to pay alimony allowed in a previous divorce suit is not an original and independent bill, but a petition connected with, and a part of the proceeding in which divorce and alimony was granted, and is not abated by pendency of an action at law to recover a sum decreed as alimony. *Lyon v. Lyon*, 21 Conn. 180.

Filing a petition in a court in which a receivership is pending by the purchasers at the receiver's sale, asking to be allowed certain deductions from the purchase price of property for alleged fraud of the receiver, is in no sense the commencement of an action and does not abate an action by receiver upon the notes given for the purchase price. *Van Cleef v. Britton* (Ind. App.), 90 N. E. 1034.

*Scire facias* to make parties is not a "suit" or "action" in which there can be a recovery and will not be abated by another *scire facias* for the same purpose. *Hunt v. Bates*, 70 Ga. 633.

Forcible Detainer and Writ of Possession.—Alternative remedies for recovery of land under a decree of foreclosure, by writ of possession and by forcible detainer, are concurrent and either or both may be pursued until a satisfaction is had, the writ of possession being merely auxiliary. *Waninger v. Whitaker*, 82 Ill. 22.

12. *Ala.*—*Dean v. Massey*, 7 Ala. 691. *Miss.*—*James v. Dowell*, 7 Smed. & M. 333. *N. J.*—*Harris v. Linnard*, 9 N. J. L. 58.

13. *Ill.*—*Brannan v. Rose*, 8 Ill. 173. *La.*—*Gilbert v. Huie*, 14 La. 124. *Mich.*—*See Churchill v. Goldsmith*, 64 Mich. 250, 31 N. W. 187.

pendency of a prior attachment in the court of another state.<sup>14</sup>

C. CRIMINAL PROCEEDINGS.—Pendency of a criminal action is no bar to the prosecution of a civil action.<sup>15</sup> Nor is pendency of one indictment a good plea in abatement to another indictment for the same cause.<sup>16</sup>

D. EJECTMENT.—The rule does not apply to actions of ejectment, since a former judgment or recovery in one action of ejectment is generally held to be no bar to a subsequent action of ejectment between the same parties for the same cause.<sup>17</sup>

E. MANDAMUS.—The general rule which applies to other civil actions is applicable to mandamus proceedings, and the pendency of another mandamus may be pleaded in abatement where the parties and the subject-matter are the same.<sup>18</sup> The writ will also be denied when it appears that the right respecting which the mandamus is sought is already the subject of a suit in equity in which the same relief can be obtained.<sup>19</sup>

Prohibition to prevent the issue of a certificate of election cannot be brought pending mandamus proceedings to compel the issuance of the certificate to the applicant.<sup>20</sup>

14. Ark.—*Moore & Co. v. Emerick*, 38 Ark. 304. Ill.—*Barber v. Gluck*, 20 Ill. App. 408. N. Y.—*Sargent v. Sargent Granite Co.*, 6 Misc. 394, 26 N. Y. Supp. 737, 31 App. (N. Y.) 131.

For a full treatment of the subject at this section see the title "Attachment."

15. In criminal prosecutions for selling on Sunday and proceedings to revoke license for same act (*Laws*, 1881, p. 54), the parties are not the same and the character of the suits and the ends to be accomplished are as unlike as it would be possible to conceive. *La Court v. Courts of Fairfield Co.*, 53 Conn. 321, 47 Am. Rep. 648.

"The true rule is believed to be that the party may institute the proceeding for damages as promptly as he pleases, only he must not bring on the trial in advance of his public duty, which cannot when he has made his complaint and appeared before the grand jury and secured or failed to secure an indictment." *McBlain v. Hagar*, 65 N. J. L. 634, 48 Atl. 600, citing many cases.

Prover for goods taken not abated by prosecution for larceny. *Keyser v. Rodgers*, 50 Pa. 275.

A criminal prosecution for non-payment of a license tax does not abate action to recover same. *Heller v. City of Alvarado*, 1 Tex. Civ. App. 409, 20 S. W. 1003.

Suspension of Civil Action.—By statute in some states the civil action

is suspended until the criminal prosecution is completed. *Ex parte Brooks*, 48 Ala. 423.

16. Whenever either of them is tried and a judgment rendered on it, such judgment will afford a good plea in bar to the other either of *autrefois convict* or *autrefois acquit*. *Com. v. Drew*, 3 Cush. (Mass.) 279.

*The King v. Stratton*, 1 Doug. 239, 99 Eng. Reprint 156; *Reg. v. Goddard*, 2 Ld. Raym. 920, 92 Eng. Reprint 114; *Sir William Withipole*, Cro. C. 134, 79 Eng. Reprint 718.

17. *Calahan v. Davis*, 125 Mo. 27, 28 S. W. 162.

Under Alabama Code, § 2209, trespass to try title is subject to the same rules as common law ejectment, and pendency of another action between the parties for same premises is not good matter for a plea in abatement.

*Hall v. Wallace*, 25 Ala. 438. See generally the title "Ejectment."

18. U. S.—*United States v. Norfolk & W. R. Co.*, 114 Fed. 682. Cal.—*Goytino v. McAleer*, 4 Cal. App. 655, 88 Pac. 991. Fla.—*State v. Sumter*, 20 Fla. 859. Neb.—*State v. No. Lincoln St. R. Co.*, 34 Neb. 634, 52 N. W. 369.

19. *People v. Chicago*, 53 Ill. 424; *People v. Warfield*, 20 Ill. 160; *Hardcastle v. Maryland & D. R. Co.*, 32 Md. 32.

20. *Page v. Letcher*, 11 Utah 134, 39 Pac. 502.



**F. IN EQUITY.**—The defense that there is a bill pending between the same parties for the same cause is a good ground for dismissing the second bill.<sup>21</sup>

**G. ACTION AT LAW AND SUIT IN EQUITY**—**1. First in Equity.**—The pendency of a suit in equity cannot be pleaded in abatement of an action at law.<sup>22</sup>

**2. First at Law.**—The pendency of an action at law cannot be pleaded in abatement or bar of a suit in equity.<sup>23</sup>

21. **U. S.**—*Mutual Life Ins. Co. v. Braine*, 96 U. S. 588, 24 L. ed. 737. **Ky.**—*Savary v. Taylor*, 10 B. Mon. 534; *Curd v. Lewis*, 1 Dana 351. **Md.**—*McKaig v. Pratt*, 34 M. J. 249. **Ore.**—*Crase v. Larsen*, 15 Ore. 345, 15 Pac. 356. **Wis.**—*Rowley v. Williams*, 5 Wis. 151.

Under Louisiana Code, art. 335, the words "before another court of competent jurisdiction" include another suit pending in the same equity court, and the plaintiff may be compelled to elect between suits. *Fleitas v. Cook*, rem., 101 U. S. 391, 25 L. ed. 954.

22. **U. S.**—*Griswold v. Bacheller*, 77 Fed. 857; *Paul v. Hulbert*, 18 Fed. Cas. No. 10,841; *Hunt v. Danforth*, 12 Fed. Cas. No. 5,888; *Graham v. Meyer*, 4 Blatchf. 129, 10 Fed. Cas. No. 5,673. **Conn.**—*Hatch v. Spedford*, 22 Conn. 485, 38 Am. Dec. 433, where it was pointed out that the rule was based on the peculiar nature and extent of the jurisdiction of these different courts. **Fla.**—*Sanford v. Good*, 17 Fla. 542. **Ill.**—*Kellerhouse v. Hall*, 116 Ill. 147, 4 N. E. 652; *Evans v. Lingle*, 55 Ill. 455. **Mo.**—*Haskins v. Lombard*, 16 Mo. 140, 33 Am. Dec. 645, where it was held that the pending of a bill for specific performance did not preclude complaint from making defence at law. **Mass.**—*Mattel v. Conant*, 156 Mass. 418; 31 N. E. 487; *Moore v. Spiegel*, 143 Mass. 413, 9 N. E. 827 (where it was said that "if defendant is entitled to any advantage from the pendency of the bill it is only by injunction from the equity court to stay proceedings at law"); *Colt v. Patridge*, 7 Mete. 570. **Ore.**—*Farris v. Hayes*, 9 Ore. 81. **S. C.**—*Byne v. Byne*, 1 Rich. L. 438; *Denny v. Garden*, 2 Brev. 70. **Vt.**—*Blanchard v. Stone*, 16 Vt. 234, a leading case. **Va.**—*Williamson v. Paxton*, 18 Gratt. 475. **W. Va.**—*Rischer v. Wheeling R. & C. Co.*, 57 W. Va. 149, 49 S. E. 1016. **Wis.**—*Quinn v. Quinn*, 27 Wis. 168.

23. **U. S.**—*Thorne v. Towanda Tanning Co.*, 15 Fed. 289. **Ky.**—*Peak v. Bull*, 8 B. Mon. 428. **Mich.**—*Wheeler v. Hathaway*, 58 Mich.

77, 24 N. W. 780; *Robertson v. Baxter*, 57 Mich. 127, 23 N. W. 711 (holding that equity proceedings to restrain the enforcement of a drain assessment may go on collaterally with proceedings by certiorari to review the drain commissioner's action); *Kinney v. Robinson*, 52 Mich. 389, 18 N. W. 199. **Miss.**—*Anderson v. Newman*, 60 Miss. 532. **N. J.**—*Fulton v. Golden*, 25 N. J. Eq. 353; *Way v. Bragaw*, 16 N. J. Eq. 213, 84 Am. Dec. 147. **N. Y.**—*Consolidated Fruit Jar Co. v. Warner*, 38 App. Div. 360, 56 N. Y. Supp. 713 (declaring that the code has not changed the rule); *Gillette v. Smith*, 18 Hun 10; *Peck v. Kirtz*, 15 N. Y. St. 398. **Va.**—*Warwick v. Norvall*, 1 Rob. 396.

See *Pennsylvania Co. v. Phila. Nat. Bank*, 14 Pa. Co. Ct. 193, 3 Pa. Dist. 93, a case apparently *contra*, but in Pennsylvania there is no separate equity jurisdiction.

"That one is an equitable action and the other a suit at law is immaterial so long as both suits are based upon substantially the same facts." The contrary rule "is not sustained by the current of modern authority and there is no good reason why it should obtain in this state where the forms of procedure which, under the old system of practice, distinguished legal and equitable action are abolished." *Monroe v. Reid*, 46 Neb. 315, 64 N. W. 983.

An action by a creditor to enjoin his debtor from making an assignment or giving a preference in violation of an agreement on which he obtained credit from the plaintiff, and to have his assets appropriated between plaintiff and other creditors, does not abate an action by the same plaintiff to recover judgment against the debtor on the same indebtedness. An action which prior to the code a court of equity had no jurisdiction over is not abated by a suit which prior to the code a court of law had no jurisdiction over. *Paige v. Wilson*, 8 Bosw. (N. Y.) 294.

**3. Compelling Election.**—The proper course to prevent vexation in such a case is to apply to the court to compel the plaintiff to elect to proceed either at law or in equity.<sup>24</sup> The defendant, however, is not entitled to an order to compel the plaintiff to elect until he has fully answered the complainant's bill.<sup>25</sup> If the complainant elects to proceed at law his bill will be dismissed, but if he elects to proceed in equity he will be required to discontinue his action at law,<sup>26</sup> or restrained from prosecuting it without leave of court.<sup>27</sup> An election will not be compelled when the suit at law and the bill in equity are not instituted for the same claim or demand,<sup>28</sup> or for the same object,<sup>29</sup> or between the same parties.<sup>30</sup>

**H. FIRST ACTION INEFFECTUAL.**—1. In General.—Where it appears

**Fraud.**—Courts of law and equity having concurrent jurisdiction in matters of fraud, the rule is that the court which is first to acquire jurisdiction of the cause must adjudge its own right to the exclusion of the other. *McCulla v. Bondleson*, 17 R. L. 29, 29 Atl. 11, an action at law on a bond where the bill charged fraud in procuring the bond.

**24. Ala.**—*Planters' Bank v. Borland*, 5 Ala. 531. **Ky.**—*Curd v. Lewis*, 1 Dana 151. **Md.**—*Bradford v. Williams*, 2 Md. Ch. Dec. 1. **Mass.**—*Sanford v. Soule Piano & Organ Inv. Co.*, 41 N. E. 120; *Colt v. Patridge*, 7 Met. 570. **Mich.**—*McGunn v. Hanlin*, 29 Mich. 476. **N. H.**—*Eastman v. Amoskeag Mfg. Co.*, 47 N. H. 71. **N. Y.**—*Laustreine Fertil. Co. v. Lake Guano & Fertil. Co.*, 82 N. Y. 476. **Pa.**—*Freeman v. Lambert*, 27 Pa. 22, 26 Atl. 230.

**25. Ky.**—*Curd v. Lewis*, 1 Dana 351. **N. Y.**—*Soule v. Corning*, 11 Paige 412, refusing such order while demurrer or plea to the bill, or exception to the answer for insufficiency was undisposed of. **Pa.**—*Brooke v. Phillips*, 6 Pa. 302. **Va.**—*Priddy v. Hartsook*, 81 Va. 67; *Williamson v. Paxton*, 18 Gratt. 475.

**Contra.**—Where a suit at law and a bill in chancery are instituted for the same claim or demand, the defendant on suggestion supported by affidavit may move the court to inspect the records, and if it appear that the two suits are commenced, in either suit of action, it shall be ordered that the plaintiff elect in which he will proceed and that he dismiss the other." The suggestion may be made at the earliest possible moment after the two suits are commenced, in either suit. *Planters' Bank v. Borland*, 5 Ala. 531.

**26. Sanford v. Soule Piano, etc. Co.** (Mass.), 41 N. E. 120.

**27. Union Bk. v. Kerr**, 2 Md. Ch. Dec. 460.

**28. Ala.**—*McRae v. Singleton*, 35 Ala. 297. **Cal.**—*Howard v. Hewitt*, 139 Cal. 614, 73 Pac. 414. **Mass.**—*Cobb v. Fogg*, 166 Mass. 466, 44 N. E. 534. **Mich.**—*Himes v. Robison*, 52 Mich. 382, 18 N. W. 120; *McGunn v. Hanlin*, 29 Mich. 476.

**Mortgages.**—A mortgagee may sue at law on his bond and in equity to enforce his mortgage or trust deed—one being in *personam*, the other in *rem*. **Ark.**—*Very v. Watkins*, 18 Ark. 546. **N. Y.**—*Jones v. Conde*, 6 Johns. Ch. 77. **Va.**—*Priddy v. Hartsook*, 81 Va. 67.

An action at law to recover the debt secured by a mortgage does not abate by beginning an action by bill of foreclosure in equity in a federal court to enforce the lien on real estate, securing the same debt for the recovery of which the action at law was being prosecuted. *Garneau v. Kendall*, 61 Neb. 396, 85 N. W. 291.

**29. Object.**—**U. S.**—*Kittredge v. Race*, 92 U. S. 116, 23 L. ed. 488. **Ill.**—*Kiddiehouse v. Hall*, 116 Ill. 147, 4 N. E. 652. **Ia.**—*Chicago & S. W. R. Co. v. Howard*, 44 Iowa 358. **Ky.**—*Peak v. Bull & Co.*, 8 B. Mon. 428. **Mass.**—*Weeks v. Edwards*, 176 Mass. 453, 57 N. E. 701. **Mich.**—*Robertson v. Baxter*, 57 Mich. 127, 23 N. W. 711. **Miss.**—*Anderson v. Newman*, 60 Miss. 532. **N. J.**—*Carlisle v. Cooper*, 18 N. J. Eq. 241. **N. Y.**—*Sawatsch v. Cooney*, 86 Hun 546, 33 N. Y. Supp. 775. **Pa.**—*Stewart's Appeal*, 56 Pa. 413; *Raessler v. Temp. Mut. Ben. Assn.*, 3 Pa. Co. Ct. 393.

**30. Davis v. Hunt**, 2 Bailey (S. C.) 412.



that the first action would be ineffectual its pendency does not abate the second, because the latter is not in such case deemed vexatious.<sup>31</sup>

2. **Premature Commencement.**—Where the prior action has been commenced prematurely the plea will not be sustained.<sup>32</sup>

3. **Void or Defective Process.**—So if the prior action has been commenced by process which is void,<sup>33</sup> or which is otherwise so defective that no recovery can be had, and the second action is necessary to secure the remedy sought, the reason of the rule fails and the plea will not be sustained.<sup>34</sup>

4. **Complaint Insufficient.**—If the complaint in the first action is so defective that any judgment based on it would be a nullity the second will not abate,<sup>35</sup> but if it states facts sufficient to sustain a recovery however imperfectly stated, the plea will be sustained.<sup>36</sup>

31.—*Quinebaug Bank v. Tarbox*, 20 Conn. 549, a leading case.

32. Conn.—*Ward v. Curtis*, 18 Conn. 290. Ill.—*O'Malla v. Glynn*, 42 Ill. App. 51, where there was a failure to make the demand required by statute before commencing suit of forcible entry and detainer. Mich.—*Blackwood v. Brown*, 34 Mich. 4.

*Contra*—In an action for malicious prosecution plea of another action pending is good although it appears that the first suit was commenced before prosecution ended. *Foster v. Napier*, 73 Ala. 595.

33. *Minniece v. Jeter*, 65 Ala. 222 (where attachment was issued by a person who had no authority to issue it); *Byne v. Byne*, 1 Rich. L. (S. C.) 438.

Where the service of the writ has been set aside as illegal the plaintiff may begin a new action without discontinuing the first. *Durand v. Carrington*, 1 Root (Conn.) 355.

See also *McMahan v. Hubbard*, 217 Mo. 624, 118 S. W. 481.

34. D. C.—*National Exp. & T. Co. v. Burdette*, 7 App. Cas. 551. Ga.—*Wilson v. Atlanta, K. & N. R. Co.*, 115 Ga. 171, 41 S. E. 699 (pointing out that Civ. Code § 5094, providing if the first action is so defective that no recovery can be possibly had, the pendency of a former suit will not abate the action, adopts the common law rule); *Gilmore v. Georgia R. & B. Co.*, 93 Ga. 482, 21 S. E. 50; *Rogers v. Hoskins*, 15 Ga. 270 (defective writ). Ill.—*Wright v. Keifer*, 131 Ill. App. 298, failure to file a declaration within the proper time. N. Y.—*Crossman v. Universal Rubber Co.*, 127 N. Y. 34, 27 N. E. 400, 13 L. R. A. 91; *Compton v. Green*, 9 How. Pr. 228

(holding that a set-off which was ineffectual in the first action may be subject of an independent action). Pa.—*Cornelius v. Vanarsdallen's Admr.*, 3 Pa. 444, a suit as administrator of wrong party. Wash.—*Carmack v. Drum*, 27 Wash. 142, 87 Pac. 808.

In *Quinebaug Bank v. Tarbox*, 20 Conn. 549, a writ of error was brought to reverse a judgment in which the errors assigned appeared in a bill of exceptions, and it was afterward discovered that the court below had omitted to allow and sign the bill of exceptions as stated in the writ, but having materially altered it had then allowed and signed it, and thereupon a second writ was brought, the first being abandoned. There was held to be no ground of abatement.

35. *Reynolds v. Harris*, 9 Cal. 338; *Piper v. Sawyer*, 82 Minn. 474, 85 N. W. 206.

36. Ky.—*Com. v. United States Tr. Co.*, 117 S. W. 314. Minn.—*Drea v. Cariveau*, 28 Minn. 280, 9 N. W. 802. N. Y. *Romaine v. New York, N. H. & H. R. Co.*, 84 N. Y. Supp. 491, *affirmed* in 181 N. Y. 523, 73 N. E. 1131.

Compare *Griffin v. Board of Comrs.*, 71 Miss. 767, 15 So. 107.

**Unauthorized Suit.**—An action is not barred by another suit commenced without plaintiff's authority, nor is he obliged to dismiss the first suit as a preliminary to right to recover in one actually authorized by him. *Wolf v. Great No. R. Co.*, 72 Minn. 435, 75 N. W. 702. But see *Briggs v. Gardner*, 60 Hun 543, 15 N. Y. Supp. 335.

**Destruction of Papers.**—That the papers in a suit are burned does not prevent such suit from being a bar to a new action; the lost record should



5. Jurisdiction Lacking of Matter or Person. — A former action brought to a court which has not jurisdiction of the subject-matter,<sup>37</sup> or which has not acquired jurisdiction of the defendant, cannot be pleaded as another action pending.<sup>38</sup>

**III. ACTIONS IN DIFFERENT JURISDICTIONS. — A. GENERAL RULE.** — Prior pendency is not a cause for abatement unless the prior and subsequent actions are both pending in the same jurisdiction, and the plea will not avail where the prior action is pending in a foreign jurisdiction.<sup>39</sup> Of course if both actions are pending in the same state,<sup>40</sup> although in the courts of different counties, the second will

be supplied as provided for by statute (Gen. St., c. 7, § 44). *Tulle v. Alley* (Ky.), 21 S. W. 115.

37. Ala. — *Hood v. Edwards*, 17 Ala. 440. Ill. — *Phillips v. Quinn*, 68 Ill. 343. Ky. — *Lebanon Water Co. v. Clark*, 24 Ky. 47, 21 S. W. 136. La. — *Noland v. Stealing*, 23 La. Ann. 277, a court which had venue to grant. Mass. — *Nowell v. Newton*, 10 Pick. 470. N. Y. — *Kell v. Parrall*, 92 App. Div. 234, 74 N. Y. Supp. 829. N. C. — *Campbell v. Potts*, 119 N. C. 530, 26 S. E. 300. Pa. — *Stroh v. Ulrich*, 1 Watts & S. 57.

The true test is the existence of such an action in any court or tribunal having jurisdiction of the subject-matter of the controversy, and the plea is sustained if such court have authority to entertain such a cause of action notwithstanding the pendency of a plea in the jurisdiction, because until such jurisdictional question is determined, it is doubtful that the other issue may not be heard and decided. *Merriman v. Barker*, 2 Minn. 43.

Appeal from an order of the bankruptcy court dismissing bankruptcy proceedings against the defendant without right to said petitioners to further prosecute their respective claims, does not abate an action on the claim between the same parties, as such an order was beyond the power of the court. *Veysey v. Bernard*, 49 Wash. 271, 95 Pac. 1088.

Pendency of a colorable suit in which the removal court will not assume jurisdiction is no ground for staying proceedings in a state court which has jurisdiction to dispose of the controversy. *La Grange v. State Treasurer*, 24 Mich. 468.

38. Chicago, B. I. & P. R. Co. v. Campbell, 5 Kan. App. 423, 49 Pac. 321 (where there was no service personally or by proper following of the steps required by statute); *Cray v. Johnson* (N. J.), 20 Atl. 212.

If in the original action the trial court was without jurisdiction there was no action pending at any time and it would be a travesty on justice to present such a defense, for it "negatives the proposition that there was another action pending." *Naylor v. Lorimer-Scholes Co.*, 131 App. Div. 85, 115 N. Y. Supp. 150.

39. U. S. — *Mutual Life Ins. Co. v. Brune*, 96 U. S. 588, 24 L. ed. 737; *Stanton v. Embry*, 93 U. S. 548, 23 L. ed. 983. Conn. — *Hatch v. Spofford*, 22 Conn. 485, 22 Am. Dec. 433. Ind. — *De Arment v. Fisher*, 13 Ind. 607. N. Y. — *Walsh v. Durkin*, 12 Johns. 99; *Bowne v. Joy*, 9 Johns. 221. Pa. — *Smith v. Lefthrop*, 44 Pa. 220, 31 Am. Dec. 443. R. I. — *O'Reilly v. New York, etc. R. Co.*, 16 R. I. 388, 17 Atl. 171, 19 Atl. 244. Wis. — *Wood v. Lake*, 13 Wis. 84. Eng. — *Peruvian Guano Co. v. Bockwoldt*, 23 Ch. D. 225, 52 L. J. Ch. 714, 48 L. T. 7 (holding that an action in France was no bar to action in England); *Cox v. Mitchell*, 7 C. B. N. S. 55, 29 L. J. C. P. 33 (holding that an action in United States does not stay an action in England); *Wiscon v. Farland*, L. R. 13 Eq. 362, 26 L. T. 387; *McHenry v. Lewis*, 22 Ch. D. 397, 52 L. J. Ch. 325, 47 L. T. 549.

All colonial courts are as to English courts foreign. *Bank of Australia v. Nias*, 16 Ad. & El. (N. S.) 717, 71 E. C. L. 717.

In *Bayley v. Edwards*, 3 Swanst. 703, 36 Eng. Reprint 1029, the plaintiffs attempted to set up the suit in England in bar of the jurisdiction of Jamaica, "but the causes for allowing the plea of double suits are all where the suits are in courts here—while this is of a second suit in a court which is a foreign court inasmuch as this country has no process to enforce its decrees in the island."

40. *Lorillard Fire Ins. Co. v. Meshural*, 7 Robt. (N. Y.) 308.

abate if for the same cause of action and between the same parties.<sup>41</sup>

**B. IN DIFFERENT STATES.**—It is well established that the pendency of a prior action *in personam* for the same cause between the same parties in the court of another state furnishes no ground of abatement, as the states are regarded as foreign to each other,<sup>42</sup> nor will plaintiff be compelled to elect.<sup>43</sup>

The provisions of the codes concerning one suit abating another are construed to mean suits pending in the same state.<sup>44</sup>

41. Ill.—Lewis v. Schwinn, 71 Ill. App. 265. N. C.—Claywell v. Sudderish, 77 N. C. 287. Pa.—Cleveland P. & A. R. Co. v. Erie, 27 Pa. 380, 1 Grant Cas. 212.

**Inferior Court.**—In Johnson v. Bower, 4 J. & M. (Eng.) 487, a suit pending in an inferior court in the same state having jurisdiction was held sufficient. The contrary, however, has been held either in Rhode Island. See Bullock v. Bolles, 9 R. I. 501.

42. Ala.—Humphries v. Dawson, 36 Ala. 199. Ark.—Grider v. Apperson & Co., 32 Ark. 332. Conn.—Hatch v. Spofford, 22 Conn. 485, 58 Am. Dec. 433, overruling Hart v. Granger, 1 Conn. 154. Ga.—Chattanooga R. & C. R. Co. v. Jackson, 86 Ga. 676, 13 S. E. 109. Ill. Allen v. Watt, 69 Ill. 655; McJilton v. Love, 13 Ill. 486, 54 Am. Dec. 449. Ind.—Bradley v. Bank of Indiana, 20 Ind. 528; Eaton & H. R. Co. v. Hunt, 20 Ind. 457; De Armond v. Bohn, 12 Ind. 607 (a leading case). Ky.—Balfour v. Weston, 9 Dana 472, holding this no violation of the federal constitution. Md.—Cole v. Philcraft Co., 47 Md. 312; Seever v. Clement, 28 Md. 426. Mass. Colt v. Partridge, 7 Mete. 570. Mich. Wilcox v. Kassick, 2 Mich. 165. Minn. Sandwich Mfg. Co. v. Earl, 56 Minn. 390, 57 N. W. 938. N. H.—Yelverton v. Conant, 18 N. H. 123; Goodall v. Marshall, 11 N. H. 88, 35 Am. Dec. 472. N. J.—Kerr v. Willetts, 48 N. J. L. 78, 2 Atl. 782. Fairchild v. Fairchild, 53 N. J. Eq. 678, 34 Atl. 10, 51 Am. St. Rep. 650. N. Y.—Smith v. Crocker, 14 App. Div. 245, 43 N. Y. Supp. 427, affirmed, 162 N. Y. 600, 57 N. E. 1124; Hecker v. Mitchell, 6 Duer 687; Republic of Mexico v. De Arrangoiz, 5 Duer 634; Osgood v. Maguire, 61 Barb. 54; Williams v. Ayrault, 31 Barb. 364; Walsh v. Durkin, 12 Johns. 99 (leading case); Bowne v. Joy, 9 Johns. 221 (leading case). Ohio.—Keith v. New York Cent. R. Co., 1 West Law Month.

451. Pa.—Smith v. Lathrop, 44 Pa. 228, 84 Am. Dec. 448. E. I.—The Quaker & Barton Co. v. Giddings, 21 R. I. 187, 43 Atl. 191. O'Reilly v. New York & N. E. R. Co., 10 R. I. 388, 17 Atl. 171, 19 Atl. 244 (where there was an action in Massachusetts and in Rhode Island for the same personal injury). R. C.—Dun v. 1001, 61 S. C. 134, 28 S. E. 309. Tenn.—Lockwood & Co. v. Nye, 3 Fess 511, 38 Am. Dec. 13. Tex.—Orphe v. Hensner, 8 Tex. 351. Va.—Davis v. Morris' Exrs., 76 Va. 21. W. Va.—Conrad v. Buck, 21 W. Va. 126.

**Divorce Proceedings.**—The pendency of divorce proceedings between the parties in another state does not prevent the enforcement of alimony rights. Wood v. Wood, 56 Fla. 882, 47 So. 560.

43. Howard v. Wilmington & W. R. Co., 2 Har. (Del.) 471.

**Continuance of a suit in New Hampshire** because of the pendency of an action in another state is a matter of discretion. Moore v. Maryland Cas. Co., 74 N. H. 47, 64 Atl. 1099. See also Chatzel v. Bolton, 3 McCord (S. C.) 33.

**Contra.**—Conrad v. Buck, 21 W. Va. 396.

44. Ind.—De Armond v. Bohn, 12 Ind. 607. Ia.—Schmidt v. Posner, 130 Iowa 347, 106 N. W. 700. Mo.—Davis v. Morton, 4 Bush 442, 96 Am. Dec. 309. La.—Peyroux v. Davis, 17 La. 479; West Lyndie, etc. v. McConnell, 5 La. 424, 25 Am. Dec. 191; Godfrey v. Hall, 4 La. 158; Stone v. Vincent, 6 Mart. (N. S.) 517.

“The intention of the code is not to enlarge a defense or create a remedy, but merely to direct the mode in which defenses or objections already available by law may be taken advantage of, the nature of those defenses or objections being left unaltered.” Barrows v. Miller, 5 Howe Pr. (N. Y.) 51.

## C. FEDERAL AND STATE COURTS. — 1. First Action in State Court. —

It is well settled that the pendency in a state court of a prior action *in personam* whether at law or equity presents no bar and furnishes no ground for the abatement of a subsequent action or suit in a federal court, although there is identity of parties, subject-matter, and relief sought,<sup>45</sup> even if the federal court has concurrent territorial jurisdiction with the state court;<sup>46</sup> nor is it ground to stay proceedings until the action in the state court is finally determined.<sup>47</sup> But

45. *Gordon v. Gilfoil*, 29 U. S. 128, 25 L. ed. 222; *Mutual Life Ins. Co. v. Bruce*, 20 U. S. 188, 24 L. ed. 137; *Stanton v. Embury*, 93 U. S. 548, 23 L. ed. 200; *Commonwealth Trust Co. v. Quinby*, 137 Fed. 882, 70 C. C. A. 220; *Greenway v. Lussan*, 120 Fed. 1, 69 C. C. A. 1; *Boatmen's Bank of St. Louis v. Fidelity*, 100 Fed. 605, 65 C. C. A. 182; *Short v. Hephurn*, 75 Fed. 113, 21 C. C. A. 225; *Brown v. Albers*, 100 Fed. 452; *Wright v. Wynn*, 155 Fed. 274; *Horton v. Dowley*, 163 Fed. 421; *Reuter v. De Forest Wireless Tel. Co.*, 124 Fed. 142; *Burk v. McCaffrey*, 134 Fed. 600; *Humphreys v. Thorpe*, 52 Fed. 60; *Phares v. Hughes*, 52 Fed. 587; *Stanton v. Hill*, 52 Fed. 18; *Gurrie v. Davidson*, 52 Fed. 377; *Central City, etc. Co. v. Builders, etc. Co.*, 12 Fed. 222; *Leatherstocking v. Fishery*, *White v. Whitman*, 100 Fed. 404; 58 Fed. Cas. No. 17,531; *Wadleigh v. Veazie*, 3 Sumn. 163, 24 Fed. Cas. No. 17,031; *McKay v. Garcia*, 16 Ben. 556, 16 Fed. Cas. No. 8,844; *Loring v. Marsh*, 2 Cliff. 311, 15 Fed. Cas. No. 3,111.

*Contra*. — *Earl v. Raymond*, 4 McLean 233, 8 Fed. Cas. No. 4,243; *Ex parte Balch*, 3 McLean 221, 1 Fed. Cas. No. 790.

A learned note on this question supplementing a valuable indirect discussion is to be found in 42 L. R. A. 449 *et seq.*, under the case of *Willson v. Milliken*, 103 Ky. 165, 44 S. W. 660, cited elsewhere herein.

"The reason for the rule that the pendency of an action in a state court is no bar and furnishes no ground for abatement of another action for the same cause between citizens of different states is the federal unity, is that the latter court has concurrent jurisdiction of such controversies with the courts of the state and that citizens of different states have the constitutional right to the independent opinion and judgment of the judges of the national courts upon the questions presented by their controversies, at least

until those questions have become *res adjudicata* by the judgment of other competent courts." *Barber Asphalt Pav. Co. v. Morris*, 132 Fed. 945, 66 C. C. A. 55, 67 L. R. A. 761, where Judge Sanborn discusses the question at length.

*Scire facias* in a United States court to revive a judgment is not barred by an action of debt upon the same judgment in a state court. *Lafayette Co. v. Wonderly*, 92 Fed. 313, 34 C. C. A. 360.

**District of Columbia.**—A matter pending in a court of the District of Columbia is pending in a foreign jurisdiction. *Strong v. District of Columbia*, 17 Ct. Cl. 217.

46. *City of North Muskegon v. Clark*, 62 Fed. 694, 10 C. C. A. 591; *Wilcox, etc. Co. v. Phoenix Ins. Co.*, 61 Fed. 199; *Logan v. Greenlaw*, 12 Fed. 10; *Dwight v. Cent. Vermont R. Co.*, 9 Fed. 785 (obiter); *Hughes v. Elsher*, 5 Fed. 263.

*Contra*.—*Radford v. Folsom*, 14 Fed. 97. See also *D. E. Loewe & Co. v. Lawlor*, 130 Fed. 633; *Brooks v. Mills County*, 4 Dill. 524, 4 Fed. Cas. No. 1,955.

**Anti-Trust Law.**—Pendency in a state court of a suit involving the Sherman anti-trust act cannot be pleaded to abate an action to recover treble damages under § 7 of such act (Act July 2, 1890, c. 647, 26 Stat. at L. 210). Power to enforce such remedy does not exist in the state court. *D. E. Loewe & Co. v. Lawlor*, 130 Fed. 633.

47. In an action *in personam* it is error for a federal judge to stay proceedings until an action pending in the state court is finally determined. He should proceed with convenient speed to the petitioner's controversy, and mandamus will lie if the action is stayed. *Barber Asphalt Pav. Co. v. Morris*, 132 Fed. 945, 66 C. C. A. 55, 67 L. R. A. 761. *Wadleigh v. Veazie*, 3 Sumn. 165, 28 Fed. Cas. No. 17,031.



it has been held that the court may do so as a matter of comity.<sup>48</sup>

2. **First Action in Federal Court.**—By the weight of authority pendency of a prior personal action in a federal court does not abate a subsequent action in a state court,<sup>49</sup> although both courts have the same territorial jurisdiction.<sup>50</sup>

D. **ACTIONS NOT IN PERSONAM.**—Where two courts, although of different sovereignties, have concurrent jurisdiction *in rem* and one obtains possession or dominion of the specific property by proper process the suit in the coordinate jurisdiction will not be dismissed, but before a seizure of property is made therein it will be stayed until the proceedings in the court which first obtained jurisdiction of the property are concluded;<sup>51</sup> but where the first action does not place the

48. *Bunker Hill, etc. Co. v. Shoshone Mtn. Co.*, 102 Fed. 504, 47 C. C. A. 709; *Orman v. Underwood*, 86 Fed. 427, 30 C. C. A. 162.

49. *La. Cent. Imp. & Cont. Co. v. Greater Cent. Co.*, 119 La. 222, 44 So. 10; *N. Y. v. Hollister v. Stewart*, 111 N. Y. 244, 19 N. E. 782; *Omella Co. Bank v. Bonney*, 101 N. Y. 173, 4 N. E. 332 (where it was said that until a recovery is obtained each may proceed to judgment and execution when a satisfaction of either would require a discharge of both); *Checkley v. Prov. & S. S. Co.*, 60 How. Prac. 510; *Litchfield v. Brooklyn*, 13 Misc. 693, 34 N. Y. Supp. 4,090; *Orma Mfg. Co. v. Oilis*, 37 How. 591; *Walsh v. Darwin*, 12 Johns. 92; *N. C. v. Kenton v. Southern R. Co.*, 146 N. C. 276, 59 S. E. 871. **S. C.**—*Logan v. Atlanta, etc. R. Co.*, 82 S. C. 518, 64 S. E. 518; *Mayfield v. Atlanta, etc. R. Co.*, 79 S. C. 558, 61 S. E. 106. **Wis.**—*Rice v. Ashland Co.*, 114 Wis. 130, 89 N. W. 908; *Wood v. Lake*, 13 Wis. 84.

*Contra.*—*Orman v. Lane*, 130 Ala. 305, 30 So. 441; *Wilson v. Milliken*, 103 Ky. 165, 44 S. E. 660, 42 L. R. A. 440.

50. **N. C.**—*Sloan v. McDowell*, 75 N. C. 21, holding that the code does not change the rule. **Tex.**—*Harby v. Patterson* (Tex. Civ. App.), 59 S. W. 63; *International G. N. R. Co. v. Barton*, 24 Tex. Civ. App. 122, 57 S. W. 292. **Wash.**—*Caine v. Seattle & N. R. Co.*, 12 Wash. 596, 41 Pac. 904.

*Contra.*—The above decisions are based on the theory that as federal courts derive their powers from a different sovereignty state courts are to them foreign. But in *Smith v. Atlanta Mut. Fire Ins. Co.*, 22 N. H. 21, it was held that the circuit court of the United States within its territorial limit, and as to causes within its jurisdiction,

cannot be regarded as a foreign court. "Its powers are not derived from any foreign government; its judgments operate directly to bind persons and property within this state; its process, issue and trial, is effectual to enforce its own orders. The circuit court of another district has no authority within this state and may be considered territorially and for the same purposes as a foreign jurisdiction."

**Removal to Federal Court.**—Pendency of an action in the United States court which has been removed from the state court will abate a subsequent action in the state although in the second suit damages are laid in less than the sum of \$2,000. The system of removal contemplated that the circuit court of the United States should have exclusive jurisdiction so long as a case should be pending there. *Louisville & N. R. Co. v. Newman*, 132 Ga. 523, 64 S. E. 541.

**Ne Exeat.**—Where a judgment debtor has been sued upon the judgment in the Circuit Court of the United States, sitting within the state, and held to bail in such suit, and a bill has also been filed against him in a court of chancery, to obtain payment of some judgment, and a *ne exeat* issued thereon against him, the *ne exeat* will be discharged, unless complainant elects to release defendant from his arrest and bail in the United States court. *Mitchell v. Bunch*, 2 Paige (N. Y.) 606, 22 Am. Dec. 669.

51. **U. S.**—*Barber Asphalt Pav. Co. v. Morris*, 132 Fed. 945, 66 C. C. A. 55, 67 L. R. A. 761; *Zimmerman v. So Relle*, 80 Fed. 417, 25 C. C. A. 518 (where an action to quiet title was stayed pending a prior action in the state court, as it might be found necessary at some stage of the proceedings to appoint a receiver to collect rents

property in the exclusive possession of the foreign tribunal,"<sup>52</sup> and the maintenance of the second is not calculated to cause a conflict over the property between the two courts, the second will not be dismissed or stayed.<sup>53</sup>

and otherwise care for the property pending the litigation); *Gates v. Bucki*, 100 Fed. 301, 3 L. ed. A. 110 (foreign court in United States court stayed pending attachment and proceedings to cancel mortgage in state court); *Hurd v. Hobbins*, 18 Fed. 307 (bill to foreclose and bill to cancel mortgage); *Martin v. Baldwin*, 19 Fed. 349 (partition suits); *Taylor v. The Royal Saxon*, 1 Wall. Jr. 311, 23 Fed. Cas. No. 13,803 (holding that replevin in state court to settle right of property in a vessel is a bar to that in admiralty to settle the same right). Ky.—*Laveland Current Co. v. Day*, 40 Ky. L. Rep. 879, 10 S. W. 924. Pa.—*Lowry v. Hall*, 2 Watts & S. 180, 37 Am. Dec. 405, holding that chattels delivered to the plaintiff as replevin in a New York court, cannot be counter replevied in Pennsylvania. Wash.—*State v. Tallman*, 29 Wash. 411, 69 Pac. 1115, holding that a suit commenced in a federal court claiming all of certain funds against the holder and another claimant, and to compel delivery and to restrain delivery to anyone else, abated subsequent action in the state court having concurrent jurisdiction by other claimants against complainants in the first suit.

When a suit is brought to enforce a lien against specific property, to marshal assets, administer a trust, or liquidate an insolvent, etc., and in all other cases of a similar nature where, in the progress of the case the court may find it necessary or convenient to assume control of property in controversy, the court which first acquires jurisdiction of such a case by the issuance and service of process is entitled to retain it to the end without interference on the part of any court of co-ordinate jurisdiction. *Merritt v. American Steel-Barge Co.*, 79 Fed. 228, 24 C. C. A. 505.

**Admiralty and Law.**—The rule in regard to action *in rem*, in both admiralty and common law courts, gives exclusive jurisdiction to that tribunal which has acquired it by a judicial seizure of the thing. The statute makes service of process equivalent to seizure and jurisdiction in *rem* suits. If there is several courts at the same

time over the same thing, but the court that makes the first actual seizure has exclusive power over its disposal. *Averill v. The Hartford*, 2 Cal. 308. See also *Calhoun v. Hoyt*, 3 Wheat. (U. S.) 246, 314, 4 L. ed. 381; *Hall v. Warren*, 2 McLean 332, 11 Fed. Cas. No. 5,952; *United States v. The Haytian Republic*, 154 U. S. 118, 14 Sup. Ct. 992, 38 L. ed. 930.

**Successive Attachments.**—Where a state statute provides for successive attachments of the same property, a prior attachment in a state court affords no ground for the discharge of an attachment in a federal court. *D. E. Loewe & Co. v. Lawlor*, 130 Fed. 633.

52. *Babcock v. DeMott*, 160 Fed. 822, 88 C. C. A. 64.

Pendency in a state court of a suit to recover real property is no bar to a suit in equity in a federal court to quiet title. *N. C. Min. Co. v. Westfeldt*, 151 Fed. 290.

Trespass to try title in a state court does not abate suit to quiet title to same land in a United States court. *Slaughter v. Mallett Land & Cattle Co.*, 141 Fed. 282, 72 C. C. A. 430.

In a suit in equity to have appointment under a will set aside as fraudulent and to have the property assigned to the plaintiff, a plea alleging the pendency of a prior proceeding in the court of another state should be allowed only if it shows that the latter court has possession of the *res*. *Briggs v. Stroud*, 58 Fed. 717.

53. A writ of assistance in a state court is not a bar to ejectment between the same parties for the same property brought by an applicant for the writ in a federal court. "The crucial point in each case is whether, under the circumstances, the prosecution of the second suit during the pending of the first involves an unseemly or improper interference with the rightful jurisdiction of the court entertaining the first suit. Where no such interference occurs or is threatened the second suit may proceed regardless of any difference of opinion between the two tribunals as to the ultimate determination which should be made as to the rights of person or property involved

**IV. WHEN FIRST ACTION DEEMED PENDING.**—A. TIME OF COMMENCEMENT.—1. **Service of Process.**—An action is not commenced and pending in the sense that a prior suit will abate a later when process has not been issued,<sup>64</sup> or the writ<sup>65</sup> or summons has not been served.<sup>66</sup>

2. **Service or Filing of Complaint.**—There is no action pending in this sense where the summons has been served but no complaint has been filed or served.<sup>67</sup>

It has also been held that the action is commenced when the writ is served,<sup>68</sup> or when an attachment is sued out and levied;<sup>69</sup> and again when it is actually entered and pending in court.<sup>69</sup>

in the litigation." *Lamar v. Spalding*, 154 Fed. 27, 83 C. C. A. 111.

Partnership in hands of a receiver appointed by a state court does not prevent an action in federal court on a claim against the partnership. *Rowitzer v. Wyatt*, 40 Fed. 609. See also *Orton v. Smith*, 18 How. (U. S.) 263, 15 L. ed. 393; *Trimble v. Kansas City P. & G. R. Co.*, 180 Mo. 574, 79 S. W. 678.

**Probate and Equity Courts.**—Partition in probate is no bar to partition in equity. *Marshall v. Marshall*, 86 Ala. 383, 5 So. 475.

Widow's petition in probate court for allowance is no bar to the executor's bill in chancery to enforce ante-nuptial contract, to compel defendant to abide by settlement made thereunder, and to restrain ejectment for dower. *Carr v. Lyle*, 126 Mich. 655, 86 N. W. 145.

54. *Primm v. Gray*, 10 Cal. 522; *Weaver v. Conger*, 10 Cal. 234.

55.—*Neal v. Mills*, 5 Blackf. (Ind.) 208.

56. *Monroe v. Millizen*, 113 Ill. App. 157; *Hart v. Hart*, 86 App. Div. 236, 83 N. Y. Supp. 897; *Burton Co. v. Cowan*, 80 Hun 392, 30 N. Y. Supp. 317.

*Contra.*—An action is begun when a petition is filed and a summons issued in good faith upon it. The summons need not be first executed. *Loveland-Garrett Co. v. Day*, 30 Ky. L. Rep. 879, 99 S. W. 924.

Under the code the mere issuing of summons is not commencement of an action, but must be completed by service of summons. "An action cannot be commenced as to any man until such jurisdiction has been acquired that without doing anything more a judgment can be entered against him either personally or such a judgment as would bind his interest in the property which is the subject of the action;

so long as neither of these things can be accomplished the party cannot be said to be in court and the action has not commenced against him." *Warner v. Warner*, 6 Misc. 349, 27 N. Y. Supp. 169.

Naked papers purporting to be a complaint and answer in an action but not shown to have been filed, served or used in any action, with no evidence of summons or its service, are insufficient to show an action pending. *Woodward v. Stark*, 4 S. D. 588, 57 N. W. 195.

57. *Hirsch v. Manhattan R. Co.*, 84 App. Div. 374, 82 N. Y. Supp. 754; *Phelps v. Gee*, 29 Hun (N. Y.) 202; *Hoag v. Weston*, 10 N. Y. Civ. Proc. 92.

Answer averring defendant was arrested on a capias in a prior action is not sufficient to show another action pending for the same cause where no declaration appeared to have been filed in the suit. *Gardner v. Clark*, 21 N. Y. 399.

58. *Parker v. Colcord*, 2 N. H. 36; *Downer v. Garland*, 21 Vt. 362.

The service of the writ must have been sufficiently completed so that defendant is called upon to answer. *Kirby v. Jackson*, 42 Vt. 552.

59. *Reynolds v. McClure*, 13 Ala. 159; *Dean v. Massey*, 7 Ala. 601. See also *Bennett v. Chase*, 21 N. H. 570.

60. *Com. v. Churchill*, 5 Mass. 174.

Under Iowa code, § 3514, the commencement of an action dates from the time when notice is in fact served under the code, and completed service by publication does not relate back to the time when the affidavit was first filed for publication. *Littlejohn v. Bulles*, 136 Iowa 150, 113 N. W. 756.

A suit which went no further than citation and in which there was no appearance by the defendant is no bar to a second action. *Succession of Wiemann*, 106 La. 387, 30 So. 893.



**B. FIRST ACTION ON APPEAL. — 1. Appeal Before Commencement of Second Action.**—The prior action is pending within the rule if an appeal has been perfected,<sup>61</sup> and is pending and undetermined.<sup>62</sup>

Under N. J. P. L., 1898, p. 648, §§ 9, 10, respecting a person who proposes to apply to the court for partition to give *some weeks' notice* to all tenants of the time when the petition for that purpose will be presented to the court, there is no action pending until the petition is presented. *Brown v. Gashill*, N. J., 70 Atl. 555.

41. Ind.—*Clayton v. Gray*, 61 Ind. 100. The Court of Morgan Co. v. Halstead, 2 Ind. 228. Ken.—*Land v. White*, 18 Kan. 45. Minn.—*Larson v. Shook*, 68 Minn. 30, 70 N. W. 775.

In *Smith v. Walke*, 43 S. C. 381, 21 S. E. 219, a demurrer to the jurisdiction was orally sustained and an appeal taken which was not perfected. Before the order sustaining the demurrer was signed plaintiff brought a second suit. No other action was pending.

62. U. S.—*Watson v. Jones*, 13 Wall. 679, 20 L. ed. 668. Ala.—*Orman v. Lane*, 13 Ala. 205, 30 So. 441. *Rawell v. Tammill*, 10 Ala. 968 (appeal from justice's court). Cal.—*Fish v. Abraham*, 71 Cal. 452, 10 Pac. 374, 12 Pac. 400, appeal from judgment sustaining demurrer. Ill.—*Tobler v. Babcock*, 234 Ill. 271, 88 N. E. 445. Ind.—*Morley v. Hines*, 100 Ind. 416; *Hochhaus v. Loganport B. Co.*, 71 Ind. 267; *Scott v. Herald*, 8 Blackf. 129; *Tracy v. Reed*, 8 Blackf. 56. Ia.—*Jennings v. Warren*, 31 Iowa 278. Ky.—*Macdonald v. Chambers*, 4 J. J. Marsh. 401. La.—*Stann v. Tucker*, 19 La. Ann. 107.

N. Y.—*Park v. Hotchkiss*, 52 Barb. Pr. 726. Allen v. Malcolm, 12 Abb. Pr. (N. Y.) 335. *Gregory v. Gregory*, 1 Jones & S. 1 (holding that where plaintiff recovers judgment against some of several defendants, while others recover judgment against the plaintiff, and the losing defendants appeal—they can plead their appeal in abatement of a second suit brought by plaintiff against the same parties). R. L.—*Municipal Ct. of Providence v. McDonough*, 24 R. I. 498, 53 Atl. 866 (holding that pending an appeal from the allowance of the account of the guardian an action against the guardian and surety on the bond, alleging a breach in that the guardian had not turned over the balance of his account after it had

been allowed and he had been removed as guardian, cannot be maintained). Probate Court of Johnston v. Thornton, 21 R. I. 518, 45 Atl. 150. Va.—*Moore v. Pierre*, 6 S. E. 1002. Wis.—*Tomlinson v. Nelson*, 49 Wis. 679, 6 N. W. 366; *Matteson v. Curtis*, 13 Wis. 426 (obiter).

**Erroneous dismissal of a suit by a justice of the peace, against the remonstrance of the plaintiff, ends it, and an appeal will not restore its pendency.** *Lord v. Ostrander*, 43 Barb. (N. Y.) 337.

Appeal from a suit in a United States court abates a subsequent suit in a state court. *Orman v. Lane*, 130 Ala. 305, 30 So. 441.

Under Code Civ. Proc., § 680, demurrer lies where a prior action is pending on appeal and the fact appears in the complaint in the second action. *Wetzstein v. Boston*, etc. Min. Co., 28 Mont. 451, 72 Pac. 865.

Appeal from refusal to grant injunction in a suit brought by defendants attacking validity of tax bills is no bar to an action on the tax bills. *Smith v. Tobener*, 32 Mo. App. 601.

In *Walker v. Heller*, 73 Ind. 46, there was a dismissal by plaintiff and judgment against him for the costs, from which the defendant appealed. Where the only effect of an appeal is to stay execution on a final judgment, the appeal does not establish the pendency of a prior action.

**Appeal from Non-Suit.**—The appeal from the entry on the docket of the order of non-suit could not continue a case as pending which was already out of court—the judgment of non-suit must be regarded as the legal determination of the suit. *Trimmer v. Trail*, 2 Bailey (S. C.) 480.

Where under statute an action before a justice of the peace should have been dismissed for failure of plaintiff to appear, an appeal is not a prior action pending. *Yentzer v. Thayer*, 10 Colo. 63, 14 Pac. 53, 3 Am. St. Rep. 563. Under Iowa code, § 4128, providing that no proceedings or order shall be stayed by an appeal in the absence of a supersedeas bond, a judgment or decree is *res adjudicata* pending appeal. *Watson v. Richardson*, 110 Iowa 698, 80 N. W. 416, 80 Am. St. Rep. 331.

Pendency of a bill in equity to rein-

**2. Appeal After Commencement of Second Action.**—The action is not pending where the appellate proceedings are instituted subsequent to the bringing of the second action.<sup>62</sup>

**3. Ineffectual Appeal.**—The action is not pending within the rule if the appeal would be ineffectual,<sup>63</sup> or has been taken from a dismissal for want of jurisdiction.<sup>64</sup>

**4. Effect of Reversal of Judgment in First Action.**—If on appeal the judgment is reversed and the case remanded to the lower court the action is still pending and an action brought subsequent to the reversal will abate.<sup>65</sup>

**C. FIRST ACTION DISMISSED OR DISCONTINUED.**—**1. By the Plaintiff.**—Where the first action has been dismissed<sup>66</sup> or discontinued by the plaintiff the second action will not abate.<sup>67</sup>

state an appeal from a justice dismissed in circuit court will not abate a suit on appeal bond. *Evans v. Langle*, 53 Ill. 455.

**63.** Where writ of error is sued out subsequent to the bringing of the second action the common and universal practice is to apply to the court in which the second action is pending for an order to stay the proceedings in the case until there is a determination of the writ of error. *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449; *Hallman v. Buckmaster*, 8 Ill. 408.

Subsequent appeal has no retroactive effect, as an appeal is not to be deemed to relate back to the entry of the judgment appealed from so as to defeat the plaintiff's action properly brought intermediate the judgment and the appeal. The court has power to stay until the determination of the appeal. Ill.—*Wendlandt v. Taylor*, 23 Ill. App. 139. Minn.—*Althen v. Tarbox*, 48 Minn. 13, 50 N. W. 1018, 31 Am. St. Rep. 616. N. Y.—*Porter v. Kingsbury*, 77 N. Y. 164.

Under 2 N. Y. Rev. St., 256, § 176, certiorari to remove a justice's judgment is a good defense although not sued out until after the commencement of the suit on the judgment. *Wemple v. Johnson*, 13 Wend. (N. Y.) 515.

**64.** *Gunnels v. Devours*, 57 Ga. 177. After a judgment of nonsuit where writ of error was so defective that it could not have withstood a motion by defendant in error to dismiss it there was no suit pending. In adjudication upon the plea the court should have treated the first action as terminated before the second was brought. *Gilmore v. Georgia R. & B. Co.*, 93 Ga. 482, 21 S. E. 50.

Under S. D. Rev. Code of Civ. Proc.

an order dismissing an action on plaintiff's motion is not appealable, and an attempted appeal is a nullity and no bar to a subsequent action. *Deere & Webber Co. v. Hinkley* (S. D.), 106 N. W. 108.

The court ordered an administrator to collect to pay a balance to the administrator, and continued the hearing as to other items. Subsequently the probate court dissolved a credit claimed by the administrator to settle and charged the same against him, and he appealed from this. The administrator sued for the amount first ordered to be paid. The appeal did not abate. *Saloman v. People*, 191 Ill. 200, 61 N. E. 82.

**65.** *Mills v. City of Chicago*, 127 Fed. 731; *Haviland v. Wehle*, 11 Abb. Pr. N. S. (N. Y.) 447.

**66.** *Capehart v. VanCampen*, 10 Minn. 158; *Gregory v. Gregory*, 1 Jones & S. (N. Y.) 1.

**67. Ala.**—*Bullock v. Perry*, 1 Sneed & P. 319. **la.**—*Pray v. Life Indemnity & Security Co.*, 104 Iowa 114, 73 N. W. 450 (motion agreed to be signed and submitted in vacation but dismissed before hearing by plaintiff is not bar to subsequent action for same cause although defendant's answer in first suit set up a counterclaim as set-off where defendant sets up same claim in subsequent action); *Toledo Sav. Bk. v. Johnston*, 94 Iowa 212, 62 N. W. 748. **Ky.**—*Cheapeake & O. R. Co. v. Middle's Admx.*, 24 Ky. L. Rep. 1687, 72 S. W. 22. **N. C.**—*Swepson v. Harvey*, 69 N. C. 387.

**68. La.**—*Jackson v. Larche*, 11 Mart. (O. S.) 284. **Mo.**—*Karnes v. Am. Fire Ins. Co.*, 53 Mo. App. 438, voluntary non-suit. **N. Y.**—*Hallett v. Hallett*, 10 Misc. 304, 30 N. Y. Supp. 946; *Golden*

2. By the Court. — Where the first action has been dismissed by the court there is no abatement.<sup>69</sup>

3. Dismissal After Second Action Begun. — *Old Rule.* — The older cases hold that if the first suit is pending when the second is instituted the latter will be abated, and subsequent dismissal of the first action is of no avail.<sup>70</sup>

*Modern Rule.* — The modern tendency is to regard the objection as removed if the dismissal or termination occurs after the plea is filed.<sup>71</sup> And it has been held that dismissal at any time before the

*r. Metropolitan El. R. Co.*, 1 Misc. 142, 20 N. Y. Supp. 630; *Butler v. Jarvis*, 51 Hun 448, 4 N. Y. Supp. 137 (by leave of court). Pa. — *Hale v. McWilliams*, 21 Pa. Super. Ct. 137. Vt. — *Ballou v. Ballou*, 26 Vt. 673; *Hill v. Dunlap*, 15 Vt. 645. Wis. — *Williams v. Sexton*, 19 Wis. 42.

Filing supplementary intervening petition in a state court is an abandonment of first intervening position in a federal court. *Trimble v. Kansas City, etc. R. Co.*, 180 Mo. 374, 79 S. W. 678.

In *Fitzpatrick v. Riley*, 163 Pa. 65, 29 Atl. 783, the facts and ruling are thus summarized by the court: "It was bad practice, and a hardship on defendant, for plaintiff, after bringing a second action, and proceeding to trial and compulsory non-suit, to go back to his first action by an alias summons therein. The costs of the non-suit not having been paid, the plea in abatement to the alias in the first action was a good plea of the defendant, and the court might well have refused to take off the nonsuit, and abated the action on the alias. But that was a matter within its discretion, and, the non-suit having been taken off, and the suit discontinued, and costs paid, there was no error in overruling the plea in abatement. The issue of a new original instead of an alias in the first action was not equivalent to a discontinuance of the latter, as appellant argues. It could have no other force than of a second action begun while the first was pending. The real hardship to defendant is in treating a compulsory non-suit under the statute, after plaintiff's evidence is all in, as an ordinary non-suit, and not as a demurrer to evidence, which it really is, and which ought to be a bar to another action. But the practice in this respect is firmly settled. *Bourneville v. Goodall*, 10 Pa. 113."

69. 116. — *Wood v. Norton*, 85 Mo. 588, non-suit on plaintiff's motion. Neb.

*Council Bluffs Sav. Bk. v. Griswold*, 50 Neb. 753, 70 N. W. 376, motion to set aside non-suit after dismissal does not suspend judgment. N. Y. — *Conlon v. Nat'l Fireproofing Co.*, 128 App. Div. 970, 112 N. Y. Supp. 652 (waiver of prosecution); *Goldstein v. Loeb*, 21 Misc. 72, 46 N. Y. Supp. 838 (failure to appear); *Owens v. Loomis*, 19 Hun 606; *Porter v. Kingsbury*, 13 Hun 33. N. C. — *Fleming v. Southern R. Co.*, 128 N. C. 80, 38 S. E. 253 (non-suit); *Webster v. Laws*, 86 N. C. 178. Okla. *Jay v. Zeisness*, 6 Okla. 591, 52 Pac. 928. Pa. — *Clark v. Ballou*, 12 Pa. Co. Ct. 369 (writ of account quashed for defect of form). S. C. — *Hurst v. Southern R. Co.*, 62 S. C. 281, 40 S. E. 670. Tex. — *Boley v. Bremond*, 7 Tex. 537. Wash. — *Harris v. Fidalgo Mill Co.*, 38 Wash. 169, 80 Pac. 204 (on demurrer); *Hurst v. Fidalgo*, 34 Wash. 646, 104 Pac. 119 (a motion to vacate a judgment dismissed without prejudice is not ground of abatement of a suit to quiet title against the judgment).

Erroneous dismissal ends a case as effectively as if dismissed on plaintiff's motion. *Lord v. Ostrander*, 43 Barb. (N. Y.) 337.

70. Ga. — *Singer v. Scott*, 44 Ga. 659. Ind. — *Lee v. Bailey*, 21 Ind. 98. Ia. — *Dawson v. Gibson*, 6 Iowa 557. Ky. *Frogg's Exrs. v. Long's Admr.*, 3 Dana 157, 26 Am. Dec. 401, if the plea be true at the time when it is filed, it cannot be defeated by a subsequent discontinuance of the prior action. Mass. *Comm. v. Churchill*, 5 Mass. 174, overruling *Clifford v. Cook*, 1 Mass. 405. N. H. — *Farber v. Colford*, 2 N. H. 36, pointing out that a "second action is barred as matter of its commencement" a prior action were pending though discontinued before the plea was pleaded." N. Y. — *Hadden v. St. Louis, I. M. & S. R. Co.*, 57 How. Pr. 390.

71. U. S. — *Chamberlain v. Eckert*, 2



hearing on the plea,<sup>72</sup> or even at the trial of the second action, is not too late.<sup>73</sup>

4. Improper Dismissal. — A dismissal without right does not affect the status of the suit.<sup>74</sup>

Biss. 124, 5 Fed. Cas. No. 2,576. Ga. — Rogers v. Hoshins, 15 Ga. 370. Ill. — Gage v. Chicago, 216 Ill. 137, 74 S. E. 726; Wright v. Keifer, 131 Ill. App. 298; Jerseyville Sham Mfg. Co. v. Bell, 125 Ill. App. 496. Ky. — Citizens' Nat. Bk. v. Freeman's Assignees, 111 Ky. 209, 63 S. W. 454, 56 L. R. A. 673. Minn. — Phelps v. Winona & St. P. R. Co., 37 Minn. 483, 35 N. W. 213, 5 Am. St. Rep. 867; Page v. Mitchell, 37 Minn. 368, 34 N. W. 896. Mo. — Worder v. Henry, 117 Mo. 530, 23 S. W. 776. N. Y. — Porter v. Kingsbury, 77 N. Y. 164; O'Hairne v. Lloyd, 1 Sweeney 13; Averill v. Patterson, 10 How. Pr. 85; Beals v. Cameron, 3 How. Pr. 414; Clark v. Clark, 7 Rob. 276; American Bible Soc. v. Hague, 4 Edw. Ch. 117. Pa. — Findlay v. Keim, 52 Pa. 112. R. I. — Bancroft v. Worcester Rubber Co., 22 R. I. 93, 46 Atl. 183. Tenn. — Turner v. Sumbrick, 19 Tenn. 7. Tex. — International & G. N. R. Co. v. Boston, 24 Tex. Civ. App. 122, 57 S. W. 292; Texas & P. R. Co. v. Kenna (Tex. Civ. App.), 52 S. W. 555.

In *Wilson v. Milliken*, 103 Ky. 165, 44 S. E. 660, 42 L. R. A. 449, a carefully considered case, the court pointed out that under the old rule of pleading there was no replication to a plea of former action pending, but *nul tunc record*. "The more modern rule seems to be that the objection of a former suit pending is removed by its dismissal or discontinuance even after plea in abatement in the second suit." But this rule is not inflexible and is not to be applied to all cases. "If it appear that the second action was brought for purposes of vexation rather than to seek legal rights the plea should be sustained."

72. Cal. — Balfour-Guthrie Inv. Co. v. Woodworth, 124 Cal. 169, 56 Pac. 891; Dyer v. Sealmanini, 69 Cal. 637, 11 Pac. 327 (where the action first brought was dismissed before the second was tried). Ill. — Mundt v. Cooke-Rutledge Coal Co., 118 Ill. App. 124. Ia. — Moorman v. Gibbs, 75 Iowa 537, 39 N. W. 832; Ball v. Keokuk & N. W. R. Co., 71 Iowa 306, 32 N. W. 354; Rush v. Frost, 49 Iowa 183. Kan. — Snow v. Hudson, 56 Kan.

378, 43 Pac. 355. La. — Schmidt v. Brauna, 10 La. Ann. 26. Minn. — Nichols v. State Bank, 35 Minn. 102, 47 N. W. 469, pointing out that the important thing is that at the time of trial there be no other suit on the same cause of action pending against the defendant so that he is liable to be harassed by two suits for the same thing at the same time. Tex. — Travitt v. Martin Brown Co., 74 Tex. 522, 12 S. W. 216. Wis. — Winner v. Knaben, 97 Wis. 394, 32 N. W. 937.

*Davis v. Chambers*, 32 Wis. 324, pointed out that the former strict rule that the pendency of the former action at the time of the commencement of the second is sufficient to abate the second, is not in accord with modern decisions. "We see no good reason for holding to a rule which is almost sure to sacrifice substantial rights of parties to a mere technicality." This case overruled *Le Clare v. Wood*, 2 Pin. 37.

73. Lamb v. Chicago, 219 Ill. 229, 76 N. E. 443.

A dismissal of a prior action may be made and judgment entered at any time before the trial of the second action is completed. *Moore v. Hopkins*, 83 Cal. 270, 23 Pac. 318, 17 Am. St. Rep. 248.

In New York the first action must be terminated before the issue is perfected and the second noticed for trial, or the second action will abate. *Rowker Fertilizer Co. v. Cox*, 106 N. Y. 555, 13 N. E. 95; *Swart v. Borst*, 17 How. Pr. (N. Y.) 69.

Discontinuance must be at least by the time the issue is regarded as perfected and cause noticed for trial in the second suit. *Marston v. Lawrence*, 1 Johns. Cas. (N. Y.) 397, holding proper at any time before issues joined on the plea. See also *Hyatt v. Ingalls*, 124 N. Y. 93, 26 N. E. 285.

After trial of issue of *lis pendens* it is error to allow the plaintiff to enter a rule *nunc pro tunc* for the discontinuance of the former action. *Bedell v. Powell*, 13 Barb. (N. Y.) 183.

74. *Worcester v. Lakeside Mfg. Co.*, 174 Mass. 299, 54 N. E. 833.

**5. Non Performance of Conditions.** — If the dismissal is conditioned on payment of the costs in the former suit and the costs have not been paid, the first action for the purposes of the plea is still pending.<sup>75</sup>

**D. ABATEMENT OF FIRST ACTION.** — If the earlier action is abated by death before the commencement of the second action<sup>76</sup> or before the filing of the plea or answer raising the defense of the pendency of the other action, the second action will not abate, since pendency at the time of commencing the second is not sufficient.<sup>77</sup>

**V. REQUISITES AS TO PARTIES.** — **A. IN GENERAL.** — The parties to both actions must be the same,<sup>78</sup> or their privies or successors

75. *Wright v. Jett*, 120 Ga. 997, 48 S. E. 345; *Shapiro v. Brewster*, 9 Paige (N. Y.) 245. See also *Smith v. White*, 7 Hill (N. Y.) 500; and compare *Smith v. Trudlove*, 66 Ga. 48.

**Costs Untaxed.** — If the costs are untaxed and the discontinuance is acquiesced in by an offer to pay costs when taxed, the plea will not be sustained. *Slocumb v. Thatcher*, 20 Mich. 52.

76. *Ind.* — *Indianapolis St. R. Co. v. Stout*, 53 Ind. 143. **Ky.** — See *Com. v. Smith*, 10 Ky. L. Rep. 750, 105 S. W. 466. **N. Y.** — *Baker v. Baker*, 70 Hun 26, 24 N. Y. Supp. 1083. **Wis.** — *Mason v. Ford*, 30 Lac. 48 *Wis.* 123, 4 S. W. 402.

**Entry on Docket.** — If the case has been dismissed seasonally the formal entry on the docket may be made after a second case is filed.

**N. C.** — *Wilson v. Pearson*, 102 N. C. 408, 18 E. 707. **S. C.** — *Smith v. Walker*, 187 S. C. 481, 21 S. E. 249. **Vt.** — *Forster v. Garland*, 21 Vt. 362. **Wis.** — *Boland v. Johnson*, 20 Wis. 200, 6 S. W. 819.

**Cal.** — *Chambers v. Tolmire*, 115 Cal. 180, 46 Pac. 906. Where the failure to formally enter is due to the clerk's failure the action cannot be pleaded as pending. *McIntosh v. Robb*, 4 Cal. App. 484, 88 Pac. 517.

77. **Ala.** — *Coaldale B. & T. Co. v. South Const. Co.*, 110 Ala. 605, 19 So.

**Ill.** — *Johnson v. Johnson*, 114 Ill. 611, 3 N. E. 232; *Garriek v. Chamberlain*, 97 Ill. 620; *Bancroft v. Eastman*, 7 Ill. 259. *Ross v. Nesbit*, 7 Ill. 252; *Mundt v. Cooke-Rutledge Coal Co.*, 118 Ill. App. 124 (where it was said that "a statement of a former suit pending, when at the time the plea is filed such former suit is not pending and undetermined, is a legal absurdity"); *O'Donnell v. Raymond*, 106 Ill. App. 148. **Ind.** — *Morris v. State*, 101 Ind. 560; *Moore v. Kessler*, 59 Ind. 152. **Ky.** — *Clay v. Shuman*, 8 Ky. L. Rep. 709; *Adams v. Gardner*, 13 B. Mon. 197;

*McKinsey v. Anderson*, 4 Dana 62; *Froggs' Exrs. v. Long's Admr.*, 3 Dana 157, 28 Am. Dec. 69; *Leathers v. Meglasson*, 2 T. B. Mon. 64. **Md.** — *Leavitt v. Mowe*, 54 Md. 613. **N. C.** — *Kesterson v. Southern R. Co.*, 146 N. C. 276, 59 S. E. 371; *Orbelle v. Ferguson*, 100 N. C. 60, 48 S. E. 551. **Pa.** — *Toland v. Tichenor*, 3 Rawle 320. **Ore.** — *Hopwood v. Patterson*, 2 Ore. 49. **Va.** — *Norfolk & W. R. Co. v. Nunnally's Admr.*, 88 Va. 546, 14 S. E. 367; *Archer v. Ward*, 9 Gratt. 622. **Tex.** — *Oldham v. Erhart*, 18 Tex. 147; *Payne v. Benham*, 16 Tex. 364.

**Cal.** — *Ortigue v. Piedmont Land & Min. Co.*, 109 N. C. 401, 13 S. E. 944, where it was held that the fact that the plaintiff in the former action submitted to a judgment of non-suit after the present one began could not alter the case.

78. **U. S.** — *Cook v. Burnley*, 11 Wall. 659, 20 L. ed. 29; *Degrauw v. Attrill*, 75 Fed. 744; *Pierre v. Poyau*, 79 Fed. 187. **Cal.** — *Calaveras County v. Brackley*, 30 Cal. 225. **Ky.** — *Tracy v. Dale*, 1 T. B. Mon. 190. **Pa.** — *Noble v. Thompson Oil Co.*, 40 Pa. 406; *Haug v. Brown*, 6 Whart. 468. **S. C.** — *Davis v. Hunt*, 2 Bailey 412. **Tex.** — *Conner v. Maxfield*, 94 Tex. 107, 18 S. W. 827, holding that a suit to recover land against an adverse claimant who has already commenced suit for same land against third party does not abate. **Wis.** — *Level Land Co. No. 3 v. Sivyler*, 110 Wis. 442, 88 N. W. 717; *Roberts v. Chicago & N. W. R. Co.*, 101 Wis. 222, 77 N. W. 151; *Wood v. Lake*, 13 Wis. 82.

Misjoinder of defendants is the former suit is no objection to the validity of a plea of another action pending between the same parties. *Athinson v. The State Bank*, 5 Blackf. (Ind.) 84.

New parties defendant added by plaintiff by leave of court after a plea

in interest. The word "parties" in the statute includes privies.<sup>79</sup>

**B. QUI TAM AND PENALTY ACTIONS.**—Qui tam actions, or actions to recover penalties in which the plaintiff shares with the state, are exceptions to the general rule.<sup>80</sup>

**C. SUBSTANTIAL IDENTITY SUFFICIENT.**—Substantial identity is sufficient, however, nominal identity not being required.<sup>81</sup>

**D. PARTY SUEING OR SUED IN DIFFERENT CAPACITIES.**—On the other hand there is no identity of parties where the same person nominally

in abatement was filed defeats the plea. *Hillbron v. Fowler Switch Canal Co.*, 75 Cal. 426, 17 Pac. 535.

A question which is pending in one court of competent jurisdiction cannot be raised and agitated in another by adding a new party and raising a new question as to him along with the old one as to the former party. *Memphis City v. Dean*, 8 Wall. (U. S.) 64, 19 L. ed. 326.

79. Cal.—*Chapman v. Moore*, 151 Cal. 509, 91 Pac. 324, 121 Am. St. Rep. 130. Ill.—*Haas v. Righeimer*, 220 Ill. 193, 77 N. E. 69. Ind.—*Truett v. Vincennes Mfg. Co.*, 20 Ind. App. 253, 50 N. E. 583. Mo.—*Holloway v. Holloway*, 103 Mo. 274, 15 S. W. 536, where it was said: "If a man institutes a suit and afterwards sells a part of the property in question to another who files an original bill touching the part so purchased by him, a plea of former suit depending—touching the whole property—will hold." Mont.—*Wolstein v. Boston*, etc. Min. Co., 28 Mont. 451, 72 Pac. 865, holding that "parties" as used in Subd. 3, § 680, Code Civ. Proc., includes privies. Ore.—*Crane v. Larsen*, 15 Ore. 345, 15 Pac. 326, deciding that under the Oregon code either the same parties or their privies is sufficient. Wis.—*McDonald v. Green Bay & Miss. Canal Co.*, 42 Wis. 335.

Substantial identity of parties is all that is required. So that the addition of parties to the second suit who since the first suit have become interested in the land involved, does not make any material difference with reference to pleading the former suit. *Haas v. Righeimer*, *supra*.

80. Com. v. *Drew*, 3 Cush. (Mass.) 279; Com. v. *Howard*, 13 Mass. 221; Com. v. *Cheney*, 6 Mass. 347; Com. v. *Churchill*, 5 Mass. 174.

81. Pendency of a proceeding to have omitted property listed for taxation on behalf of the commonwealth instituted by the auditor's agent for the

county, abates one by a revenue agent for the state at large against the same defendant for the same purpose. Com. v. *United States Tr. Co.* (Ky.), 117 Ky. 7, 116 S. W. 714.

Where a sheriff is proceeding to enforce collection of taxes by a levy, which effort is resisted, pending determination of his right to do so an auditor's agent representing the commonwealth cannot institute proceedings to recover the same taxes from the same party. Com. v. *Louisville Water Co.* (Ky.), 116 S. W. 712.

Under Kentucky Gen. St., c. 57, § 4, providing that if the life of any person is lost by wilful neglect of a corporation or its servants, the widow, heirs or personal representatives may sue to recover punitive damages, an administrator sued. Defendant pleaded that after this the widow sued for the same cause. As the widow was the sole beneficiary the defendant could plead, in either action, the pendency of the other. *Henderson's Admr. v. Kentucky C. R. Co.*, 86 Ky. 389, 5 S. W. 875.

Creditors filed a bill against the directors of an insolvent bank. The assignee subsequently brought an action against the directors for the same cause. As the parties were substantially the same, each case being against the same defendant, and brought by or for the corporation for the benefit of creditors, the assignee's action abated. *Warner v. Hopkins*, 111 Pa. 328, 2 Atl. 83, 56 Am. Dec. 266.

**Nominal Plaintiffs.**—Pendency of a suit brought for the use of one person is not ground for abating a subsequent suit brought on the same cause of action and in the name of the same nominal plaintiff but for the use of another as beneficial plaintiff, who alone is interested in the recovery and has full control thereof. *Foreman Shoe Co. v. F. M. Lewis & Co.*, 191 Ill. 175, 60 N. E. 971. See also *Ellerbe v. Troy*, 58 Ala. 143.



is a party to one suit in his individual capacity and to the other in a representative capacity.<sup>82</sup> But if the character is the same although the parties are styled differently,<sup>83</sup> or where the same plaintiff recovers the avails of both, the second suit will abate.<sup>84</sup>

**K. DEFENSE NOT AVAILABLE TO ONE NOT A PARTY TO FORMER SUIT.**—A defendant cannot plead the pendency of a former action to which he was not a party, brought by the same plaintiff against a different defendant.<sup>85</sup>

**L. PRESENCE OF OTHER PARTIES.**—The fact that there are additional parties defendant to the second action does not prevent its abating as to one who is also a defendant in the first.<sup>86</sup>

82. Ky.—*Parker v. Parker*, 24 Ky. L. Rep. 1136, 71 S. W. 528, an administrator and individually. N. J.—*Thompson v. Hays*, 64 N. J. L. 42, 42 Atl. 175, "representative" and individually. N. Y.—*Wheeler v. Gilman*, 61 Misc. 836, 117 N. Y. Supp. 883, holding that a foreclosure suit by one in his individual capacity was not abated by another action pending wherein plaintiff is joined as defendant not individually but as trustee; no judgment therein would not conclude him in capacity in which he was sued. Eng.—*Hulbert v. Langham*, 3 Laving 250, 81 Eng. Reprint 100, "trusts of B" and "executors of B".

Where administrator had sued as representative of the wrong party and was consequently compelled to bring a new action, a plea of pendency of the prior action, pleaded in abatement of new action, cannot be sustained. *Overholser v. Vandenstede*, 1 Pa. 434.

83. Where the plaintiff in one case is styled "trustee" and in the other "creditor" and he is acting under a strict appointment and there is no distinction between his duties, the second suit abates. *Howard v. Meridian Nat. Bank*, 149 Ind. 20, 48 N. E. 352.

84. Where a husband brings two suits on a note payable to his deceased wife, one in his capacity as administrator and the other as individual, there is identity of parties, for under Connecticut law the plaintiff directs and controls both suits and recovers the avails of both. *Beach v. Norton*, 8 Conn. 71.

85. Ariz.—*Rabbitt v. Field*, 6 Ariz. 6, 52 Pac. 775, holding that a junior mortgagee not a party to foreclosure cannot plead it in abatement of a subsequent suit in which he is made party defendant to foreclose the same mortgage. Cal.—*Kerns v. McKean*, 65 Cal. 411, 4 Pac. 404. Ind.—*Dawson v.*

*Vaughan*, 42 Ind. 395. Ia.—*Jones v. Broadt*, 59 Iowa 322, 10 N. W. 854, deciding that an action to enjoin sheriff and judgment plaintiff from selling is no bar to action to quiet title against purchaser at sheriff's sale. Kan.—*Wilson v. Fuller*, 9 Kan. 176, holding replevin against third party is no bar to replevin against defendant. Ky.—*Perry v. Perry*, 3 Ky. L. Rep. 656; *Adams v. Gardiner*, 13 B. Mon. 197. N. Y.—*Maloy v. Associated Lumber Co.*, 55 Hun 610, 8 N. Y. Supp. 815; *Upton, etc. v. U. S.*, 104, 37 Illus 361; *Omery v. Webster*, 31 Hun 418. W. Va.—*Shannon's Valley Nat. Bank v. Bates*, 20 W. Va. 210.

Where a non-resident is proceeded against by substituted process, the judgment can operate only on the property seized in the suit; hence where such a suit is against two parties and property of only one of them is seized, the suit can be invoked as its pendency only by the party whose property has been seized. The first was a suit *in rem* and the *res* belonged to one defendant and the other, also a non-resident, had no interest in the matter so could not be affected by suit and judgment. *Henderson Iron Wks. & S. Co. v. Howard*, 119 La. 555, 44 So. 296.

If a trustee in bankruptcy sues to recover proceeds of the sale of bankrupt's store claimed to have been paid to defendant as a preference, defendant cannot show that the trustee had an action against the purchaser from the bankrupt, since the pendency of the latter action would not abate this. *Cree v. Bradley's Bank*, 141 Iowa 232, 119 N. W. 614.

86. Chapman v. Moore, 151 Cal. 509, 91 Pac. 324, 121 Am. St. Rep. 130; Mullen v. Mullock, 22 Kan. 598.

In *Quinn v. Monona County*, 140 Iowa 105, 117 N. W. 1100, "the road supervisor and the township trustees

G. DIFFERENT PLAINTIFFS. — One can not plead in abatement another action to which he is a party but to which the plaintiff in the second suit is not a party, although both are otherwise alike.”

of Monona county were sued in a representative capacity in the first action, and, on behalf of the public, they filed a counterclaim involving the identical issues presented by the second suit. In the second case the county was a party defendant, and it, too, represented the public as did the road supervisor and the trustees in the first one. Under such a state of facts, it is clear that the second suit should be abated. A judgment in the first case against the road supervisor and the trustees upon the issues tendered would have been conclusive upon the county. In each case there was a defendant who stood for the general public, and the decision in either would be binding upon the public as *res adjudicata*.”

“By the statement ‘between the same parties’ is not meant that both actions shall be brought by the same plaintiffs against the same defendants only. If the same plaintiffs bring two actions, at different times, upon the same cause of action, the first one instituted being against a single defendant, and the second being against the defendant in the prior action, and also against another joined as defendant, the action will, so far as the defendant who is a party to both actions, be between the same parties and the second action as to him, by reason of the pendency of the prior action, may be abated.” *Atkinson v. State Bank*, 5 Blackf. (Ind.) 84; *Rehman v. The New Albany, etc. R. Co.*, 8 Ind. App. 200, 35 N. E. 292.

87. U. S. — *Hunt v. New York Cotton Exch.*, 205 U. S. 322, 27 Sup. Ct. 529, 51 L. ed. 821 (where it was held that an injunction obtained by defendant restraining a telegraph company from ceasing to deliver quotations was no bar to an action to enjoin the defendant from receiving and using the same quotations); *Converse v. Michigan Dairy Co.*, 45 Fed. 18; *Maupin v. Pie*, 2 Cranch C. C. 38, 16 Fed. Cas. No. 9,309. Cal. — *Lake Merced Water Co. v. Cowles*, 31 Cal. 215 (holding that where two corporations each commence condemnation proceedings in the same cause for the same land against the same defendant, the court of its own motion cannot in one take notice of the pendency of the other and refuse

to appoint commissioners to appraise). *O'Connor v. Blake*, 29 Cal. 312. Ind. — *10th v. Hatcherford*, 2 Ind. 184, 30 to 100 804. La. — *Hacker v. Landreaux*, 16 L. R. Ann. 204; *Duchaux v. Dartanseau*, 2 Mart. (N. S.) 215, holding that if vendee promise to pay vendor of the vendue he cannot delay until the first vendor will be abate judgment against his vendor on alleged deficiency in quantity of land sold him, for judgment in first suit would not bar plaintiff in second. Mass. — *Olney v. Smith*, 3 Mass. 299, holding an action of replevin not abated by pendency of an earlier action for the same chattels brought by defendant against a third person. N. Y. — *Hallistors v. Stewart*, 111 N. Y. 544, 12 N. E. (5th) 179; *Lyons v. Townsend*, 23 N. Y. 229; 240; *Palmer v. Wright*, 15 How. Pr. 484. S. C. — *National Bank v. Knicker*, 18 S. C. 101, 3 S. E. 464.

Continuance of goods the title of which is to remain in the consignor until the purchase price is paid may maintain trover for conversion of goods by an other who seized them, and an action against him of consignment, and pendency of action of trover by consignor against officer is no defense. *Adrian v. Hedges*, 164 Mass. 270, 42 N. E. 470.

Affirm by Personal Representatives. In an action by devisee or heirs at law to recover devised lands, a subsequent action brought by the personal representative against the defendant is not used as a bar for a plea paid *Barre's* continuance. *Hall's Heirs v. Hall*, 61 Ala. 290. Suit by administratrix no bar to suit by children and heirs at law to recover possession of the same land. *Row v. Johnson*, 25 Ky. L. Rep. 1799, 78 S. W. 906. Ejectment for land out of which rent charge issues brought by executors of testator no bar to recovery of rent by devisees. *Streaper v. Fisher*, 1 Rawle (Pa.) 153, 18 Am. Dec. 604.

Notes and Bills.—Action by payee against maker is no bar to an action against the maker by a person to whom the note was subsequently indorsed. *Bennett v. Chase*, 21 N. H. 570.

Pendency of an action by an indorser against the maker does not prevent the payee, who later takes up the

**II. JOINT AND SEVERAL LIABILITY. — 1. Cases in Tort. —** The pendency of another action brought by the same plaintiff will not abate a subsequent action against a different joint tort-feasor for the same injury.<sup>60</sup>

**2. Cases on Contract. —** Nor can a defendant who is liable jointly and severally in contract plead in abatement the pendency of a for-

note, from suing maker. *Casey v. Harrison*, 13 N. C. 244.

Action by payee against maker of a note is no bar to an action by indorsee against maker. *Thomas v. Freeman*, 17 Vt. 318.

**Different Taxpayers. —** Pendency of a suit by non-resident taxpayers in behalf of complainants and all other non-resident property owners and taxpayers, to declare illegal and void a contract entered into by the defendant city, abates a suit subsequently brought for the same cause in the same court by other non-resident taxpayers. "Complainant may be joint, and property regarded as representing a class all of whom will be concluded by whatever judgment may be rendered therein." *Gamble v. San Diego*, 59 Fed. 487.

A bill filed by one taxpayer to enjoin the collection of an illegal tax does not estop another from maintaining a similar suit, although the latter may have contributed something to the expenses of conducting the first suit. *Harley v. Pittsburgh*, 112 Ala. 514, 21 So. 344, 36 L. R. A. 615, where the court said that it was not even shown that the evidence was the same.

**Mandamus ex rel.** a claimant for a writ is not a bar to mandamus in the name of the state by the district attorney against the same defendant, as the writ is a writ of a private person and not a writ of the suit of the state. *State v. Morgan*, 28 La. Ann. 482.

**Quo warranto to try title to public office** is no bar to an action by the claimants to restrain the same defendants from exercising the duties of the office, since one is the action of the state and the other of individuals. *State v. Bradley*, 80 S. C. 64, 91 S. E. 211, 128 Am. St. Rep. 855. See also *Vogel v. State*, 107 Ind. 374, 8 N. E. 104.

**29. U. S. —** *Evans v. Worthington*, 34 Fed. 465 (holding an action against master for infringements of trade-marks no bar to second action for same infringe-

ments against master and servants); *Steiger v. Heidelberger*, 4 Fed. 455. **Ga. —** *Augusta & S. R. Co. v. Dorsey*, 68 Ga. 228. **Mo. —** *Cumberland County v. Central W. S. T. Co.*, 90 Mo. 81, 10 A. 867, 60 Am. St. Rep. 246, holding that if the master of a tug is negligent while towing a vessel and injury results to a third party, a suit against owner of tug is not barred by action against the owner of the vessel for the same injury. **Minn. —** *Williams v. McGrade*, 18 Minn. 82, holding that an action against several for trespass in taking personal property is not abated as to all by pendency of replevin against one for property taken. **S. C. —** *London v. Atlantic*, 96, 11, 52 S. E. 519, 64 S. E. 515 (holding action by servant of lessee for injuries against lessor railroad not barred by another action by him against lessee railroad); *Mayfield v. Atlanta, etc. R. Co.*, 79 S. C. 324, 31 S. E. 100 (holding the death against lessor railroad not barred by another against lessee railroad).

**Joint Wrongdoers. —** If the sheriff levies two or more attachments in favor of different creditors at the same time and on the same property, he is regarded as their common agent though each creditor was endeavoring to secure a priority of lien, and if the levy be wrongful but one action of damages can be maintained against him. A plea in abatement to a second suit is therefore proper. *Harmon v. McRae*, 91 Ala. 401, 8 So. 548.

**Action for Death From Negligence. —** Maryland Code, Art. 97, § 2, giving a right of action for death caused by negligence and providing that "not more than one action shall lie for and in respect of the same subject matter of complaint," does not prevent separate actions against joint tort-feasors and the widow of the one whose death was caused by a wharf being out of repair may proceed concurrently against the owners of the wharf and the lessees of the wharf. *State v. Boyce*, 72 Md. 140, 19 Atl. 366, 20 Am. St. Rep. 458, 7 L. R. A. 272.



mer suit against other obligors, but a joint action against all abates subsequent separate actions against any one of them."

**I. CREDITOR'S BILLS.** — A pending creditor's bill filed by the claimant therein for himself and all other creditors who may join therein is no bar to another bill filed by a creditor of the same debtor who was not a party to the first proceeding."

**J. PARTIES REVERSED.** — **1. In General.** — As a general rule not only must the parties to both actions be the same but it must appear that the same person, as plaintiff, commenced both actions."

**89. U. S.**—United States v. Price, 9 How. 83, 13 L. ed. 56, overruling United States v. Cushman, 2 Sumn. 426, 25 Fed. Cas. No. 14,908. Ky.—Graves v. Dale, 1 Mon. 191. N. Y.—Dawley v. Brown, 65 Barb. 107, holding that an action against two to recover possession abates separate suit against each for part of land covered by first action. Ohio.—Weil v. Guerin, 42 Ohio St. 299, holding that an action against surviving partner and administrator of deceased partner abates subsequent action against surviving partner alone.

*Contra.*—Turner v. Whitmore, 63 Mo. 526, based on United States v. Cushman, 2 Sumn. 426, 25 Fed. Cas. No. 14,908, and holding that where a contract is joint and several there are two distinct remedies upon it—one against all jointly and the other against each severally.

If, pending a joint action against obligors on a joint and several bond, one dies, another action may be brought against his executor, as death works a severance. Pres. etc. of State Bk. v. Welles, 3 Pick. (Mass.) 15.

An action of replevin against a judgment creditor for goods levied under execution does not abate an action on his bond for damages for the levy against the officer making the levy, but if the judgment creditor who is surety on the bond is joined, the second suit will abate as to him, as the wrongful deprivation of property is the substantial fact upon which plaintiff's relief is claimed, although the actions differ in matter of form and in the relations of the defendant to the infringement of the plaintiff's rights. Mullen v. Mullock, 22 Kan. 598.

**90. U. S.**—Parsons v. Greenville & C. R. Co., 1 Hughes 279, 18 Fed. Cas. No. 10,776. Ala.—American Pig Iron, etc. Co. v. German, 126 Ala. 194, 28 So. 603, 85 Am. St. Rep. 21; Alabama Iron and Steel Co. v. McKeever, 112 Ala. 134; 20 So. 84; Hall v. Alabama Term. &

Imp. Co., 104 Ala. 577, 16 So. 439, 53 Am. St. Rep. 87; Talladega Merc. Co. v. Jennifer Iron Co., 102 Ala. 259, 14 So. 740. Ill.—Sweeney Mfg. Co. v. Goldtharg, 66 Ill. App. 508. N. Y.—James v. Lansing, 7 Paige 582. Lachaise v. Marks, 4 E. D. Smith 610. See also Schuchter v. Holman, 85 N. Y. 279.

Pendency of a creditor's bill in another state which seeks to subject to the claims of creditors the proceeds of an insurance policy upon which an assignee of the insured has instituted an action in this state is not ground for stay of proceedings here when the assignee is not a party to the action in the foreign court. State v. Superior Court, 14 Wash. 686, 45 Pac. 670.

Under West Virginia Code, 1891, — 125, § 7, when a suit has been begun by one judgment creditor for himself and all other lienors to enforce the lien of a judgment on land, no other lien holder can sue for the same purpose, and such a plea under the statute is a plea in bar. Foley v. Huley, 43 W. Va. 514, 27 S. E. 268.

Two or more creditors of an insolvent corporation may proceed concurrently against a stockholder to enforce his statutory liability, and pendency of proceedings by one creditor is no bar to that of another. Buist v. Citizens' Sav. Bank, 4 Kan. App. 700, 46 Pac. 718.

**91. U. S.**—Langstraat v. Nelson, 40 Fed. 783; Wadleigh v. Veazie, 3 Sumn. 165, 28 Fed. Cas. No. 17,031; Paul v. Hulbert, 18 Fed. Cas. No. 10,841; New England Screw Co. v. Bliven, 3 Blatchf. 240, 18 Fed. Cas. No. 10,156; Certain Logs of Mahogany, 2 Sumn. 589, 5 Fed. Cas. No. 2,559. Cal.—Walsworth v. Johnson, 41 Cal. 61. Ia.—Pratt v. Howard, 109 Iowa 504, 80 N. W. 546, pointing out that the reason of the rule applies only when plaintiffs in both actions are the same, and that hence the rule itself falls when this is not true. Mass.—Colt v.

2. When Full Relief Can Be Had in First Action.—It has been held that when the first suit affords a full, plain and adequate remedy and the issues in both are the same, the position of the respective parties on the record, whether plaintiffs or defendants, is immaterial.<sup>92</sup>

**VI. REQUISITES AS TO CAUSE OF ACTION.**—A. GENERAL RULE.—A prior action pending will not abate a second action between the same parties unless founded on the same identical cause

Partridge, 7 Mete. 670. Ohio.—Barr v. Chapman, 5 Ohio C. C. 69. Tenn.—Marley v. Power, 5 Lea 691. Wis.—Wood v. Lake, 13 Wis. 84.

"Unquestionably, the general rule is, as stated by defendants, that the doctrine of a prior suit pending applies only when the plaintiff in both suits is the same person and both are commenced by himself, and not to cases where there are cross-suits by plaintiff in one suit who is a defendant in the other, because it cannot be said that either is prosecuting two actions against the other within the rule in question." So merely asserting a defense which defendant had alleged as a cause of action, is not seeking to harass plaintiff with a second suit. Defendant did not begin the second litigation and has a right to set up the defense. *Rowley v. Gibbs*, 184 Mo. 1, 81 S. W. 147.

22. Ala.—Troy Fertilizer Co. v. Preston, 116 Ala. 119, 22 So. 262, holding that suit brought by creditors to have deed declared void abates suit by defendant in another court to enjoin such suit and have deed declared valid. Cal.—*Cuthrough v. Adams*, 10 Cal. 314, 15 Pac. 634, an accounting. Ia.—*Pratt v. Howard*, 109 Iowa 604, 80 N. W. 140. La.—*Kansas City S. R. Co. v. Railroad Comm.*, 105 La. 28, 31 So. 311 (action to have fine annulled abated by action for recovery of fine); *Scott v. The World*, 20 La. Ann. 180. Mass.—*Orin v. Partridge*, 7 Mete. 670, *id.* N. H.—*Walton v. Robinson*, 52 N. H. 286, a partnership accounting. N. Y.—*Shebert v. Laughlin*, 122 App. Div. 701, 101 N. Y. Supp. 508 (a partnership accounting); *City Real Est. Co. v. McFarland*, 121 App. Div. 652, 106 N. Y. Supp. 293 (holding that the plaintiff who had taken an assignment of a mortgage, when its validity was involved in two actions then pending against its assignor in which all other parties in interest were before the court, should not be permitted to require the committee of an incompetent

person, who is plaintiff in one of such actions, to litigate in defense matters affirmatively alleged by him in the other actions). Groshon v. Lyon, 16 Barb. 461 (holding that under Code, § 144, the parties may be reversed and still there may be an action between the same parties within the code meaning); *Danvers v. Dorrity*, 14 Abb. Pr. 206 (holding that a partition of real estate by one partner abated by action brought by the other partner for dissolution of partnership and an accounting, the property being firm capital). Ore.—*Crane v. Larsen*, 15 Ore. 345, 15 Pac. 326. S. C.—*Emry v. Chapell*, 62 S. E. 411, an accounting. Wash.—*Tacoma v. Commercial Bldg. L. & P. Co.*, 15 Wash. 515, 46 Pac. 1043, holding that where an electric light company secured a restraining order prohibiting the city from interfering with it while stretching wires which had been torn down the night before by city officials, a subsequent action by the city seeking to restrain the company from replacing the wires involves identical issues and will abate. Wis.—*Rowley v. Williams*, 5 Wis. 151, holding that foreclosure by a subsequent mortgagee to which a prior mortgagee is a party abates foreclosure by the latter, it being "sufficient that all the parties interested in the object of the suit should be before the court, either as complainants or defendants."

See also *Commissioners of Craven v. Atlantic & N. C. R.*, 77 N. C. 297.

It is not always necessary that the parties must be the same in the sense that the same person or persons are plaintiffs in each of the cases. "The general rule is as contended for, but there are several well recognized exceptions. Thus: Where partition of real estate is desired and suit is brought by one co-owner against the other, it must be manifest that a cross-suit with the parties reversed to accomplish the same purpose should not be tolerated. And clearly the principle is applicable where successive actions are brought to

of action. The codes have not changed the rule.<sup>75</sup> One test for determining whether there is such an identity is to ascertain whether the evidence properly admissible in one will support the other. If so, then the plea will be sustained.<sup>76</sup> Another test is whether the judgment which could be rendered in the prior action would be conclusive between the parties and operate as a bar to the second.<sup>77</sup>

B. IDENTITY IN PART.—Where the prior action is for recovery on only one cause of action and the second includes that and other causes of action the second will not entirely abate.<sup>78</sup> But it has been held that although the second action will not abate entirely, the plea will be allowed to stand as a defense in the second action to the extent to which there is an identity of causes of action in the two actions.<sup>79</sup>

C. SPLITTING CAUSES.—An entire and indivisible demand cannot be split and made the subject of several suits, and if this is done the pendency of the first suit may be pleaded in abatement of the others.<sup>80</sup>

construe a will" with the parties reversed. *Van Vlack v. Anderson*, 130 Iowa 363, 113 N. W. 523, citing *Deva v. Deva*.

93. "When the pendency of one suit is set up to defeat another, the cause must be the same. There must be the same parties, or at least such an representation the same interest; there must be the same right asserted and the same relief prayed for. This relief must be founded on the same facts and the title or essential basis of the relief sought must be the same." *Watson v. Jones*, 13 Wall. (U. S.) 679, 20 L. ed. 666.

The code does not establish any new rule for determining the identity of cause of action. *Julian v. Pilcher*, 2 Dav. (Ky.) 254; *Kelsey v. Ward*, 16 Abb. Pr. (N. Y.) 28; *Paige v. Wilson*, 8 Bosw. (N. Y.) 294.

94. U. S.—*Strom Packet Co. v. Bradley*, 5 Crank. C. C. 221, 12 Fed. Cas. No. 13,393. Cal.—*Montgomery v. Harrington*, 58 Cal. 270. N. H.—*Roger v. Odell*, 39 N. H. 417. N. J.—*Stears v. Shaw*, 53 N. J. L. 358, 21 Atl. 940. N. Y.—*Dawley v. Brown*, 79 N. Y. 390; *Stowell v. Chamberlain*, 60 N. Y. 272.

95. U. S.—*Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666. Ala.—*Foster v. Napier*, 73 Ala. 593; *Hall v. Wallace*, 25 Ala. 438. Cal.—*Hall v. Susskind*, 109 Cal. 243, 41 Pac. 1012. La.—*Hoschoff v. Theurer*, 8 La. Ann. 15. Neb.—*State v. North Lincoln R. Co.*, 34 Neb. 634, 52 N. W. 269; *Merrill v. Hootman*, 1 Neb. (Unof.) 822, 96 N. W. 406.

There is a strong analogy between the pleas of *res adjudicata* and *litis pendens*, and it is a fair test to inquire whether if there were final judgment in the former suit such judgment

would support the plea of *res adjudicata* in this. *Dick v. Oliver*, 4 La. Ann. 721.

96. Cal.—*Thompson v. Leven*, 14 Cal. 29, holding that where an action is abated as to an entire action that another suit for the same cause of action was pending the plea stated that the first action is for only a part of the same matter used for in the second suit, the plea fails. Ind.—*Bigelow v. Farmer*, 5 Blackf. 21, where in a declaration in abatement something of four counts the defendant pleaded in abatement to the whole declaration that another action was pending for the same cause of action contained in two counts, and this was held bad on general demurrer.

N. Y.—*Walker v. Pease*, 17 Misc. 415, 41 N. Y. Supp. 219. Vt.—*Ballou v. Ballou*, 28 Vt. 474. Wash.—*Oak v. Woolery*, 20 Wash. 440, 55 Pac. 562.

97. N. Y.—*Alcolm Co. v. Philip Hano & Co.*, 96 N. Y. Supp. 221, holding that the former action for two of the three items sued for in the present action abates only those two items and the whole complaint should not be dismissed. Tenn.—*Scaright v. Payne*, 1 Tenn. Ch. 186. Tex.—*Cornick v. Arthur*, 31 Tex. Civ. App. 579, 73 N. W. 410.

If it appears that cause of action in second suit is in a material and substantial part the same as in the first although other causes of action are inserted in the second it is, within the meaning of the rule of law, an action instituted for the same cause of action and is good cause of abatement. *Buffum v. Tilton*, 17 Pick. (Mass.) 510.

98. *Bar v. Sturges*, 16 N. Y. 548;



**D. Successive Causes.**—Although one entire demand cannot be divided, still when the acts giving rise to the cause of action sued on in the second suit occur after the commencement of the first, although alike in other respects, the causes of action are not the same and the plea of another action pending will fail.<sup>89</sup> This is illustrated

*Gibbs v. Lloyd*, 6 Ahls. Pr. (N. Y.) 457; *Handersnap v. Cocks*, 10 West. (N. Y.) 207, 22 Am. Dec. 448 (holding that sums due on a current or bank account constitute one entire indivisible demand); *Guernsey v. Carver*, 8 West. (N. Y.) 402, 51 Am. Dec. 80 (holding that an account for goods sold is an entire demand). "The law allows a multiplicity of suits and therefore if a party bring an action on a part only of an entire and indivisible demand the pendency thereof may be pleaded in abatement of another action on the remainder," *Guernsey v. Carver*, *supra*.

The services of a standing or regularly appointed attorney are usually rendered pursuant to some general contract and whatever is due at the end of the retainer constitutes but one cause of action. Plaintiff attorney for defendant for eight years, sued for his services for that period and afterward brought the present action for services in settling and delivering certificates of title during that period. The latter was held to abate. *Hughes v. Dunlap*, 130 Cal. 30, 70 Cal. 2d 311.

Right of recovery under statute for death caused by wilful negligence is a bar to cause of action that survived at common law upon the same facts, and new actions cannot be brought—one for mental and bodily suffering and another for death of the intestate caused by the same negligence. *Cumler's Appeal*, 121 Pa. 121, 12 Pa. 184.

89. U. S.—*Bates Mach. Co. v. W. A. Force Co.*, 179 Fed. 746 (different and subsequent infringement of same patent). *W. A. Force Co. v. Bates Mach. Co.*, 207 U. S. 30, 26 Fed. Cl. No. 17,498 (subsequent infringement of patents). Cal.—*Shanklin v. Gray*, 111 Cal. 88, 43 Pac. 120 (successive violations of statute requiring directors to file reports of corporate affairs. Ga.—*Baker v. Davis*, 127 Ga. 619, 57 S. E. 62, holding that an action to prevent defendant from cutting across soil of size specified by contract no bar to action to prevent cutting at all, on the ground that the right under the contract had ceased to exist since the beginning of the first

action. Ill.—*Leigh v. Laughlin*, 222 Ill. 265, 78 N. E. 563; *Steele v. Grand Trunk Junction R. Co.*, 125 Ill. 385, 17 N. E. 483; *Armstrong v. Crilly*, 51 Ill. App. 504. Ky.—*Goff v. Wilburn*, 15 Ky. L. Rep. 614, 24 S. W. 871, holding that a bill to quiet title does not abate trespass for subsequently entering on same land and cutting timber. La.—*Bogart v. Rile*, 8 La. Ann. 55, holding a petitory action no bar to a suit to enjoin committing waste and obtaining a sequestration of timber already cut. Mo.—*State v. Dougherty*, 45 Mo. 294. N. Y.—*Witty v. Campbell*, 44 N. Y. 410 (replevin no bar to action to recover proceeds of sale of the replevied property sold as perishable); *Parker v. Selye*, 3 App. Div. 149, 38 N. Y. Supp. 164 (deed recorded subsequent to first action); *Geery v. Webster*, 11 Hun 428 (conveyance made subsequent to commencement of action to set aside previous conveyances as fraudulent). Ohio.—*Methodist, etc. Church v. Laws*, 13 Ohio C. C. 147, appeal to reverse judgment as to right to use roadway and as to certain obstructions therein is no defense to action to enjoin additional obstructions placed there pending appeal. Ore.—*Roots v. Boring Junction Lumb. Co.*, 50 Ore. 298, 94 Pac. 182, holding that the pendency of an action at law for violation of contracts giving defendant the right to cut and take timber and of a suit in equity to reform one of the contracts, does not abate a suit to enjoin further cutting in violation of a modification of the contracts. Pa.—*Stewart's Appeal*, 56 Pa. 413, holding that a bill to prevent future trespasses was not abated by trespass for past acts. W. Va.—*Pickens v. Coal River Boom and Timber Co.*, 65 S. E. 865.

A street railway having wilfully and maliciously laid tracks in such a way as to injure abutting owner's land and building, the owner may bring a second action to recover for continuance of the unlawful act; and additional injury to sewerage subsequent to commencement of first action. *Becker v. L. & M. St. R. Co.*, 25 Pa. Super Ct. 367.

in a case where the second action is brought on a title acquired subsequent to the commencement of the first action.<sup>1</sup>

**E. IDENTITY OF SUBJECT-MATTER.**—There can be no identity of causes of action unless the subject or subject-matter of the two suits is the same. So where the same property is not in controversy in both actions,<sup>2</sup> or where each action is based upon a contract different from that involved in the other,<sup>3</sup> or upon a different

Pending, an appeal by defendant from a judgment for possession of certain premises and rent, plaintiff cannot commence another action for possession and for rent from the time of recovery in the former action, as under Rev. Code, 1899, § 1973, the rent asked for in the second could have been recovered in the first action. *McLain v. Nurnberg*, 16 N. D. 138, 112 N. W. 245.

**Divorce.**—See *Cordier v. Cordier*, 36 How. Pr. (N. Y.) 187, holding that for adulteries with the same person occurring after the commencement of the first action of divorce the plaintiff may commence a new action for divorce.

Separation for desertion does not abate divorce from bonds of marriage for desertion, where statute giving latter right was passed after commencement of the first suit. *Stevens v. Stevens*, 1 Met. (Mass.) 270.

**Instalments.**—Where a contract calls for payment of money at different times an action may be maintained on each as it falls due. *Aaronson v. David Mayer Brew. Co.*, 26 Misc. 867, 56 N. Y. Supp. 599, *Drach v. Lewis*, 47 Mo. 344 (foreclosing for non-payment of instalment, second instalment of rent accruing after the first was sued for). But it must embrace all instalments due at its commencement. *Drexler v. Cohen*, 108 N. Y. Supp. 680.

**Supplemental Complaint.**—The second action may be brought even though the cause of action might have been embraced in the former action by amendment or supplemental complaint. *Parker v. Seyle*, 3 App. Div. 149, 38 N. Y. Supp. 164; *Cordier v. Cordier*, 26 How. Pr. (N. Y.) 187.

1. New title by patent from the state acquired subsequent to commencement of first action. *Larco v. Clements*, 36 Cal. 132; *Vance v. Olinger*, 27 Cal. 358.

In *Leonard v. Flynn*, 89 Cal. 535, 26 Pac. 1097, 23 Am. St. Rep. 500, plaintiff acquired legal title by sheriff's deed.

2. U. S.—*Empire State L. M. & D. Co.*

*v. Banker Bldg. etc. Co.*, 121 Fed. 973, 18 C. C. A. 311. *Id.*—*Watson v. Rich*, 110 Iowa 508, 30 N. W. 416, 8 Am. St. Rep. 331, partition of land and controversy as to title and distribution of personality. *Ky.*—*Severy v. Taylor*, 10 B. Mon. 344, attachment of property in one county in first suit and different property in another county in the second. *Mont.*—*Mares v. Dillon*, 30 Mont. 117, 75 Pac. 963. *Pa.*—*Wester v. Hunsolt*, 2 Rulph. 529.

3. U. S.—*Scott v. Amer. Mfg. Co. v. Palanques*, 44 Fed. 129, ancillary proceedings on separate judgments. *Conn.*—*Dratt v. Palmer*, 18 Conn. 219, 91 Atl. 1009. *Ga.*—*Smith v. Printup*, 59 Ga. 214 (holding that a suit against one as drawer is no defense to suit against him as acceptor). *Graham v. Messenger Advertising Agency*, 4 Ga. App. 826, 62 S. E. 567 (holding that an action on open account pending does not abate a subsequent action on unconditional contract in writing). *Ky.*—*Thomas v. Thomas*, 3 J. J. Marsh. 589, an action on the same note alleged as assigned at different dates. *La.*—*Love v. McComas*, 14 La. Ann. 201, different bonds. *N. Y.*—*Lawrence v. Freeman*, 59 App. Div. 55, 59 N. Y. Supp. 61; *Kehey v. Ward*, 18 App. Pr. 98 (holding four actions for rent payable quarterly no bar to action to recover rent upon same tenancy under a claim that it is payable at the expiration of the year). *Pa.*—*Chase v. Ninth Nat. Bank of New York*, 56 Pa. 355.

In *Western Union Telegraph Co. v. Crumpton*, 138 Ala. 632, 36 So. 517, there were two suits against the telegraph company for not promptly transmitting and delivering two messages, sent from different places. The facts that the character of damages claimed was the same, that the messages were sent within a few hours of each other, concerning the same matter, were not sufficient to make the pendency of one a bar to the maintenance of the other, for "the two suits as originally brought were each based upon a con-

tort, there is not another action pending for the same cause.<sup>4</sup>

However, identity of subject-matter is not a conclusive test of identity of causes of action, for there may be distinct and separate causes of action arising out of the same state of facts.<sup>5</sup> Thus several may have distinct causes of action against the same person arising out of the same tort,<sup>6</sup> or out of different breaches of the same contract, and pendency of an action for one will not abate the others.<sup>7</sup>

*tract different from that involved in the other."*

Action on a judgment obtained in another state on the same original debt cannot be pleaded as another action pending for the same cause in abatement of an action on the original demand subsequently commenced, since the judgment becomes not merely evidence of the former debt, but a new debt and the causes of action are not the same. *Kan.—Dunkley v. Westervelt & Jones*, 7 Kan. App. 70, 52 Pac. 194. *N. H.—Rogers v. Odell*, 39 N. H. 317. *N. J.—Stearns v. Shaw*, 69 N. J. L. 338, 21 Atl. 940.

*L. Ga.—Holt v. Cobby*, 118 Ga. 820, 45 S. E. 684, holding an action for publication of libelous article on one day no ground for abating altogether suit against another for publication of the same libel on the same day and on other days. *S. C.—Whaley v. Linton*, 57 S. C. 198, 35 S. E. 741. *Vt.—Richardson v. Fletcher*, 76 Vt. 204, 50 Atl. 981, neglect to present a will to the probate court and neglect to signify acceptance or make known refusal to accept trust.

5. *Blackburn v. Watson*, 85 Pa. 241, an action against a firm as indorser of a note, and an action against one partner for indorsing without authority.

"Different causes of action may arise from the same act, as for instance a cause of action for injury to the person and one for injury to property; a cause of action for injury to real property and one for injury to personal property." An allegation that the two causes of action grew out of the same act is not sufficient to show identity of cause of action. *Wilson v. St. Paul, etc. R. Co.*, 44 Minn. 445, 46 N. W. 909.

"Cause of action" is not synonymous with "subject matter." *Tyler v. Standard Wine Co.*, 52 Misc. 374, 102 N. Y. Supp. 67, 68 Misc. 2, 121 App. Div. 928, 106 N. Y. Supp. 1148. Action on

quantum meruit for balance due after partial payment for services rendered, and action for recovery of the partial payment on the ground that the services were not performed and the consideration had failed, are not for the same cause. *Mandeville v. Avery*, 56 Ill. 78, 10 N. Y. Supp. 222, 121 App. Div. 124 N. Y. 376, 26 N. E. 951, 21 Am. St. Rep. 678.

6. *Jackson v. Larche*, 11 Mart. (La.) 284, different plaintiffs against the same defendant for the same trespass.

If one of several joint owners of a chattel sue alone for a tort and the defendant does not plead in abatement, other part owners may afterward sue alone for the injury to their undivided shares. *Lefebvre v. Utter*, 22 Wis. 189.

7. Different Breaches of the Same Bond.—*Ill.—Anderson v. County Court of Clinton Co.*, 63 Ill. 526, sheriff's bond. *Me.—White v. Wilkins*, 24 Me. 299, sheriff's bond. *N. Y.—Hood v. Hayward*, 48 Hun 330, 1 N. Y. Supp. 566. *S. C.—Treasurers v. Bates*, 2 Bailey 362, sheriff's bond.

Wages earned and due before dismissal, and wrongful dismissal, constitute two separate causes of action and may be proceeded on separately. *Perry v. Dickerson*, 85 N. Y. 345, 39 Am. Rep. 663; *Smith v. New York Cooperage Co.*, 35 Misc. 203, 71 N. Y. Supp. 479.

An action for damages for preventing the plaintiff from earning commissions does not abate an action for commissions earned before discharge but accruing after discharge. *Flaherty v. Herring-Hall-Neason Life Co.*, 22 Misc. 320, 49 N. Y. Supp. 174.

**Actions in Different Jurisdictions.**—The fact that an action was pending in another court of this state against appellant for violation of the same bond did not affect plaintiff's action, because this action was based on the sale of another bond. As many breaches of the bond as the defendant might be guilty of, might be sued for at the same time in different counties and all



**F. SAME RIGHTS MUST BE INVOLVED.** — There is no identity of causes of action unless the rights asserted in each action are the same, for otherwise there is no identity of issues,\* although the same property, real or personal, is involved in both actions.<sup>2</sup> Thus where right to possession of property is involved in one action, and in the other the title and ownership of the same property, there is no abatement.<sup>3</sup>

prosecuted at once, but only one judgment collected. One condition of the bond was as to the price of the book. It was violated in regard to two different books and there might be an action in each county. *Maynard-Merrill & Co. v. Cowning*, 31 Ky. L. Rep. 1340, 105 S. W. 114.

**Pennsylvania Act of 1836** permits only one suit on a sheriff's bond and gives to all persons who have several interests the right to join in that suit. *Com. v. Cope*, 45 Pa. 161; *Com. v. Staub*, 35 Pa. 137; *Stecher v. Com.*, 6 Whart. (Pa.) 60; *Hartz v. Com.*, 1 Grant Cas. (Pa.) 359.

2. *Stinson v. Dismuth (Ala.)*, 48 So. 66 (holding action by board of directors no bar to action by directors individually); *Macey v. Chidlow*, 3 Tenn. Ch. 23 (different equities).

The fact that plaintiff water company is a party to condemnation proceedings involving its private rights does not necessarily involve the issue of law involved in a statutory action brought by it in its capacity as taxpayer to enjoin the taking of its land and water rights to construct a city water supply. *Queens County Water Co. v. O'Brien*, 131 App. Div. 91, 115 N. Y. Supp. 495.

Action by a trustee to foreclose a mortgage given as security for bonds is no bar to an action by bondholder of overdue coupons to recover amount due thereon as, under the terms of the trust, the trustee had no right or authority to enforce payment of bond other than by realizing on the security nor entitled to deficiency judgment. *Welsh v. First Div. St. Paul & P. R. Co.*, 25 Minn. 314.

9. *Ala.*—*Hall v. Holcombe*, 26 Ala. 721, holding that in trespass to try title a plea in abatement setting up the pendency of a former suit by the plaintiff and others to recover the same land is defective. *Cal.*—*Henry v. Everts*, 30 Cal. 425, holding an action for rent and profits not abated by ejectment. *Ind.*—*Loech v. Aultman & Co.*, 75 Ind. 162, holding that an action to foreclose to which the purchaser is a party

does not abate action to recover possession from the purchaser. *Ky.*—*Jones v. Henry*, 3 Litt. 46, holding foreclosures no bar to detinue. *Minn.*—*Matthews v. Hennepin Co. Sav. Bank*, 43 Minn. 442, 48 N. W. 913. *N. Y.*—*Ryan v. Benjamin*, 178 App. Div. 51, 112 N. Y. Supp. 441.

In *Weeks v. Edwards*, 176 Mass. 453, 67 N. E. 701, it was held that to establish a resulting trust and a petition at law for the partition of the same land are not inconsistent. Proceedings for petition go on the legal title. It is consistent with this that he should have an equitable right to a larger share. There is no inconsistency in ascertaining legal rights and controverting legal rights and controverting equitable rights at same time.

10. *Cal.*—*Martin v. Spivack*, 65 Cal. 615, 11 Pac. 484, holding that unlawful detainer after expiration of a lease does not abate ejectment in which the plaintiff bases his right on a deed from defendants to him. *Kan.*—*Buehlinger v. Hurley*, 34 Kan. 595, 9 Pac. 197, forcible entry and detainer and ejectment. *La.*—*Palmer v. Yarbrough*, 10 La. 167, possessory action and petitory action. *Ohio.*—*Smith v. Findlay*, 2 Handy 69, holding forcible entry and detainer no bar to an action under code 866, 567 to determine an adverse estate or interest in real property.

By a statute of Kentucky (Sec. 11, Ky. St. 1903) it is provided that any person having both the legal title and possession of lands may prosecute a suit by petition in equity against anyone setting up claims thereto. In a recent case it was held that the suit under such section did not abate, there being no tenancy, by the pendency of an action for forcible detainer brought by the present defendant against the plaintiff. *Engle v. Tennis Coal Co.*, 30 Ky. L. Rep. 1269, 101 S. W. 309.

In *Williams v. Gaston*, 148 Ala. 214, 42 So. 552, it was held, under code 1896, §§ 2135-6, that pendency of an action of unlawful detainer was no bar to ejectment brought by the same plaintiff against the same defendants,

**G. CONCURRENT REMEDIES. — 1. In General.** — In certain cases the same person may have concurrent and independent remedies for the enforcement of the same demand, and the pendency of one will not abate the other. A creditor having collateral security for his claim may prosecute simultaneously whatever actions in law or equity are warranted by the principal and collateral obligations.<sup>11</sup>

**2. Mechanic's Lien and Contract.** — A suit to enforce a mechanic's lien is a cumulative remedy and may be concurrently pursued with the ordinary action for the collection of the amount due on the contract.<sup>12</sup>

**3. Foreclosure and Action on Debt.** — The pendency of proceedings to foreclose a mortgage whether upon realty or personally is no hindrance to an action on the notes to secure which the mortgage was given.<sup>13</sup> The contrary is the case, however, in some states under

an estate or merits of title cannot be required into in an action of lawful detainer.

In *Dray v. Doyle*, 28 Mo. App. 249, it was held that unlawful detainer was not abated by ejectment. Issues to be tried are not the same. In one case the matter of the forcible entry and unlawful invasion of an actual possession is involved; in the other the absolute right of the possession is to be tried and determined.

11. Ill.—*Pyle v. Criles*, 112 Ill. App. 480. Mass.—*Harris v. Rawson*, 164 Mass. 501, 41 N. E. 482. Pa.—*King v. Blackmore*, 72 Pa. 441, 14 Am. Rep. 684.

The right to proceed against other parties who stood in the relation of co-sureties for the same debt is not defeated except by actual payment of the judgment, and creditor may proceed against different parties at same time until that result is reached. *Tracy v. Pringle*, 117 Mass. 4. And see *Moore v. Loring*, 106 Mass. 455.

12. Mass.—*Morrison Co. v. Williams*, 200 Mass. 406, 86 N. E. 878; *Angler v. Bay State Distil. Co.*, 178 Mass. 163, 59 N. E. 620. Miss.—*Palmer v. Elder*, 51 Miss. 495. N. Y.—*Raven v. Smith*, 71 Hun 197, 24 N. Y. Rep. 501; *Hall v. Bennett*, 16 Jones & S. 302; *Maxey v. Larkin*, 2 E. D. Smith 540. Tenn.—*Farmerlee v. Tennessee & S. V. R. Co.*, 13 Lea 800. Utah.—*State v. Morse*, 103 Pac. 909.

As in the case of a mortgage lien a party may have two recoveries for the same cause but only one satisfaction. *Culver v. Elwell*, 73 Ill. 536.

The remedy given by the act authorizing the enforcement of the lien of a mechanic or other person who has furnished labor or materials for purpose

of erecting or repairing a building, is a proceeding *in rem* and is cumulative. *Delaney v. Clement*, 4 Ill. 291.

An action on a promissory note of a third person given as collateral security for the payment of work is not abated by proceedings to enforce a mechanic's lien although the maker is a party to both suits. *Gambling v. Weight*, 39 N. Y. 364.

13. Ga.—*Montgomery v. Fouché*, 125 Ga. 43, 53 S. E. 767. Ia.—*Guest v. Byington*, 14 Iowa 30. Ky.—*Turner v. New Farmer's Bank*, 19 Ky. L. Rep. 187, 32 S. W. 424; *Julian v. Pitcher*, 2 Duv. 254; *Black v. Lackey*, 2 B. Mon. 257. Mass.—*Burtis v. Bradford*, 122 Mass. 129; *Draper v. Mann*, 117 Mass. 439; *Torrey v. Cook*, 116 Mass. 163; *Ely v. Ely*, 6 Gray 439; *Amory v. Fairbanks*, 3 Mass. 562. Mich.—*Joslin v. Millspaugh*, 27 Mich. 517, where it was said that no such thing is known in a common law court as a plea in abatement of a suit in equity. Neb.—*Garneau v. Kendall*, 61 Neb. 396, 85 N. W. 291. N. Y.—*Gillette v. Smith*, 18 Hun 10; *Gridley v. Rowland*, 1 E. D. Smith 670; *Suydam v. Bartle*, 9 Paige 294; *Jones v. Conde*, 6 Johns. Ch. 77; *Dunkley v. Van Buren*, 3 Johns. Ch. 330. Va.—*Priddy & Laylor v. Hartson*, 81 Va. 67.

"The cause of action in a foreclosure proceeding is the lien and the breach of condition of the mortgage contract; the cause of an ordinary action upon the notes is the promise which they contain and its non-performance. That the debt is the same makes no difference, for the securities are different and upon each security for a debt, however numerous the securities may be, an action will lie if its



statutes intended by the legislature to do away with a multiplicity of actions.<sup>14</sup>

**4. Libel in Admiralty and Action at Law.**—Where the cause of action is a maritime tort or breach of a maritime contract, the injured party may pursue his remedy by a suit *in rem* against the vessel and, at the same time, by a suit *in personam* against the owner.<sup>15</sup>

**H. IDENTITY OF RELIEF.**—If the relief sought in the second action can be had under the issues in the former action so that a judgment in one could be pleaded in bar of the other an abatement should follow, whether the second action is instituted by the defendant or by the plaintiff in the first action,<sup>16</sup> and although less relief is sought

terms are not complied with." *Jackson v. Bush*, 60, C. C. 61 (in 71, 74).

The remedy in equity to foreclose and that at law in assumption on the note are cumulative and concurrent. *Black v. Thompson*, 129 Ill. App. 494.

Pendency of an action at law to foreclose a mortgage given by a married woman upon her separate property does not abate a suit in equity to charge the debt thereby created upon the property mortgaged. *Heburn v. Warner*, 112 Mass. 241, 17 Am. Rep. 86.

**Foreclosure by Assignee.**—Pendency of an action by the payee of the note is not a bar to foreclosure of the mortgage by the assignee in equity. *Gunn v. Hyington*, 13 Iowa 39.

**14. Idaho Code, § 468**, permits but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or personal property. *Cederholm v. Leaf-borrow*, 2 Idaho 176, 9 Pac. 641.

**Under Michigan Comp. Laws, § 5149**, an action at law upon a note cannot be brought during the pendency of foreclosure proceedings in chancery without leave of court, and such leave should not be granted *ex parte* where defendant is within reach. *Goodrich v. White*, 39 Mich. 489.

**15. U. S.**—*The Kalorama and The Custer*, 10 Wall. 204, 19 L. ed. 941 (the leading case, involving repairs and supplies); *Wolf v. Cook*, 40 Fed. 432; *Providence W. Ins. Co. v. Wager*, 35 Fed. 364; *Atlantic Mut. Ins. Co. v. Alexandre*, 16 Fed. 279 (pointing out that one is to enforce a particular lien only, the other a general). **Cal.**—*Russell v. Alvarez*, 5 Cal. 48, action for freight money in state court and libel for non-delivery in United States court. **Eng.**—*Nelson v. Couch*, 15 C. B. (N. S.) 99, 33 L. J. C. P. 46, 10 Jur. (N. S.) 366, 8 L. T. 577, 11 W. R. 964.

**Is Granger v. Judge of Wayne Circuit Court**, 27 Mich. 402, 10 Am. Rep. 102, involving services for fitting out a vessel, it was held: "The remedy which he was sought to administer is by a suit *in rem* which involves nothing but his lien upon the vessel. . . . The rule must be interpreted, and another a court of law and a court of admiralty can properly allow suits *in rem* and *in personam* to be treated as involving identical issues."

**16. Conn.**—*Callih v. Callih*, 76 Conn. 242, 27 Atl. 284 (holding that agreement to try title loan action under Gen. St. Conn. § 4633, allowing action against those claiming adversely for the purpose of determining such adverse interest); *Hanson v. Jones*, 24 Conn. 253, 7 Atl. 408 (holding that action to purchase to recover purchase money bars action by him for breach of warranty). **Ky.**—*Phillips v. Southern Div., etc. R. Co.*, 110 Ky. 33, 60 S. W. 941. **La.**—*Tucker v. Monahan*, 6 La. Ann. 236, holding that party in possession under a bond given to release property from sequestration cannot be sued for same property in another court upon the ground that it was improperly bonded, for that defense is available in the first action. **N. Y.**—*Butler v. Weble*, 4 Hun 54; *Groshon v. Lyon*, 16 Barb. 461 (holding that after a general decree that a trustee shall account, creditor's trust cannot seek accounting in another action, since the decree affects all interest in the fund and they may come in and obtain their rights effectually). **N. C.**—*Long v. Jarratt*, 94 N. C. 443; *Smith v. Moore*, 79 N. C. 82; *State v. Atlantic & N. C. R. Co.*, 77 N. C. 297; *Gee v. Hine*, 62 N. C. 315; *Whitaker v. Bond*, 62 N. C. 227; *Rogers v. Holt*, 62 N. C. 108. **Pa.**—*Streator v. Ricketts*, 2 Kulp 529. **B. I.**—*Sharron v. Thaverga*, 80 Atl. 501, trespass and trover. **Tex.**—*Davidson*



in the second.<sup>17</sup> But where the purpose and object of the two actions is not the same,<sup>18</sup> or where additional relief is sought in the second

*v. Jefferson*, 68 S. W. 822; *York v. Gregg*, 2 Tex. 87 (matter which would properly constitute a defense to a suit pending cannot be made the subject of an independent suit); *Bryan v. Alford*, 1 White & W. (Cal. Cts.), 185.

If an administrator be sued upon notes and bonds of his intestate, pending an action previously commenced against him upon a covenant of his intestate, he cannot plead the pendency of the action on the covenant and that the assets would be liable in the first instance to the recovery in that action, if effected, and no assets *ultra*. If he neglects to avail himself of such defense he cannot afterward have relief in equity. *Wells v. Goodfriend*, 46 N. C. 9. See *ante*, V. J.

17. Cal.—*Montgomery v. Harrington*, 18 Cal. 270. Ia.—*VanVleet v. Anderson*, 146 Iowa 360, 113 N. W. 874, action by beneficiaries under a will against the plaintiff and a co-trustee under the will for accounting, quieting of title and other relief depending on construction of a paragraph of the will abates a subsequent action by the plaintiff for a construction of the same paragraph. Kan.—*Mullen v. Mullock*, 22 Kan. 598. Va.—*McAllister v. Harrison*, 67 Va. 540, 34 S. E. 474.

A creditor's bill to wind up an insolvent estate abates a subsequent suit by the administrator for the same purpose and it is not material that the creditor's bill seeks in addition to hold the administrator for a debt or that the administrator's bill to recover of the creditor a claim for usury exacted from defendant, as that could be obtained by cross bill in the first suit. *Spencer v. Goodlett*, 104 Tenn. 648, 58 S. W. 322.

*Coubrough v. Adams*, 70 Cal. 374, 11 Pac. 634, held that an action for accounting abates a subsequent action between the same parties, founded on one or more items involved in the prior action.

18. U. S.—*Rothschild v. Hasbrouck*, 43 Fed. 283. Cal.—*Astion v. Hegarty*, 128 Cal. 616, 62 Pac. 231, action against distributee and assignee to compel restitution of stock and action against corporation and transferee to cancel certificate and compel issuance of stock to executors. Ga.—*Dunlap v. Hooper*, 37 Ga. 724. Kan.—*Schwab v. Wilson*, 72 Kan. 617, 84 Pac. 123, where it is

held that mandamus to compel appraisers of school land to appraise land and improvements does not oust court of jurisdiction of a suit to enjoin the county treasurer from selling same land under other proceedings. Ky.—*Mattingly v. Elder*, 19 Ky. L. Rep. 1645, 44 S. W. 215, action by creditors to recover claims not a bar to action by them to settle estate of defendant who has made an assignment for benefit of creditors. *Peak v. Bull*, 8 B. Mon. 428. La.—*Ingram v. Richardson*, 2 La. Ann. 839. Mich.—*Ernest v. Woodworth*, 124 Mich. 1, 82 N. W. 661 (action by firm to replevy firm property on which a sheriff has levied under a judgment against one of the partners is not inconsistent with suit to enjoin a sale of the property until an accounting could be had between the partners); *Eaton v. Eaton*, 68 Mich. 158, 36 N. W. 50 (foreclosure no bar to suit to have mortgage satisfied of record). Minn.—*Coles v. Yorks*, 31 Minn. 213, 17 N. W. 941. N. J.—*In re Bradley's Est.*, 63 Atl. 1117; *Carlisle v. Cooper*, 18 N. J. Eq. 241 (damages for overflow no bar to bill to ascertain height of dam). N. Y.—*Cobb v. Cullen Bros. & Lewis Steel Co.*, 68 App. Div. 179, 74 N. Y. Supp. 56 (equity to recover goods and action for their purchase price); *People v. Morgan*, 65 Barb. 473 (suit to cancel town bonds no bar to remedy of a taxpayer to review the proceeding by certiorari). N. C.—*Prigot v. Mathis*, 115 N. C. 526, 20 S. E. 710, holding that suit to establish will, record of which had been destroyed, is no bar to suit to recover possession of land only part of which was involved in previous controversy. Pa.—*Hessenbruch v. Marks*, 194 Pa. 681, 45 Atl. 669. R. I.—*Dodge v. Hogan*, 19 R. I. 4, 31 Atl. 268, 1659. Tenn.—*Hall v. Calvert*, 46 S. W. 1120.

Damages and Specific Performance.—An action at law to recover damages for breach of a contract does not abate a bill to enforce specific performance of the same contract. Ia.—*Chicago & S. W. R. Co. v. Heard*, 44 Iowa 358, a contract to convey right of way. Md.—*O'Keefe v. Irvington Real Est. Co.*, 87 Md. 196, 39 Atl. 428, a contract to buy land. Mass.—*Tobin v. Larkin*, 188 Mass. 489, 68 N. E. 349, a contract to convey land; *Connihan v. Thompson*, 111 Mass. 270, a con-

action which is not attainable in the first, the second will not abate.<sup>19</sup>

**I. CROSS-ACTIONS.**—A defendant who has a right to an action at law or in equity which is independent of the issues raised in the first suit, may maintain a cross action where he seeks different relief,<sup>20</sup> or affirmative relief in the second while a judgment in his favor in the first would only result in dismissal of the first action.<sup>21</sup>

tract to convey land. **N. Y.**—Lawatsch v. Cooney, 86 Hun 546, 33 N. Y. Supp. 775.

**19. Ky.**—Flint v. Spur, 17 B. Mon. 499, holding that a suit to restrain waste is no bar to a suit to settle rights of parties to their land. **Md.**—McKraig v. Platt, 34 Md. 249. **N. J.**—Larier v. Canfield, 59 N. J. Eq. 461, 45 Atl. 616, holding a bill for accounting and settlement on trust agreement no bar to bill for reformation of agreement and accounting on corrected basis; Way v. Bragaw, 16 N. J. Eq. 217. **N. Y.**—Maloy v. Asso. Lace Makers Co., 55 Hun 610, 8 N. Y. Supp. 815; Geery v. Webster, 11 Hun 428, action to set aside conveyances no bar to second action to set aside same conveyances and others made since commencement of first. Risley v. Squire, 53 Barb. 280, holding second action in which plaintiff seeks to recover other property which he did not know was in defendant's possession at time of commencing the first action does not abate. **Pa.**—Large v. Steer, 121 Pa. 30, 15 Atl. 422, holding ejectment and saving profits no bar to action for damages on injunction bond for having wrongfully enjoined plaintiff from maintaining an action for possession of the same premises. **S. C.**—Walters v. Laurens Cotton Mills, 53 S. C. 155, 31 S. E. 1, holding action for possession of personal property and damages for detention no bar to action for punitive damages for wrongful and malicious seizure of the same property.

Where the only additional relief sought in the second action is an accounting, and the complaint does not state facts sufficient to constitute a cause of action for an accounting, and plaintiff could have obtained in former action all other relief which he claims in this, then the second abates. Wetzstein v. B. & M. Consol. Copper & Silver Co., 28 Mont. 451, 72 Pac. 865.

**20. Ala.**—Meyer v. Johnston, 53 Ala. 237, denying right of trustee of mortgage of portion of a railroad to plead pendency of foreclosure in federal court in bar of foreclosure against him and others by trustees of a subsequent mort-

gage covering the entire property. **Cal.**—Simpson v. Simpson, 41 Pac. 304, holding action by husband to annul marriage for duress does not abate divorce by wife for non-support. **Ky.**—Conner v. Nat. Bk. Co.'s Receiver v. Adams, 24 Ky. L. Rep. 2083, 72 S. W. 1125, holding action by depositor against receiver of bank for the amount of a deposit not abated by action by receiver against depositor as a stockholder. **Md.**—Gillis v. Carroll, 93 Md. 44, 47 Atl. 1101, partition suit not a bar to bill for a sale under a mortgage of part of the same land. **Mich.**—Schubel v. Lockport, 30 Md. 122 (bill to redeem a mortgage, for accounting of rents received by mortgagee in possession, and redemption, not abated by foreclosure by mortgagee). **Minn.**—Majors v. Roschell, 11 Minn. 247. **Mo.**—Hood v. Lowe, 163 Mo. 519, 61 S. W. 687, 81 Am. St. Rep. 578, holding partition no bar to action to set aside a mortgagor's deed. **N. Y.**—Hamilton v. Faber, 33 Misc. 64, 68 N. Y. Supp. 144, holding action against all trustees for an accounting and for removal of one not abated by action for removal of another. **Va.**—McAllister v. Harman, 97 Va. 543, 34 S. E. 474.

A suit in a state court for divorce and for a division of community property is a different cause of action from one to cancel a written contract of marriage, and does not abate the latter in federal court. Basis of the two suits is different; one seeks to enforce a contract up to the present moment; the other is based on no contract because of fraud. Sharon v. Hill, 22 Fed. 281. **Stewart v. Chesapeake & O. Canal Co.**, 1 Fed. 361.

**21. Ill.**—Shepardson v. McDade, 49 Ill. App. 350, forcible detainer not abated by specific performance by person in possession. **Ia.**—Pratt v. Howard, 109 Iowa 504, 80 N. W. 546, holding that action to recover on a note is not abated by an action to compel the surrender of the note. **Minn.**—Piper v. Sawyer, 82 Minn. 474, 85 N. W. 206, holding that an action to set aside agreement and foreclosure proceeding

Thus the defendant in an action for recovery on a contract may institute a cross action to reform,<sup>22</sup> or to cancel, the same contract.<sup>23</sup> And similarly the defendant in an action to rescind a contract may bring another action to enforce it.<sup>24</sup>

does not abate subsequent action of ejectment. *N. Y.*—*Sowden & Co. v. Murray*, 114 N. Y. Supp. 164 (holding that action for injuries to a garment when in plaintiff's hands for alteration is not a defense to an action by the other for the work and labor on the garment); *Dugan v. Plumer Iron Wks.*, 91 App. Div. 394, 86 N. Y. Supp. 222 (holding a suit for damages for failure to complete contract within specified time not abated by action by defendant to recover balance due on the contract); *Boyd v. Boyd*, 33 App. Div. 152, 85 N. Y. Supp. 859, affirmed 26 Misc. 679, 56 N. Y. Supp. 760 (suit to restrain prosecution of ejectment suit and to establish equitable title is not abated by judgment); *Natar v. DeKamalaris*, 22 Misc. 337, 49 N. Y. Supp. 216, action for money contracted and abated by action to collect claim due on special contract to pay 5 per cent on sales; *Smith v. Fleischman*, 23 App. Div. 355, 48 N. Y. Supp. 234 (action for breach of contract no defense to action in equity by defendant to foreclose mechanic's lien for services performed under the contract); *Douglas Co. v. Moler*, 3 Misc. 373, 22 N. Y. Supp. 1045 (action for goods sold not abated by action for services); *Carlin v. Richardson*, 1 N. Y. Supp. 102, 11 N. Y. St. Rep. 102 (action to recover unpaid balance due for services not abated by action to recover amount paid for failure of consideration). *S. C.*—*James v. Mason*, 1 Gray, 67, Wis.—*Koch v. Peters*, 97 Wis. 492, 73 N. W. 25, action by chattel mortgagee against sheriff and attaching creditors of mortgagor for conversion not abated by suit by attaching creditors against mortgagor and mortgagee to set aside the mortgage.

An action to collect a judgment is not abated by a suit by the judgment debtor to enjoin collection. "One involves the validity of the judgment, and the other not only the validity but its actual execution." *McGrath v. Maxwell*, 17 App. Div. 246, 45 N. Y. Supp. 187.

An action for malpractice brought by a patient against a physician does not abate an action by the physician

for services. *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308; *Gates v. Preston*, 41 N. Y. 113.

"The defense of a prior action pending is not made out by showing that a judgment in favor of the plaintiff therein would bar the bringing of a new action by the defendant therein for a claim in his favor. It must further appear that a judgment therein in favor of the defendant therein even if it were only a dismissal of the complaint on its merits would be a bar to such new action by the defendant." *Consolidated Fruit Jar Co. v. Wisner*, 38 App. Div. 369, 56 N. Y. Supp. 723, 725.

**Partition and Foreclosure.**—A partition suit to which a mortgagee is a party does not abate subsequent foreclosure. *N. J.*—*Van Houten v. Stevenson*, 68 N. J. Eq. 490, 64 Atl. 1058. *S. C.*—*Trimmer v. Trimmer*, 23 S. C. 600, 11 S. E. 103. *Wis.*—*Gibson v. Southwestern Land Co.*, 89 Wis. 49, 61 N. W. 242.

22. *Haire v. Baker*, 5 N. Y. 357.

The pendency of an action to recover on a policy of insurance is not a bar to an action by the insurer for the reformation of the policy. "The actions are not for the same thing. One is a legal action to recover on a contract and the other is an equitable action to reform the contract itself. The purpose of the actions is entirely different and the relief demanded antagonistic and inconsistent. A judgment in favor of the plaintiff in the first action would be a bar to the plaintiff in this action. A judgment in favor of the plaintiff in this action would not only be a bar to the plaintiff in first action but it would give to the plaintiff additional and further affirmative relief." *National Fire Ins. Co. v. Hughes*, 189 N. Y. 84, 81 N. E. 562, 12 L. R. A. (N. S.) 907.

23. *Mutual Life Ins. Co. v. Hargus* (Tex. Civ. App.), 99 S. W. 580, holding that action by insurer on note given by insured for first annual premium does not abate action by insured for cancellation of the policy and note.

24. *Mich.*—*Jennison Hdw. Co. v. Godkin*, 112 Mich. 57, 70 N. W. 428, action



A cross action also lies where all parties necessary to secure the same relief are not parties to the first action,<sup>25</sup> even though the court has power to bring in the additional parties.<sup>26</sup>

**J. CROSS-BILL OR PETITION.**—Although the relief sought in the second action could have been obtained by filing a cross-bill or petition, this will not prevent the institution of the cross action, since the filing of the cross-bill is not required but is optional.<sup>27</sup>

**K. COUNTER-CLAIM AND SET-OFF.**—Failure to plead a demand available in set-off or counter-claim does not preclude the defendant

to rescind sale by purchaser not abated by seller's action for the price. **N. Y.** Pullman v. Alley, 35 N. Y. 647, holding action to foreclose not barred by action to rescind sale for price of which mortgage given as security. **Tex.**—Garza & Co. v. Jesse French Piano & Organ Co. (Tex. Civ. App.), 126 S. W. 906 (holding that a suit by seller against purchaser on notes given for purchase price is not abated by action by buyer to rescind contract and cancel notes; Simmang v. Braunagel (Tex. Civ. App.), 27 S. W. 1032 (action by indorsee not abated by action by maker to cancel).

*Contra.*—Rochereau & Co. v. Lewis, 26 La. Ann. 581 (where it was held that a suit to cancel notes abates suit to collect them); Bishoff v. Theurer, 8 La. Ann. 15; Kline v. Freret, 5 La. Ann. 494, holding that a suit to annul sale for fraud and recover back the price abates suit by vendor upon one of notes given in payment of the price.

25. Bent v. Maxwell Land Grant & R. Co., 3 N. M. 158, 3 Pac. 721; People v. Northern R. Co., 53 Barb. (N. Y.) 98.

26. Though certain defenses are available in a pending action, the defendant may bring an independent action for the relief sought against all necessary parties where he seeks additional relief against some persons who are not parties to the first action, since he is not obliged to apply to the court as a court of equity to bring in additional parties. Allegany & K. R. Co. v. Weidenfeld, 5 Misc. 43, 25 N. Y. Supp. 71.

**Want of Requisite Parties.**—Where plaintiff does not bring before the court the requisite parties to enable it to adjudicate finally upon the questions

in controversy, defendant may commence new action in nature of cross-suit even after he has set up his equitable defense to plaintiff's action, and even though court may under code in first action grant plaintiff any affirmative relief to which he may be entitled. Auburn City Bank v. Leonard, 20 How. Pr. (N. Y.) 103.

27. **U. S.**—Carpenter v. Talbot, 33 Fed. 537 (bill to enjoin foreclosure not barred by bill to foreclose in a state court); Washburn & Main Mfg. Co. v. H. B. Scott & Co., 22 Fed. 719 (suit for rescission no bar to suit for enforcement of a contract); Sharon v. Hill, 22 Fed. 28. **IA.**—Osborn v. Cloud, 25 Iowa 104, 22 Am. Dec. 412. **N. Y.**—National Fire Ins. Co. v. Hughes, 189 N. Y. 84, 81 N. E. 302, 12 L. R. A. (N. S.) 907. **Tenn.**—Clement v. Clement, 113 Tenn. 40, 81 S. W. 1249. **Tex.**—Calkins v. King, 26 S. W. 606; Simmang v. Braunagel (Tex. Civ. App.), 27 S. W. 1032.

In *Raper v. Gulf City Paper Co.*, 64 Ala. 330, it was said: "Plaintiff could not in the former suit have obtained any relief without the exhibition of a cross-bill. If that had been exhibited the complainants could have dismissed the original bill; the cross-bill would have fallen with the dismissal and the appellee be driven to the institution of his original suit."

Bill for appointment of trustees with a cross-bill for general relief is not a bar to subsequent action by respondent therein on a note, as foreclosure could not be granted under general prayer in cross-bill. Walker v. Washington Title Ins. Co., 19 App. Cas. (D. C.) 575.

from bringing another action,<sup>28</sup> in the absence of statute.<sup>29</sup> However, if he does avail himself of his cause of action as a counter-claim, his cross-action is barred.<sup>30</sup>

**VII. PLEADING. — A. IN GENERAL.** — The pendency of a former action, being strictly a matter of abatement, is an affirmative defense and is waived unless specially pleaded.<sup>31</sup> The defense cannot be

28. Ind. — *Goble v. Dillon*, 86 Ind. 327, 18 Ann. Rep. 308. Mich. — *Jennison Hdw. Co. v. Chaslin*, 110 Mich. 57, 70 N. W. 478. Neb. — *Richardson v. Ogden*, 60 Neb. 187, 82 N. W. 477. N. Y. — *National Fire Ins. Co. v. Hughes*, 169 N. Y. 81, 51 N. E. 542, 12 L. R. A. (N. S.) 907; *Gates v. Preston*, 41 N. Y. 119; *Jordan v. Underhill*, 91 App. Div. 124, 86 N. Y. Supp. 400; *Tyler v. Standard Wine Co.*, 52 Misc. 374, 102 N. Y. Supp. 67, affirmed 121 App. Div. 928, 100 N. Y. Supp. 1140; *Notaris v. Deconster*, 12 Misc. 307, 40 N. Y. Supp. 216; *Cons. Fruit Jar Co. v. Warner*, 38 App. Div. 369, 56 N. Y. Supp. 723; *Snowden & Co. v. Murray*, 114 N. Y. Supp. 164; *Carlin v. Richardson*, 1 N. Y. Supp. 112. W. N. Y. — *3000 Lumber v. Hedding*, 4 E. D. Smith 285, holding that an action for goods sold was not abated by an action for damages for breach of the contract, *Thompson v. Green*, 9 Haw. Pr. 118. N. C. — *Blackwell Mfg. Co. v. McElwee*, 94 N. C. 425.

There is no rule of law or practice that requires a person who may have a claim on contract against another to counterclaim for the same whenever such other may as plaintiff bring an action on contract against him, but he can defend such action and still have his right of action for such claim. *Douglas Co. v. Moler*, 3 Misc. 373, 22 N. Y. Supp. 1045, 30 Abb. N. C. 293, where it was held that the action for goods sold did not abate by reason of a pending suit by defendant for services.

If matter of set-off or counter-claim which a party may set up or not, is not presented in a suit the defendant may make it the subject of a separate action. *Huntton v. Russell*, 41 Mich. 316, 2 N. W. 38.

29. *Schenck v. Schenck*, 10 N. J. L. 110; *Sight v. Ringler*, 1 Pa. Co. Ct. 156; *Wright v. Flitercraft*, 1 Ashm. (Pa.) 171.

An action to cancel a policy cannot be maintained by the insurer while an action is pending on the policy, as the matter in the second suit could be set up as a defense in the earlier one.

*Guardian Mut. Life Ins. Co. v. Sandal*, 3 W. L. Bul. 559.

Under Idaho Rev. St., §§ 4183-4185, a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim or connected therewith in favor of the defendant must to avail such defendant be set forth in the answer as a counter-claim and cannot be made the basis of another suit. *Stevens v. Home Sav. and Loan Assn.*, 5 Idaho 741, 51 Pac. 779, 986.

The New York code does not change the rule. *Brown v. Gallaudet*, 80 N. Y. 413; *Welch v. Hazelton*, 14 How. Pr. 97.

See, however, as to justice courts, *Natara v. DeKamalaris*, 22 Misc. 337, 49 N. Y. Supp. 216.

30. N. Y. — *Douglas Co. v. Moler*, 3 Misc. 373, 22 N. Y. Supp. 1045, 30 Abb. N. C. 293; *Ansorge v. Kaiser*, 22 Abb. N. C. 305; *Collyer v. Collins*, 17 Abb. Pr. 467. Pa. — *Pennsylvania R. Co. v. Davenport*, 154 Pa. 111, 25 Atl. 890. R. I. — *Bannigan v. Woonsocket Rubber Co.*, 22 R. I. 93, 46 Atl. 183.

**Withdrawal.** — It is competent for the plaintiff in the second action to show that before submission of first he withdrew the portion of the counterclaim on which he now sues. *Estes v. Farnham*, 11 Minn. 423.

31. Ark. — *Moss v. Ashbrooks*, 12 Ark. 369. Cal. — *Brown v. Campbell*, 110 Cal. 644, 43 Pac. 12; *Walsworth v. Johnson*, 41 Cal. 61; *Thompson v. Lyon*, 14 Cal. 39. Ga. — *Williams v. Rawlins*, 33 Ga. 117. Ill. — *City of Chicago v. Duffy*, 218 Ill. 242, 75 N. E. 912; *Meilinger v. People*, 83 Ill. App. 436. Ind. — *Kellogg v. Sutherland*, 38 Ind. 154. La. — *State ex rel., etc. v. Riedy*, 50 La. Ann. 258, 23 So. 327 (absence of plea is not supplied by evidence offered on the trial of the merits, nor can it be supplied by the court); *Cazeau v. Lesperance*, 17 La. 498. Minn. — *Williams v. McGrade*, 18 Minn. 82. Neb. — *Gregory v. Kenyon*, 34 Neb. 640, 52 N. W. 685. N. Y. — *Hollister v. Stewart*, 111 N. Y. 644, 19 N. E. 728; *Whitehall & St.*

raised under a general denial,<sup>32</sup> nor by a motion,<sup>33</sup> nor after a trial on the merits.<sup>34</sup>

**B. AT COMMON LAW.**—Under the common law procedure the pendency of another action being a matter of abatement can only be raised by a plea in abatement,<sup>35</sup> and is waived by pleading to the

*Johns T. & T. Co. v. Fish*, 105 N. Y. Supp. 346; *James v. Work*, 70 Hun 296, 24 N. Y. Supp. 149; *Wright v. Maseras*, 56 Barb. 521; *White v. Talmage*, 3 Jones & S. 223. **N. C.**—*Montague v. Brown*, 104 N. C. 161, 10 S. E. 186. **Wis.**—*Fish Co. v. Young*, 127 Wis. 149, 106 N. W. 795; *Winner v. Kuehn*, 97 Wis. 394, 72 N. W. 227; *Witte v. Foote*, 90 Wis. 235, 62 N. W. 1044.

**Under Illinois Gen. Rev. Law**, July 1, 1872, § 190, providing that the court shall hear and determine defenses in a summary manner without pleading objection of pending application for judgment against land for taxes need not be pleaded in abatement. *Andrews v. People*, 75 Ill. 605; *Dunham v. People*, 75 Ill. 613.

**32. Ind.**—*Smock v. Graham*, 1 Blackf. 314. **La.**—*Bourguignon v. Destrehan*, 5 La. 115. **N. Y.**—*Percival v. Hickey*, 18 Johns. 257, 9 Am. Dec. 210; *White v. Talmage*, 3 Jones & S. 223. **N. C.**—*Montague v. Brown*, 104 N. C. 161, 10 S. E. 186; *Blackwell v. Debbrell*, 103 N. C. 270, 9 S. E. 192.

**33. Ala.**—*Maxwell v. Peters Shoe Co.*, 109 Ala. 371, 19 So. 412; *Danforth v. Tennessee & C. R. Co.*, 93 Ala. 614, 11 So. 60 (motion to strike from docket). **Ga.**—*Central R. & Bkg. Co. v. Coleman*, 88 Ga. 294, 14 S. E. 382 (motion to dismiss); *Kennon v. Petty*, 59 Ga. 175 (motion to dismiss). **Ind.**—*Lorch v. Aultman*, 75 Ind. 162. **Mass.**—*Morton v. Sweetser*, 12 Allen 134, motion to dismiss. **Mich.**—*Ryan v. Mills*, 129 Mich. 170, 88 N. W. 392 (motion to quash); *Gruler v. McRoberts*, 48 Mich. 316, 12 N. W. 201 (should not be discussed on motion when a plea of former suit pending has been replied to and issue thereon remains undisposed of). **N. Y.**—*Bishop v. Bishop*, 7 Robt. 198, motion to stay. **Pa.**—*Gardner v. Kiehl*, 182 Pa. 194, 37 Atl. 829, motion to quash. **Tex.**—*Jones v. Nowland*, Dall. Dec. 451, motion to set aside. **Wash.**—*State v. Superior Ct.*, 45 Pac. 670, motion to stay and affidavits.

*Contra.*—The question whether another suit is pending for the same

cause may be raised by a motion and need not be raised by plea or answer, as one of the facts necessary to be shown by affidavit in order to obtain a warrant of attachment is that a cause of action exists, and if this is not only not shown but is negated by the affidavits on the motion papers then the attachment cannot stand. *Ferst v. Powers*, 58 S. C. 411, 36 S. E. 749.

Garnishee defendant cannot defend by reading at trial record of prior and pending garnishee action against them for same alleged indebtedness, but on commencement of second action must move for stay of proceedings until former is terminated. *Prentiss v. Danaker*, 20 Wis. 311.

**34. Ga.**—*Welchel v. Thompson*, 39 Ga. 357, 99 Am. Dec. 479. **Ky.**—*Cord v. Lewis*, 1 Dana 201. **La.**—*Weeks v. Flower*, 9 La. 379, after swearing of the jury too late. **Mo.**—*Buer v. Berberich*, 85 Mo. 50; objection cannot be raised for first time on motion for new trial. **Neb.**—*Smith v. Spaulding*, 40 Neb. 339, 58 N. W. 932. **N. C.**—*Blackwell v. Debbrell*, 103 N. C. 270, 9 S. E. 192; *Hawkins v. Hughes*, 87 N. C. 116 (cannot be taken advantage of on motion in arrest of judgment); *Winfield v. Barton*, 79 N. C. 388; *Smith v. Moore*, 79 N. C. 82. **Pa.**—*Findlay & Hay v. Keim*, 62 Pa. 112. **Tex.**—*Maxwell v. First Nat. Bk. of Cisco*, 24 S. W. 848.

Where defendant filed an answer and a plea of reconvention seeking damages for wrongful use of the writ of attachment, and plaintiff pleaded in abatement a prior action pending on the same cause of action pleaded in reconvention, the issues on the plea in abatement should be heard first, but the matter of order is within the discretion of the court. *Trawick v. Martin Brown Co.*, 74 Tex. 522, 12 S. W. 216.

**35. U. S.**—*City of North Muskegon v. Clark*, 62 Fed. 694, 10 C. C. A. 591; *Certain Logs of Mahogany*, 2 Sumn. 589, 5 Fed. Cas. No. 2,559; *Cheongwo v. Jones*, 3 Wash. C. C. 359, 5 Fed. Cas. No. 2,638 (attachment must be



merits, such a plea being inconsistent with the plea in abatement.<sup>88</sup>

pleaded in abatement and not as a set-off). Ala.—Holley v. Young, 27 Ala. 204. Ga.—Welch v. Thompson, 39 Ga. 559, 99 Am. Dec. 470; Williams v. Rawlins, 35 Ga. 117. Ind.—Smock v. Graham, 1 Blackf. 314. Ky.—Anderson v. Barry, 2 J. J. Marsh. 265, 281, where it was said: "Autre action pendente is a good plea in bar to a popular action, or a *qui tam* action for a penalty, because by bringing the first suit the plaintiff in it is entitled exclusively to the penalty and consequently no other person can ever have any right. But in ordinary cases such matter should be pleaded in abatement." La.—Long v. Long, 3 Rob. 108, cannot be admitted as a bar. Me.—North Bank v. Brown, 50 Me. 214, 79 Am. Dec. 609; Small v. Thurlow, 37 Me. 504 (reference to arbitrators not still under their consideration must be pleaded in abatement). Mass.—McManus v. Donoghue, 175 Mass. 205, 56 N. E. 291; Mattie v. Conant, 156 Mass. 418, 31 N. E. 487; Moore v. Regel, 142 Mass. 413, 9 N. E. 827 (saying that pendency of another action is not an answer to an action on its merits, although it shows a reason why the plaintiff should not be permitted to prosecute the action); Morton v. Sweetser, 12 Allen 134; Crease v. Babcock, 10 Mass. 525. Mich.—Muir v. Kalamazoo Corset Co., 155 Mich. 624, 119 N. W. 1079; Ryan v. Mills, 129 Mich. 170, 89 N. W. 332; Braden v. Ottawa Circuit Judge, 109 Mich. 615, 67 N. W. 200; Sullings v. Goodyear Dental, etc. Co., 85 Mich. 313. N. Y.—Percival v. Hickey, 18 Johns. 257, 9 Am. Dec. 210; Davis v. Grainger, 3 Johns. 259. Pa.—Irvine v. Lumbermen's Bank, 2 Watts & S. 190 (pendency of foreign attachment); Derham v. Berry, 5 Phila. 475; Navigation Co. v. Navigation Co., 3 Phila. 214. Va.—Williamson v. Paxton, 18 Gratt. 478.

**Form of plea in JENNISON HOW. Co. v. Godkin, 112 Mich. 57, 70 N. W. 428:** "Before the filing of the declaration in this suit, to wit, on the 10th day of October in the year 1895, this defendant commenced a suit against the above-named plaintiff, in justice's court, before Alfred M. King, a justice of the peace in and for Bay City, in the county of Bay and State of Michigan, and this defendant, in that suit, which is an action in *assumpsit*, has declared against the defendant therein,

being the plaintiff in this suit, in a cause of action the determination of which involves, and which suit will adjudicate, the cause of action as is set forth in the plaintiff's declaration in this suit, by means of which there is in said justice's court an action of *assumpsit* pending, in which and whereby the same cause of action will be litigated and adjudicated as in this suit; and this defendant further says that the parties in this and the said former suit are the same, and not other or different parties, and that said former suit, so brought and prosecuted, is still pending in the said court; and this the said defendant is ready to verify. Wherefore he prays judgment," etc. And see Connecticut form, *infra*, VII, D, 2.

38. Ind.—Estep v. Larsh, 21 Ind. 190, not after plea in bar unless under special circumstances of which the court must judge. La.—Mix v. Creditors, 39 La. Ann. 624, 2 So. 391; Chaffe v. Ludeling, 34 La. Ann. 962. N. J.—De Camp v. Miller, 44 N. J. L. 617. Pa.—Green v. North Buffalo, 56 Pa. 110; Hartz v. Commonwealth, 1 Grant Cas. 359; Engle v. Nelson, 1 Penn. R. 442; Riddle v. Stevens, 2 Serg. & R. 537. Tenn.—Southern R. Co. v. Brigman, 95 Tenn. 624, 32 S. W. 762, waived by plea of not guilty filed at same time.

After plea of *res adjudicata* overruled but before the case has been defaulted an exception of *lis pendens* filed without objection should be sustained. Byrne, Vance & Co. v. Prathier, 14 La. Ann. 653.

The pendency of a prior action between the same parties for the same cause must be pleaded in abatement whenever as in this case it denies only the plaintiff's right to maintain the particular action and does not go to his whole title as in the case of an action *qui tam* which vests the property of the thing in action in the party who first sues for it and so bars all title of any person who may afterwards bring a like suit for the same thing. Morton v. Sweetser, 12 Allen (Mass.) 134.

In Texas if the plea in abatement is sustained the latter suit does not abate, but the plaintiff is put to his election which he will prosecute and is required to abandon the other and pay the costs of it. Payne v. Benham, 16 Tex. 364.

C. IN EQUITY. — The objection is taken by plea as a preliminary question and not in an answer to the merits.<sup>87</sup> The general practice is not to reply to such a plea or to set it down for argument, but to refer it on motion at once, and of course, to a master to ascertain whether or not both suits are for the same matter, and if they are found so to be the plea is allowed, and if they are found not to be it is overruled.<sup>88</sup>

D. UNDER THE CODES. — 1. By Demurrer. — Under the codes the objection is taken advantage of by demurrer when the fact appears on the face of the complaint,<sup>89</sup> and is waived unless so

37. Ky.—Curd v. Lewis, 1 Dana 351. N. J.—Van Houten v. Stevenson, 68 N. J. Eq. 490, 64 Atl. 1058. N. Y.—Hertell v. VanBuren, 3 Edw. Ch. 20. Pa.—Williamson v. Smith, 4 Pa. Dist. 307, holding that the defect must appear on the face of the bill to be demurrable. Vt.—Battell v. Matot, 58 Vt. 271, 5 Atl. 479. W. Va.—Anderson v. Purey, 20 W. Va. 282, holding that among other matters in an answer on the merits it will not avail.

38. N. Y.—Grishons v. Lyons, 1 Code Rep. 348. N. C.—Brice v. Mallett, 3 N. C. 244. Pa.—Cleveland P. & A. R. Co. v. Erie, 27 Pa. 380. Vt.—Dietrich v. Deavitt, 69 Atl. 661; Battell v. Matot, 58 Vt. 271, 5 Atl. 479. Eng.—Lord Clarendon's Orders, Beames 17; Baker v. Bird, 2 Ves. Jr. 672, 30 Eng. Reprint 835.

No further proceeding is had until the plea is disposed of in the usual form after the master reports in favor of the truth of the plea. Hart v. Philips, 9 Paige (N. Y.) 293.

Where the proceedings in the former suit are exhibited before the chancellor either by the averments of the plea or otherwise, he may determine the matter without the delay of a reference. Van Houten v. Stevenson, 68 N. J. Eq. 490, 64 Atl. 1058.

If complainant neither takes issue on the facts of the plea nor moves a reference to a master to ascertain the fact whether both suits are for same matter, then defendant must set the plea down for argument, and then the only question is whether the plea is good in point of form. McEwen v. Broadhead, 11 N. J. Eq. 129.

The Practice is where a second bill in equity embraces the whole subject more completely than the first to dismiss the first bill with costs, and to direct the defendant in the second to answer on being paid the costs of a plea allowed. This puts the second bill

in the same situation as it would have been had the first been dismissed before the second was brought. Dietrich v. Deavitt (Vt.), 69 Atl. 661.

For New York practice, see 1 Hoff. Ch. Pr. 225.

For Tennessee practice see Searight v. Payne, 4 Tenn. Ch. 186.

39. Ind.—City of Laporte v. Scott, 166 Ind. 78, 76 N. E. 875; Bryan v. Schell, 169 Ind. 367, 30 N. E. 107. Ma.—Arthur v. Hilday, 48 Ma. 308. N. Y. Queens County Water Co. v. O'Brien, 151 App. Div. 91, 142 N. E. Supp. 405 (holding that the statute allowing a demurrer when the complaint shows on its face that there is another "action pending between the same parties for the same cause," does not permit a demurrer on the ground that another "proceeding" is pending). Quare v. Hinds, 40 Miss. 340, 60 N. Y. Supp. 440; Hadden v. Oagley Elec. Co., 89 Ill. 487, 35 N. Y. Supp. 405; Hornfager v. Hornfager, 6 How. Pr. 279; Harrows v. Miller, 2 Code Rep. 101 (holding that the code provision authorizing defendant to set up defense of another action pending by demurrer relates only to cases in which by the law previous to the code such defense was available). Wash.—Jackson v. McAuley, 13 Wash. 298, 43 Pac. 41.

A complaint which shows only that defendant commenced elsewhere a suit in which an injunction was granted, and does not disclose the nature of the cause of action, is not demurrable on the ground of pendency of another action. Berliner Gramophone Co. v. Seaman, 111 Fed. 679.

Where the complaint shows that the former action for the same cause has been commenced but does not show that it has been dismissed, it is demurrable for another action pending. State v. Calif. Min. Co., 13 Nev. 289.

In order to invoke successfully this ground of demurrer it must appear



taken.<sup>40</sup> The demurrer should lie specially on that ground, as under the codes it is a distinct cause of demurrer and cannot be raised on a demurrer assigning for cause want of sufficient facts.<sup>41</sup>

2. By Answer. — When the complaint does not show the fact the objection is raised as a defense in the answer,<sup>42</sup> and it may be

from the face of the complaint (1) that another action is pending; (2) that it is between the same parties; (3) that it is for the same cause. *Wetzstein v. B. & M. C. Co., etc. Co.*, 28 Mont. 461, 72 Pac. 805.

40. *Garvey v. New York Life Ins. Co.*, 14 Civ. Proc. 106, 14 N. Y. St. 309.

41. *Rayne v. Rayne*, 152 Ind. 172, 52 N. E. 797; *Williams v. Lewis*, 124 Ind. 444, 24 N. E. 744; *Aiken v. Brown*, 21 Ind. 137; *Somers v. Dawson*, 80 Minn. 42, 50 N. W. 119.

42. U. S. — *Underwood v. Green*, 86 Fed. 427, 30 C. C. A. 102 (Calm. coll.); *Hurst v. Everett*, 21 Fed. 218 (N. C. coll.). Ind. — *Morrison v. Kinney*, 189 Ind. 416, Neb. — *Monroe v. Reid*, 46 Neb. 219, 64 N. W. 287. N. Y. — *Sandberg & Hays Co. v. Hurst*, 27 Misc. 302, 57 N. Y. Supp. 794; *Wright v. Monroes*, 56 Barb. 411; *Christy v. Lakky*, 5 Abb. Pr. (N. S.) 192, 35 How. Pr. 119; *O'Brien v. Lloyd*, 30 Barb. 19. N. C. — *Harris v. Johnson*, 65 N. C. 478. Ore. — *Gracie v. Larson*, 15 Ore. 45, 12 Pac. 325.

Forms. — In *Monroe v. Reid*, 46 Neb. 219, 64 N. W. 287, is to be found an answer setting up this defense in the following language: "And for a second ground of defense and answer to the amended petition, defendant E. H. Monroe, answering for himself only, states that as to the plaintiff Reid, Murdock & Co. they have another action pending in this court between themselves and Frank H. Scott, in which they caused a large portion of the said goods sold by Scott to Monroe to be attached to satisfy their judgment set up in said amended petition, and that this answering defendant thereafter commenced a replevin action in this court, and therein requested said attached goods and gave the usual repleviny bond thereupon, and said replevin action is still pending in this court undetermined, and said plaintiff ought not to be allowed to maintain this action." This was an action to set aside an alleged fraudulent transfer of property and to dis-

close property that might be available for the satisfaction of judgments. The court said: "It was held in *Yantis v. Burdett*, 3 Mo. 457, that a plea stating that an action on a judgment was commenced while the plaintiff was endeavoring to enforce the same judgment by an execution was good; but whether in the present controversy the conditions and subject-matters of the cases and the relations of the parties to them established the plea and constituted it an available one as to the main element or point involved, is not, as we view the pleading and evidence, sufficiently presented to call upon us to determine it. It is clear that a plea of the pendency of the replevin suit, without any showing of its connection with and being the congruence of the attachments, would have been of no effect as a plea in abating the present action, and it devolved upon the party interposing the plea, to sustain his contention, to sufficiently state and prove all things necessary, not only the replevin action and its pendency, but also, among other matters, that the attachments were in furtherance of the satisfaction of the same claims as were included in the judgments, the basis of this action, and that the attachments were still in existence and force, not abandoned, withdrawn, or discharged. This last he neither pleaded or proved; hence the plea, even if it could have been sustained, if the question had been fully presented for adjudication, which we do not decide, was not good and must fail."

In *Weil v. Guerin*, 42 Ohio St. 299, the answer, omitting caption, signature of counsel, and verification, is as follows: "The defendant says that the plaintiff ought not to be permitted to further prosecute this action, because heretofore and on March 5, 1880, the plaintiff commenced an action in the court of common pleas of Gallia county, Ohio, against this defendant, and one Edward Delatombie, as the administrator of the said William Walker, deceased, for the same cause of action in plaintiff's petition set forth, and which said action at the commencement of



joined with defenses going to the merits," but should be passed

this action, was and still is, depending and undetermined in said court."

In *Ward v. Dewey*, 12 How. Pr. (N. Y.) 193, 196, the court said that the defendant had alleged, "in his answer, that 'there is another action now pending between the same parties for the same identical cause of action mentioned in the complaint in this action.' This was all he was required to do. Such an answer is neither indefinite nor uncertain. It plainly indicates the precise nature of the defense relied upon by the defendant. It is true, that, in this case, the defendant, in his answer, has gone on to state that he is himself the plaintiff in the prior action, and that the plaintiffs in this action, together with other persons not named, are the defendants in that action. This it was unnecessary for him to do. Having alleged the fact that a prior action was pending between the same parties, and for the same cause, he would be obliged to prove the allegation upon the trial, in order to sustain his defense, but he could not be required to state more explicitly, in his answer, the proof he expected to furnish."

In the *Augusta & Summerville R. Co. v. Dorsey*, 68 Ga. 231: "That since the commencement of this suit and the amendment made to plaintiff's declaration, made May 6th, 1879, to which interlocutory exceptions were filed July 1st, 1879, by this defendant, the plaintiff instituted, September 9th, 1879, his action against the Georgia Railroad and Banking Company for damages, setting forth the same cause of action which is set forth in said amendment of May 6th, 1879, the declaration in which case, as of file in this court, is here to the court shown, which it prays may be inspected by this court, and if found to be the same cause of action, that plaintiff be required to elect which corporation he will hold responsible, and dismiss his cause of action as to the other for the same injury before this case shall proceed further."

43. *Gardner v. Clark*, 21 N. Y. 399; *Chandler v. Metropolitan St. R. Co.*, 34 Misc. 808, 68 N. Y. Supp. 398.

"By the code the distinction in the method of pleading such matter and of proceeding upon the issue in that respect has been abolished and it is joined by the answer with matter going to the merits, all the issues are tried

together, and the designation of pleas in abatement has disappeared and the matter which formerly was interposed by them falls into the term of defenses indiscriminately applied to allegations of the answer going to defeat the alleged cause of action." *Pack v. Kirtz*, 16 N. Y. St. Rep. 67, affirmed in 113 N. Y. 609, 21 N. E. 1116.

In Connecticut the defense is made by plea in abatement and cannot be taken by answer. *Tracy v. N. Y., N. H. & H. R. Co.*, 82 Conn. 1, 73 Atl. 155.

A plea following form 341 of practice book: "At the commencement of this action there was and now is another action pending in the Superior Court for New Haven county between the same parties as the parties to this action and for the same cause as set forth in said complaint in this action." This was not demurrable for failure to allege that the pending cause was for same relief. *Cahill v. Cahill*, 76 Conn. 342, 57 Atl. 284.

Form.—In *McLain v. Nurnberg* (N. Dak.), 112 N. W. 246, the answer, so far as it alleged a former action pending, was as follows: "That as a further defense to the action of the plaintiff the defendant shows to the court: That on the 11th day of April, 1903, an action at law was commenced before Peter Pearson, a justice of the peace in and for Stutsman county, North Dakota, by the plaintiff in this action, to recover possession of the rooms occupied by this defendant in the building situated on lot 4, block 18, city of Jamestown, North Dakota, being the same and identical rooms and premises as described in the complaint in this case, and for recovery of possession of which this action is brought; that upon the trial of said cause a finding was made and a final judgment rendered by said justice of the peace, Peter Pearson; that from the finding made and judgment rendered, as above set forth, an appeal was taken to the district court of Stutsman county, North Dakota; that a bond was given by the defendant to indemnify plaintiff against any and all loss and for all rents and damage by reason of any unlawful detention of said premises by defendant; that said bond has been approved and accepted by the proper authority prior to the commencement of this action, and now in full force and

upon before other issues raised by the answer are decided.<sup>44</sup>

**E. NECESSARY ALLEGATIONS.**—1. **Commencement of Former Action.**—Whether the defense is raised at law, or in equity, or under the codes, it must show that another action was commenced before the commencement of the action in which the defense is interposed.<sup>45</sup>

2. **Its Pendency.**—So it must be alleged that it is still pending at the time when the plea is filed.<sup>46</sup>

3. **Identity of Parties.**—It must be alleged that the parties are identical or in privity with the parties to the former action.<sup>47</sup>

effect; that the parties plaintiff and the parties defendant in the aforementioned suit are the same parties plaintiff and parties defendant in this case, and all of the issues involved in this case are the same and identical issues as are pending adjudication in that case now pending in the district court of St. Louis County, North Dakota, as to the amount thereof remaining in said court appears."

44. See the title "Abatement, Pleas of," 14. "Trial and Determination."

In abatement, where defendant relies on other defenses which go directly to merits of the cause, it is the better practice for the trial court to require the defendant to present his evidence upon his defense of former action pending at the opening of his defense, for it proven to be meritorious it would in many cases save much useless labor and great expense in litigating other defenses. *Leahart v. Flynn*, 59 Cal. 545, 24 Pac. 1097, 22 Am. St. Rep. 500.

Jury should be instructed that if they find that the action was pending as alleged, they should refrain from passing on any other issues. *Montague v. Brown*, 104 N. C. 101, 10 S. E. 156.

45. *American White Bronze Co. v. Clark*, 125 Ind. 232, 23 N. E. 855; *Rosenman v. State*, 15 Ind. 48; *Porter v. Field & Hatch Knitting Co.*, 114 App. Div. 292, 99 N. Y. Supp. 815.

46. **1a.**—*Hawley v. C. B. & Q. R. Co.*, 71 Iowa 117, 29 N. W. 787. **2d.**—*Lewis v. Higgins*, 52 Md. 614. Must aver pendency at time the plea is pleaded as well as at commencement. Issues it may have been withdrawn or dismissed before plea is filed. *Mass.*—*Clifford v. Cony*, 1 Mass. 385. *Mich.*—*Paw v. Yeare*, 12 Mich. 10. **3d.** *J.*—*Haus v. Schooley*, 76 N. J. L. 461. **N. Y.**—*O'Donoghue v. Lloyd*, 6 Abb. Pr. (N. S.) 387. **N. C.**—*Kesterson v. Southern R. Co.*, 146 N. C. 276, 20 S. E. 871. **Pa.**—*Gardiner v. Kiehl*,

182 Pa. 194, 37 Atl. 829; *Toland v. Tichenor*, 3 Rawle 320; *Polsey v. White Rose Mfg. Co.*, 19 R. I. 492, 34 Atl. 997. **Wis.**—*Fish Co. v. Young*, 127 Wis. 149, 106 N. W. 795.

"Was at time of commencement of this suit and still is pending," is sufficient without alleging that the former suit was not discontinued before plea was filed. *Nelson v. Foster*, 5 Biss. 44, 17 Fed. Cas. No. 49,300.

**Under Louisiana Code of Practice a plea of *autrefois pendance* must show pendency of another suit between same parties for the same object and growing out of same cause of action before another court of concurrent jurisdiction. Succession of Ludwig**, 3 Rob. (La.) 92.

"The logic of the defense is that the matter in controversy is already the subject of a litigation, in which the rights of the parties may be adjudicated by a competent tribunal, and it is essential that the plea shall show that the parties are before that tribunal, and that their rights may be there determined." *Mattel v. Conant*, 154 Mass. 418, 31 N. E. 487.

**Under N. Y. Code Civ. Proc., § 1628, forbidding the maintaining of another action to recover a mortgage debt without leave of court during the pendency of foreclosure proceedings, an answer pleading pendency must set up that that second action was brought without leave of court.** *Shieck v. Donohue*, 77 App. Div. 321, 79 N. Y. Supp. 233.

Assignment must be alleged as a fact if the prior suit is alleged to have been brought by the plaintiff's assignee. *Cumby v. Arnold*, 100 App. Div. 515, 81 N. Y. Supp. 1089.

**Discontinuance of first suit after commencement of second must be alleged in answer to the plea.** *Porter v. Hogebery*, 77 N. Y. 194.

**47. U. S.**—*Cook v. Burnley*, 11 Wall. 659, 20 L. ed. 29. **Ala.**—*Boswell v. Tunnell*, 10 Ala. 958. **Ark.**—*Bourland v. Nixon*, 27 Ark. 315. **Ind.**—*Needham v.*



4. Identity of Causes of Action.—It must be alleged also that the two causes of action are identical.<sup>48</sup>

5. Court Where Pending.—The plea must also set out the court in which the prior action is pending.<sup>49</sup>

Wright, 140 Ind. 100, 29 N. E. 510; Bryan v. Scholl, 109 Ind. 367, 10 N. E. 167. Mass.—Motel v. Grant, 158 Mass. 418, 31 N. E. 487. N. Y.—Dodge v. Cornelius, 168 N. Y. 242, 61 N. E. 244. Wis.—Calleaux v. Mueller, 102 Wis. 525, 78 N. W. 1082.

In an action in favor of person of sound mind brought by guardian *in loco* in abatement of former suit brought by ward should allege that the former action was commenced before guardianship, or by procurement or consent of guardian, as in any otherwise disregard it. Lincoln v. Thrall, 34 Vt. 110.

Attachment.—In pleading the pendency of an attachment the plea ought to show that the defendant was personally a party to the proceeding. Branigan v. Rose, 8 Ill. 121.

Garnishment.—Plea of pendency of a garnishment must specify in whose favor. Shealy v. Toole, 56 Ga. 210.

48. U. S.—Griswold v. Bacheller, 77 Fed. 857. Ark.—Bourland v. Nixon, 27 Ark. 315. Ind.—Needham v. Wright, 140 Ind. 100, 30 N. E. 510; Amer. White Bronze Co. v. Clark, 123 Ind. 230, 25 N. E. 855; Bryan v. Scholl, 109 Ind. 367, 10 N. E. 107; Miller v. Rigney, 16 Ind. 327; Tracy v. Reed, 4 Blackf. 56. La.—City Bk. of New Orleans v. Walden, 1 La. Ann. 46, the identity of the causes of action in the two suits must be alleged and not left to inference and conjecture. Minn.—Wilson v. St. Paul, M. & M. R. Co., 44 Minn. 445, 46 N. W. 909, merely alleging that the claims grew out of same act does not show identity of causes of action. Mo.—Marks v. Mulhall, 13 Mo. App. 590. N. Y.—Tyler v. Standard Wine Co., 52 Misc. 374, 102 N. Y. Supp. 65, must show “a prior action is pending between the same parties for same cause as distinguished from different causes though depending in whole or in part on the same subject-matter. S. C.—State v. Stickley, 80 S. C. 64, 61 S. E. 211, 128 Am. St. Rep. 855.

A Plea “that the plaintiff has an action pending in the third district court against this defendant for the purpose of recovering the possession of said premises” shows ejectment, and

as the present suit is for damages for ouster and consequential damages, is insufficient. Boardley v. Morrison, 18 Ark. 472, 66 Pac. 222, 72 Am. St. Rep. 795.

In pleading a pending attachment or garnishment defendant should show what portion of the debt has been garnished. Clark v. Mathews, 33 Kan. 411, 6 Pac. 348. See also Shealy v. Toole, 56 Ga. 210.

In an action to recover land the answer must show that the same title, the same injury, and the same subject matter are in controversy in both actions. Lingo v. Clements, 36 Cal. 190; Voss v. Olinger, 31 Cal. 288.

A General Allegation Is Not Enough.—An answer setting up the pendency of another action which ought to be joined must state facts showing that causes are such as may be joined. Parsh v. Hakes, 14 Ind. 625.

49. Berger v. Moensinger, 5 Ohio C. C. 432; Bullock v. Bolles, 9 R. I. 501.

A plea founded on the pendency of a pendency submission must set out the name of the referee and allege his acceptance and conclude with “praying judgment of the writ.” Faby v. Bransford, 36 Me. 42.

Jurisdiction of the court over the subject-matter and parties must be alleged where the prior action is pending in a foreign forum. Ex parte Jones, 3 McLean 221, 2 Fed. Cas. No. 790; Newell v. Newton, 10 Pick (Mass.) 470.

Under Ga. Code, § 5094, declaring that to be a good cause of abatement the former suit must be pending in some “other court that has jurisdiction,” a plea in abatement alleging that the court in which the action was brought had jurisdiction of the case under the allegations of the declaration therein filed, sufficiently avers jurisdiction. Wilson v. Atlanta, K. & N. E. Co., 115 Ga. 171, 41 S. E. 699.

It must appear that there is another action pending in which the court has acquired jurisdiction over the defendant and it is not sufficient to simply allege that another action was commenced and is pending. Carson v. Thews, 2 Idaho 162, 9 Pac. 605.



**6. Nature and Object of Former Suit.**—The plea in equity in addition to this must also set forth the general nature, character and object of the former suit and the relief prayed for.<sup>51</sup>

**F. REQUISITES AS TO FORM.**—**1. Must Be Accurate and Certain.**—Being in the nature of a plea in abatement it must be accurate in form as well as correct in substance,<sup>52</sup> and its averments must be positive and certain.<sup>52</sup>

**2. Verification.**—The practice in regard to verification is not uniform. In some states the plea in abatement,<sup>53</sup> or answer in abatement,

Law and Equity.—Whether the former action is at law or in equity should be shown when the jurisdictions are separate. *Griswold v. Underwood*, 50 Fed. 427, 30 C. C. A. 162; *Hester v. Wheeling R. & C. Co.*, 37 W. Va. 149, 25 S. E. 1515.

**60. U. S.**—*Griswold v. Underwood*, 50 Fed. 427, 30 C. C. A. 162. **Mich.**—*Bank of Mich. v. Williams*, 114 Mich. 316. **Eng.**—*Parker v. Vassall*, 3 Atk. 267, 28 Eng. Reprint 1315.

This is analogous to the plea at common law. It should set forth with certainty the substance of the former suit, its general nature and character, its object, and the relief prayed. "The plea should aver, and as one fact should be, that the second suit is for the same subject-matter as the first, and therefore a plea which did not expressly aver this, although it stated matter tending to show it, was considered as bad in point of form. It would state that the same issues are joined in the former suit as in the suit now before the court, and that the subject-matter is the same, and that the pleadings in the former suit were taken for the same purpose. The plea should also aver that there have been proceedings in the suit, such as an appearance, or process requiring appearance, at least." *Griswold v. Underwood*, 50 Fed. 427, 30 C. C. A. 162.

**51. Griswold v. Bacheller**, 77 Fed. 457; *Macey v. Childress*, 2 Tenn. Ch. 23.

**52. Macey v. Childress**, 2 Tenn. Ch. 23; *Devie v. Lord Brownlow*, Dick. 611, 31 Eng. Reprint 409.

**Plea in Abatement.**—Great strictness is necessary in pleas in abatement; they cannot be sustained by inference or implication, but their allegations must be full and direct. Plea in statement of a pending suit commenced by attachment is bad unless it alleges

that the attachment was levied and returned so as to show legal pendency of the suit—alleging it is still "pending" and sufficient, for levy is commencement of suit. *Reynolds v. McClure*, 14 Ala. 170.

Certainty to every intent is required. Nothing can be taken by intendment in favor of the pleader. Plea averring another suit commenced at same time for not performing the very same identical promises and undertaking "without adding in the said declaration in this present suit mentioned" bad on demurrer. *Waters v. Jones*, 1 Mon. 254.

While strictness is required in pleas in abatement, it is sufficient if an reasonable doubt exists as to the identity of the two suits. *Griswold v. Alpess Circuit Judge*, 100 Mich. 42, 63 N. W. 797.

It should appear that the prior action was a matter of record and it is not sufficient to simply allege that the writ was sued out and returned in full force and undisturbed. *Ballou v. Loller*, 6 R. I. 201.

See the title "Abatement. Plea of."

The plea in equity need not expressly aver that the second suit is for the same subject-matter as the first; it is sufficient if facts stated in the plea show this to be so. *Devie v. Johnson*, 16 N. J. L. 112; *Malvern v. Broadhead*, 11 N. J. Eq. 122.

**53. Ala.**—*Ellerbe v. Troy*, 58 Ala. 143; *Hall v. Wallace*, 56 Ala. 378. **Ky.**—*Draves v. Dato*, 1 Moo. 191. **N. J.**—*Hiland v. Schaefer*, 28 N. J. L. 461 (*Trenton Bank v. Wallace*, 9 N. J. L. 83; under rule of court that no dilatory plea should be received unless the party offering it, offer therewith to be filed an affidavit proving the truth thereof or show something to satisfy the court that the matter is true).

**Contra.**—*Smith v. The Atlantic Mut. Fire Ins. Co.*, 22 N. H. 21.

is not good unless sworn to.<sup>54</sup> The plea in equity need not be sworn to.<sup>55</sup> In the federal courts an oath is required, however, in all cases, by the equity rules.<sup>56</sup>

**VIII. BURDEN OF PROOF.**—A. ON PARTY PLEADING.—The pendency of a prior action being an affirmative defense must be proved, and the burden of proof is on the party setting up the defense.<sup>57</sup> The record of the former action being the best evidence, parol is not admissible,<sup>58</sup> unless the record is shown to be unavailable.<sup>59</sup>

B. DISCONTINUANCE.—Plaintiff must show by a preponderance of testimony that the first action has been discontinued.<sup>60</sup>

54. *Lorch v. Aultman & Co.*, 75 Ind. 162; *Dawson v. Vaughn*, 42 Ind. 200; *B'd Com'rs of Morgan Co. v. Turlington*, 34 Ind. 379; *Morgan County Com'rs v. Holman*, 34 Ind. 235.

55. *Green v. Neal*, 2 Heisk. (Tenn.) 217.

56. Equity Rules, § 31.

57. U. S.—*Fowler v. Byrd, Hempst.* 213, 9 Fed. Cas. No. 4,999a. Ala.—*Bloom Supply Co. v. Parker*, 157 Ala. 512, 47 So. 794. Minn.—*Phelps v. Winona & St. P. R.*, 37 Minn. 455, 23 N. W. 273, 5 Am. St. Rep. 867. Mo.—*Langford v. Doniphan*, 53 Mo. App. 62. N. Y. *Hirsch v. Manhattan R. Co.*, 84 App. Div. 374, 82 N. Y. Supp. 754; *Kind v. Bacon*, 34 Misc. 783, 69 N. Y. Supp. 949, 33 Misc. 800, 67 N. Y. Supp. 960.

Assignment must be proved where it is alleged that the earlier action was brought by the plaintiff's assignee. *In re Drinker*, 7 N. Y. St. 291.

Suit against an executor to recover a legacy is not abated by proof that a number of suits have been instituted against the defendant as executor without some evidence that the alleged debts are demands for which the estate is probably liable. *Parker v. Dowdy*, 58 Ga. 439.

**Essentials.**—It is necessary for a party seeking the abatement to plead and prove the connection of the former action to the same subject-matter, the relations of the parties therein to be the same as that in the case in which the plea is interposed, and that the relief sought is practically identical.

*Monroe v. Reed*, 46 Neb. 316, 64 N. W. 983.

Annexation of copy of report of former suit does not do away with necessity of trial and introduction of the record in evidence. *People v. De la Sierra*, 13 Cal. 71.

On motion to dismiss where the plaintiff denies that the issues involved are the same in both actions the motion should not be granted without an inspection of the pleadings in the other action. *Saratoga Auto Top & Body Co. v. Whitner*, 114 N. Y. Supp. 925.

**Shifting Burden.**—Proof of the issuing a writ for the same cause of action shows *res inter alios acta* and shifts the burden of proof. *Fowler v. Byrd, Hempst.* 213, 9 Fed. Cas. No. 4,999a.

58. Mo.—*Hoffman v. Hoffman's Exr.*, 126 Mo. 486, 28 S. W. 623. Neb.—*Monroe v. Reed*, 46 Neb. 316, 64 N. W. 983. N. Y.—*Curry v. Wiborn*, 12 App. Div. 1, 42 N. Y. Supp. 178; *Phelps v. Gee*, 29 Hun 222; *Wright v. Masseras*, 18 Barb. 521. Ohio.—*Simley v. Dewey*, 17 Ohio 156.

59. *Woodward v. Stark*, 4 S. D. 588, 57 N. W. 496.

Where papers are destroyed by the plaintiff the testimony of the justice who issued the attachments in both cases is admissible. *Dean v. Massey*, 7 Ala. 601.

60. *Rhoades v. McNulty*, 52 Mo. App. 301.

For proof under this plea, see 1 *ENCYCLOPEDIA OF EVIDENCE*, p. 16 et seq.









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